Transforming European Copyright

Introducing an Exception for Creative Transformative Works into EU Law

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"My vision of copyright is of a modern and effective tool that supports creation and innovation, enables access to quality content, including across borders, encourages investment and strengthens cultural diversity. Our EU copyright policy must keep up with the times."

- Michel Barnier, Internal Market and Services Commissioner¹

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<tr>
<td>ALRC</td>
<td>Australian Law Reform Commission</td>
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<tr>
<td>Berne</td>
<td>Berne Convention for the Protection of Literary and Artistic Works of 1886, as amended on September 28, 1979</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>EU</td>
<td>European Union</td>
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<td>ICRC</td>
<td>Irish Copyright Review Committee</td>
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<td>InfoSoc</td>
<td>Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society</td>
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<td>IP</td>
<td>Intellectual Property</td>
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<tr>
<td>TEEC</td>
<td>The Treaty establishing the European Economic Community</td>
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<td>TFEU</td>
<td>Treaty on the functioning of the European Union</td>
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<td>TRIPS</td>
<td>Agreement on Trade Related Aspects of Intellectual Property Rights of 1994</td>
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<td>UGC</td>
<td>User-generated content</td>
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<td>US</td>
<td>United States of America</td>
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<td>USCA</td>
<td>United States of America Copyright Act of 1976</td>
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<td>WCT</td>
<td>World Intellectual Property Organization Copyright Treaty of 1996</td>
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1 Introduction

1.1 Creativity and copyright in the digital age – the rise and return of creative transformative use

The digital revolution has brought with it new advantages and disadvantages, new risks and possibilities, and new hopes and fears in equal measure. In no legal field is this more apparent than in copyright law. The current opportunities for creating, distributing, promoting, and consuming creative content are unprecedented. Likewise, the current opportunities for finding, copying, sharing, and altering these creative works are equally unmatched. The digital era has undoubtedly brought on a significant shift in several established models and structures – prompting many new questions about the nature and purpose of current copyright laws, models, and systems. One such question regards the legality and permissibility of using portions of another person’s creative works to create new, “secondary” works.

Re-using existing creations to create something new, be it through inspiration, imitation, appropriation, or direct copying, has been going on for as long as mankind has engaged in creative expression. Leonard Bernstein’s West Side Story is widely considered to be based on William Shakespeare’s Romeo and Juliet, which in turn could easily be considered to be based on Arthur Brooke’s The Tragicall Historye of Romeus and Juliet. One might even argue that this form of re-use is inherent to the very nature of creativity – to use the available mental, tangible, and conceptual resources to express oneself. It is similarly hard to refute the argument that if creators had not built upon the innovations and creations of those who came before, then collective creativity and innovation would most likely not have advanced to its current state. As Isaac Newton famously put it, “if I have seen further it is by standing on the shoulders of giants”.

It is this form of follow-on creativity which has seen a resurgence in today’s digital society – following several decades where most high-quality creative content was arguably only produced and distributed by professionals. Remixing, sampling and combining parts of existing works in the process of forming one’s own creations is now a common pastime, with online platforms facilitating every step of the process -

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3 A turn of phrase which may or may not have been an appropriation of William Hicks’ quote “A Pygmy upon a Gyants shoulder may see farther then the (sic) himself” from 1659, roughly 17 years earlier – which could in turn have been appropriated from George Herbert’s “A dwarf on a giant’s shoulders sees farther of the two” (1651), or Robert Burton’s “...a dwarf standing on the shoulders of a giant may see farther than a giant himself.” (1621).
from discovery of existing works, to creation of secondary works, to the dissemination thereof.\(^4\) Internet access and capable personal computers have now become commonplace in much of the world. As a result, all of the resources and tools necessary for creating and modifying works of audio, video, images, and words to a professional standard of quality have become both widely available and affordable.

The possible motives for creating a secondary work are many, but a large portion of works which re-use pre-existing material do so to fulfil an artistic or creative vision of their maker, and not just to cut corners or to steal the fruits of someone else’s creative effort. These works typically exhibit their creator’s own creativity, effort, and ideas – and are not merely a copy or a substitute for the preceding work. If one believes that works of creativity and innovation inevitably build on what came before, then these “creative transformative works” are an important form of creative expression, in that they can each be said to represent a “step forward” in society’s cultural progress. By comparison, a completely unique work which is intentionally created in an isolated creative space, free from all influence of previous works (a seemingly impossible task), might represent a “leap” forward in the same regard. One could thus infer that restricting creative expression to only such “leaps” would run the risk of severely inhibiting the cultural development of society. As such, it becomes clear that transformative works might not only be necessary and inevitable, but in need of support and incentive.\(^5\) When a legal system presupposes that transformative uses are infringements of copyright, it risks closing off whole avenues of creative expression in society – stifling a collective creative movement which is now practically exploding thanks to the new opportunities of the digital age.

As the investigations in this thesis will illustrate, transformative works are arguably not supported and incentivised under current European Union (EU) copyright law. Even outside the EU one might make out a trend towards limiting transformative uses – case law in the United States (US), for example, appears to have imposed severe restrictions on transformative sampling in music.\(^6\) Instead of encouraging the creative boom that the rise of both professional and amateur transformative uses

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\(^4\) What many consider to be the vanguard of these digital creative platforms, YouTube, currently receives around 100 hours of uploaded video material every minute, a large number of which are “secondary works”. See http://www.youtube.com/yt/press/statistics.html.

\(^5\) The creativity enabled by users becoming involved in the creative process has been recognised as particularly important and worthy of encouragement. See the Gowers Review of Intellectual Property (2006) (the Gowers Review), p. 31.

\(^6\) See Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390,398 6th Cir. (2004). Developments such as this are troubling when one considers the likelihood that a significant number of entire musical genres, from Hip-hop to many electronic music genres like Drum and bass, might not even exist today were it not for unauthorised and unremunerated sampling carried out by financially limited artists.
embodies, there are clearly signs of many legal systems taking steps to restrict secondary uses further.

On the other hand, one can currently see cases where the exemption of transformative use is being given more room; the call for change in how transformative creativity is being regulated is being heard not only from user rights organisations and activists. It is both being heard from and being heeded by major stakeholders, prominent academics, and legislative bodies. The Canadian government recently enacted a specific copyright exception for non-commercial user-generated content (UGC). Similarly, there are voices being raised in concern that creativity and innovation are being stifled, and that the central balance of interests in international copyright law – between the interests of the rightsholders and the interests of society – has drifted further and further from the point of sufficient equilibrium. The United Kingdom (UK) has seen multiple official reports stating a need for a transformative use exception. The Irish Copyright Review Committee (ICRC) has recently presented their report on modernising copyright – recommending the introduction of a fair use exception, an exception for non-commercial UGC, and a more permitting stance on transformative works. The ICRC also emphasises the recent measures of modernisation of copyright exceptions taken by the UK, Canada, and Australia, expressing concern that failure to follow suit will result in a competitive disadvantage. A group of legal scholars have released a draft for a unified European Copyright Code, which includes a system for flexible copyright exceptions. Meanwhile, the Dutch government has continued its apparent commitment to a European political discussion around fair use in a European format. It is against this backdrop of rampant discussion of reform that this thesis aims to discuss the possibility of introducing an exception for creative transformative uses into EU law.

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1.2 Purpose

This thesis aims to examine the current prospects for the free and legal creation and dissemination of transformative works in the member states of the European Union. It aims to examine the possibility of introducing a transformative use exception in EU copyright, under EU- and international obligations. It attempts to investigate the various current legal approaches to transformative use – in order to then examine and evaluate various solutions for drafting and implementing an EU transformative use exception. It will also examine the viability of these solutions and the degree to which they address the problems faced by the current system.

The goal is to determine what systemic problems regarding transformative uses need to be solved, examine how they may be solved, and to then compile, present and analyse possible alternatives for doing so. My initial hypothesis is that transformative use is not currently exempt from copyright protection in the EU, that such an exception needs to be implemented, and that this is best achieved through a stand-alone exception.

1.3 Delimitation

This discussion is primarily concerned with creative works, wherein the creator in one way or another during the creative process makes use of elements from pre-existing copyrighted works. The key factor here is the creative process and effort, wherein the creator of the secondary work could be said to use elements of the pre-existing work to create something new.\textsuperscript{10} It will not focus on works which simply reiterate or translate an existing work, or otherwise makes only minor alterations and adjustments to it, in a way which could not be considered a form of creative effort (i.e. what might frequently be referred to as “derivative works” or “adaptations”).

This discussion does not concern the direct copying of copyrighted works, nor the distribution thereof; the subject matter is the legal situation for follow-on creativity, wherein elements of existing copyrighted works are used in the process of creating a new work. More specifically, the intended focus is works that display a degree of originality and personal creativity that could thus be said to qualify them as independent works in their own right. The distinction is an important one, since the central subject for discussion is the legality of legitimately original and creative efforts

\textsuperscript{10} The term secondary work is explained further under 1.6.
displayed in transformative uses - not the right for anyone to simply copy existing copyrighted material.

This thesis does not specifically attempt to address specific secondary use cases such as education, research, disabilities, or other such specific purposes exempt from copyright.\(^{11}\) Although many such uses are transformative, this thesis seeks to explore the possibility of exempting transformative uses as a category primarily on the basis of their transformative nature. The focus is on secondary works in which the alteration (or transformation) of the pre-existing work has led to the work transcending the original work to become something new. This thesis also does not specifically address secondary uses of databases or computer programs. Pursuant to EU directives, these latter two categories are subject to specific legislation which does not apply to other creative works. An in-depth discussion around these two specific categories of works would therefore not be conducive to maintaining the intended focus of this thesis.\(^{12}\) Additionally, the subject or moral rights are not discussed in great detail in this investigation.

This thesis does not discuss compulsory licenses. It is acknowledged that such an avenue could provide a possible safety valve, or suitable compromise, for allowing transformative works to be disseminated. But a discussion thereof lies outside the intended scope and purpose of this thesis, given the desired focus on limitations and exceptions.

This discussion mainly concerns the re-use of material which is indisputably original and thus protected by copyright. The re-use of material that does not meet the requirements for copyright protection is, typically, not in violation of copyright law. Granted, such is not always the case when it comes to neighbouring rights, particularly the neighbouring right for phonogram producers. This right does not require the copied material to meet certain standards of originality or creative effort to be protected by the neighbouring right. While certainly significant for the permissibility of transformative uses in practice, a more in-depth examination of these neighbouring rights unfortunately lies outside the scope and reach of this thesis.

\(^{11}\) The term secondary use is explained further under 1.6.

\(^{12}\) See further Directive 96/9/EC on the legal protection of databases and Directive 2009/24/EC on the legal protection of computer programs (codified version).
Although this thesis aims to investigate the regulatory spectrum of solutions for permitting transformative uses by examining national law, it does not aspire to be a comparative study. The investigations into national law in no way aim to be exhaustive or complete regarding representation of national systems; a complete or fully representative study would lie far outside the available scope and reach. The national systems referenced merely serve as an example of possible approaches to secondary uses, the latter of which are the main focus of these specific investigations. In order to accommodate this focus, many individual investigations into national systems in this section have been kept relatively brief and somewhat generalised. This is a conscious decision, given the goal of discerning overall patterns and a general overview of possible solutions and parameters for addressing secondary and transformative uses, and given the overall scope and focus of this thesis.

The scope and time-frame of the investigation has necessitated that the underlying research be delimited to sources in English and Swedish. It has not been feasible for the investigation into national solutions to place considerable focus on non-English speaking systems because of this, and because of the language barrier and the potential errors and misunderstandings which could thus arise. It is acknowledged that this necessary delimitation introduces a risk of the overall perspective being slightly skewed towards over-representing English-speaking (and thus frequently common law) systems. This risk will therefore be kept in mind throughout, in hopes of maintaining a satisfactory balance of perspective. A few additional, non-English speaking European national systems are briefly mentioned in an exemplifying manner. This is done primarily to represent the concept of free adaptation, which is an important part of the European patchwork of secondary use regulation.¹³

This thesis recognises the inherent complications with drawing analogies between US law and law in Europe, generally in regards to property, and especially in regards to intellectual property (IP).¹⁴ The United States has many rules, norms, systems and principles which are fundamentally dissimilar to the legal systems in Europe. Approaches and solutions used by US courts and legislators are thus typically not fully transferable to a European context. However, to overlook the solutions employed by the United States is to overlook not only a significant source of transformative use discourse – but also what is, at least arguably, still the dominant

¹³ The term free adaptation is explained further under 1.6.
¹⁴ For more on the unique characteristics of US law in comparison to most other systems, as well as the resulting difficulties in drawing direct analogies between them, see Zweigert, Konrad and Kötz, Hein, Introduction to Comparative Law (2011), pp. 238-255.
nation when it comes to producing exporting copyrighted material. This thesis in no way suggests that a direct analogy can be drawn between US and EU law (whether harmonising or national), but rather seeks to exemplify possible solutions and approaches using various legal approaches, including US fair use.

1.4 Method and materials

This thesis will employ traditional legal dogmatic method.\textsuperscript{15} It will thus describe and examine the current state of law and regulation, as well as their respective structures. Materials used are codified law, preparatory works, commented law, case law, government and EU publications, legal literature and academic publications. Many of the chapters in this thesis serve both a descriptive and an analytical purpose simultaneously, as the lack of clear and definitive answers and statements in many of the discussed areas have necessitated that I contribute with my own interpretations and observations in order to carry the discussion forward. The working language of this thesis is English, rather than Swedish – partly due to the European context it deals with, but primarily to avoid translation errors and misunderstandings resulting from the language of the majority of the sources and materials used being English.

1.5 Structure

This thesis is divided into two primary parts. Part I examines the current state of law and its problems. Part II then examines possible solutions to these problems. Part I begins with Chapter 2’s examination of EU harmonising law and international obligations, as relates to secondary uses, transformative uses, and limitations and exceptions to copyright protection. Chapter 3 then investigates the various possible approaches to copyright exceptions as relates to transformative uses, exemplified by several national solutions currently in place – including several European countries, Canada, Australia, and the United States. These inquiries on both an EU and a national level provide the necessary background for the following discussion of the problems that the current system faces, and also lay the groundwork for the legislative discussion in Part II. The following fourth chapter aggregates some of the most notable problems with the current state of law regarding transformative uses in Europe. Chapter 5 then summarises the conclusions that can be drawn from the

\textsuperscript{15} On the subject of legal dogmatic method, see Peczenik, Aleksander, Juridikens allmänna läror (2005).
current state of law, and from the various problems and currently employed approaches to transformative uses.

Part II of this thesis examines various ways to solve the problems with the current system, and attempts to evaluate to which degree these approaches and solutions address the current system’s shortcomings, as well as their viability in the European context. Chapter 6 examines various such proposed and available solutions. Finally, Chapter 7 analyses the available solutions, and presents various proposals for a possible transformative use exception, as well as the overall legislative approaches that could be employed.

1.6 Terminology

1.6.2 Disclaimer

A considerable number of terms and expressions used in this area of jurisprudence are not universally agreed upon (let alone consistent), with many scholars, and even legislative bodies, employing their own disparate terms, as well as their own usage and definitions thereof. The terms described below are thus by no means universal in their definition, although I have attempted to ground much of my own use of terminology in relevant legal sources.

1.6.1 Secondary use, secondary work, secondary creator, and re-use

Works in which the creator has, at some point and to at least some extent during the creative process, made use of one or more portions of a pre-existing copyrighted work will be referred to as secondary works. This use of copyrighted work specifically is referred to as re-use. The creation and distribution/performance/making available of the secondary work is referred to as secondary use. The creator of a secondary work is referred to as the secondary creator. The term encompasses adaptations, transformative works, user-generated content, and free adaptations. These terms were chosen because the term “derivative work”, although it is often used in a similar fashion, is sometimes used to describe more limited concepts such as adaptations or non-transformative secondary works.
1.6.2 Transformative use and transformative work

The main subject matter of this thesis is a concept whose definition is not quite set in stone. However, I concur with the view of the Australian government’s Law Reform Commission (ALRC), whose definition of transformative use closely sums up my intended definition, and can thus be said to apply to the term used in this thesis:

Uses of pre-existing works to create something new, that is not merely a substitute for the pre-existing work. Works that are considered transformative include those described as ‘sampling’, ‘mashups’ or ‘remixes’.

Sampling is the act of taking a part, or sample, of a work and reusing it in a different work. The concept is most well-known in relation to music, where samples of one or more sound recordings are reused in a different composition.

A mashup is a composite work comprising samples of other works. In music, a mashup is a song created by blending two or more songs, usually by overlaying the vocal track of one song onto the music track of another. Remixes are generally a combination of altered sound recordings of musical works.

More broadly, transformative use can also refer to some appropriation-based artistic practices, including collage, where images or object are ‘borrowed’ and re-contextualised.16

In this thesis, the term transformative use encompasses the above defined creation process, as well as the distribution, performance, or making available of the resulting work; the work created through a transformative use is referred to as a transformative work.

1.6.3 Adaptation and free adaptation

An adaptation is the act and result of converting a copyrighted work into another form or medium – such as translating it into another language, or converting it to another media format (such as a book to a play, or a film to a video game). Free adaptations are secondary works which, where national rules permit this, are considered completely independent of the original work’s copyright. This can cover cases where a creator was merely inspired by a previous work, but did not directly re-use any of its content or elements. It can also refer to cases where the adaptation process has changed the re-used material so much that the individual defining elements of the original work have faded away.17

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17 See Chapter 3.4. on free adaptations.
1.6.4 User-generated content (UGC)

Perhaps the most oft-used term regarding recent discussions of transformative use, UGC as a term originated in the media industry, as a blanket term for content created by users of a platform or service, within that platform or service, but is frequently used as a term which attempts to encompass secondary or transformative works. However, the term still holds many connotations and associations which, in my opinion, make the term less suitable for this use. Regardless of other definitions, the wording of the term itself holds implications which I do not consider representative of transformative works. “User” implies usage of a service or platform, and an amateur and/or non-commercial nature. “Generated” implies a mechanical or non-expressive process – something which occurs as an effect or by-product, rather than something that is done with intent. “Content” has associations with commodity or product. Thus, UGC could actually, in some ways, be considered the antithesis of “artistically created works” – a dichotomy which I wish to avoid. The term implies creative work that is by definition of a lower standard than traditional works. It implies a measure of commodification and an associated lower intellectual value. Many instances of UGC may well be considered to fit this description, but there are similarly many instances which can rightly be considered to not fit any of them. Indeed, the purpose of this essay is primarily to examine the permissibility for transformative works with underlying creative effort to be created and distributed on the same conditions as works which have not used (or, as the case may be, have not been found to use) any portions of pre-existing works. In this thesis, I will therefore use the term UGC to refer to secondary uses of a non-professional and (in most cases) non-commercial nature. I will use the term transformative works and transformative uses to include cases of UGC which can be considered to fall under the above stated definition of these terms. UGC will only be used to discuss measures and uses which relate to UGC specifically, and not to transformative works in general. “User-created content” is a term used by the EU Commission, meaning the same thing as UGC.

18 The EU Commission has quoted an OECD study, defining UGC as “content made publicly available on the internet, which reflects a certain amount of creative effort, and which is created outside of professional routines and practices.” See the EC Commission’s Green paper on Copyright in the Knowledge Economy (2008), p. 19.
1.6.5 Exception, limitations and exceptions, and exemption (regarding copyright protection)

These terms all refer to the copyright protection. According to the World Intellectual Property Organization (WIPO), “exceptions” to copyright protection can be defined as:

Provisions that allow for the giving of immunity (usually on a permissive rather than mandatory basis) from infringement proceedings for particular kinds of use, for example, where this is for the purposes of news reporting or education, or where particular conditions are satisfied. These can be termed [...] exceptions to protection, in that they allow for the removal of liability that would otherwise arise.¹⁹

The associated term “limitations” is accordingly defined by WIPO as:

Provisions that exclude, or allow for the exclusion of, protection for particular categories of works or material. [...] [These] might be described as “limitations” on protection, in the sense that no protection is required for the particular kind of subject-matter in question.²⁰

This thesis will employ the above definitions in referring to exceptions and the collective limitations and exceptions. However, this thesis is primarily concerned with exceptions; note well that I have therefore chosen to not employ the term “limitations” on its own as the above defined legal concept – “limitations” will only refer to the above quoted definition when used as a part of the collective term limitations and exceptions. With this caveat I hope to enable the word “limitation” (in its usual linguistic sense) to be used freely in the following discussions without causing confusion.

The application and effect of an exception will be referred to as an exemption of the addressed use from the copyright of the original work, thus making the use case exempt. Note that the term exemption is thus not used to refer to a discrete category of provisions, but merely as the verb- and adjective forms of exception, and to denote the application or effect thereof. To illustrate: the exemption of a use is the effect achieved by an exception, whereby legislators have exempted the use.

¹⁹ WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment (2003), p. 3.
²⁰ Ibid.
Part I

The state of law regarding transformative uses, in Europe and elsewhere
2 EU and international law

2.1 The road to EU copyright law

Copyright in Europe is firmly based in territoriality. The various national rules govern copyright within the territory of each EU member state, and copyrighted works are protected simultaneously under all member states’ national laws (provided the work in question qualifies for copyright protection). Even so, as is the case in most of the world, copyright law in the EU is subject to several international obligations. Despite the prevailing territoriality of EU copyright law, the European Union has itself taken measures to harmonise aspects of copyright between the member states. Probably the most notable turning point in the copyright harmonisation effort came with the introduction 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 (the InfoSoc directive). This chapter will examine the developments leading up to the current state of EU copyright law, while addressing the various bodies of law which govern copyright in Europe. This chapter will also begin the examination of the state of copyright exceptions in Europe – as governed by and mandated under EU- and international law.

2.2 International law, and the standings prior to the InfoSoc directive

Intellectual property rights have historically been approached from a number of different angles within various legal systems. The multitude of legal and creative traditions has prompted various approaches to exclusive rights, and limitations and exceptions to those rights. But international trade (and copying) of literary and artistic works can, understandably, cause a great deal of trouble and discontent in an incoherent patchwork of discrete copyright regimes – wherein one system may permit or exempt a use from copyright protection, while another system regards the use as infringement. The first major effort towards copyright coherence was made by the adoption of Berne Convention for the Protection of Literary and Artistic Works of 1886, as amended on September 28, 1979 (the Berne convention), which established a minimum standard for the protection of copyright and neighbouring rights. The convention currently has 167 contracting nations, and continues to guide the
codification and application of copyright law throughout the world. The Berne convention, as recognised by the contracting parties to the World Intellectual Property Organization Copyright Treaty of 1996 (WCT), expressed a need to maintain a balance between the rights of authors and the public interest.  

The Berne convention sets out a general principle for all exceptions to copyright. This principle, coined the *three-step test*, has become a core standard in copyright governance. The test has been carried on through subsequent bodies of international copyright law including the Agreement on Trade Related Aspects of Intellectual Property Rights of 1994 (the TRIPS agreement), the 1996 WIPO Copyright Treaty (WCT), and the Performances and Phonograms Treaty (WPPT), as well as the InfoSoc directive. The two WIPO treaties addressed a weakness in the preceding TRIPS agreement, i.e. the absence of provisions specific to a digital environment. The WCT carries forward the three-step test by stating that the Berne convention right of reproduction (including the three-step test) applies in a digital environment, and by introducing its own version of the test in Article 10. The three-step test has since surfaced in discussions regarding the future of EU copyright, and will be discussed more in-depth below.

### 2.3 EU law and the standings under the InfoSoc directive

Before the 1990’s copyright law had not yet become the subject of EC law. However, copyright-related issues were raised by the Court of Justice of the European Union (CJEU) in relation to the free movement of goods and services, or unrestricted competition. The EC first began harmonising copyright within the Community in the early 1990’s. There are currently several directives governing various elements of national legislation of copyright and neighbouring rights. The most significant directives addressing uses of copyrighted works before the arrival of the new millennium were Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases (the Database directive), and Council
Directive 91/250/EEC on the legal protection of computer programs (the Computer programs directive).\textsuperscript{30} But the push toward copyright harmonisation took perhaps its most significant leap forward with the introduction of the InfoSoc directive in 2001 – harmonising several aspects of EU copyright systems. The InfoSoc directive marks a deliberate move towards more harmonised, general, and cohesive legal framework regarding copyright within the EU.\textsuperscript{31} The legal basis for the directive was Article 95 of the Treaty establishing the European Economic Community (TEEC) – currently Article 114 of the Treaty on the functioning of the European Union (TFEU). The provision enables the Community to pursue an approximation of laws for the purpose of creating and enabling a functioning internal market.\textsuperscript{32} Such harmonisation is typically undertaken to remove legal differences between national laws that either hinder free movement or distort competitive conditions.\textsuperscript{33}

As per their raison d’être, the European Parliament and Council acted primarily in service of the internal market when drafting the InfoSoc directive. Besides the purpose of harmonisation and alignment with the WCT and WPPT, the introduction of the InfoSoc directive additionally (and arguably primarily) sought to promote investment in creativity and innovation, thus increasing growth and competitiveness in European industry.\textsuperscript{34} The rise of new digital forms of use in society was prompting many member states to consider various new regulations in response. According to the InfoSoc directive’s preamble, the purpose of the directive was mainly to prevent these isolated initiatives from causing fragmentation among the member states’ copyright systems, which could adversely affect the free movement of goods and services in the internal market.\textsuperscript{35}

As mentioned, another important function of the InfoSoc directive was alignment with various international obligations under the WCT and the WPPT.\textsuperscript{36} In this implementation, it is clear that the European Commission went beyond the treaty obligations in terms of copyright protection, e.g. regarding anti-circumvention laws for technical rights-management systems.\textsuperscript{37} It has been argued that this “over-implementation” further points to the main purpose of the directive being the

\textsuperscript{30} The latter has since been revised in the form of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.
\textsuperscript{31} See the InfoSoc directive’s preamble, Recital (2).
\textsuperscript{32} See Mazzotti (2008), p. 49.
\textsuperscript{33} Ibid.
\textsuperscript{34} See the InfoSoc directive preamble, Recital (2) and (4).
\textsuperscript{35} Ibid, Recital (6), and Mazzotti (2008), p. 50.
\textsuperscript{36} See Mazzotti (2008), p. 51.
\textsuperscript{37} Ibid, p. 52.
promotion and protection of European investment in copyrighted digital works and network infrastructure.\textsuperscript{38}

The InfoSoc directive harmonises the right of reproduction, distribution, communication of works to the public, and making works available to the public. It covers authors and related rightsholders (performers, phonogram producers, film producers and broadcasting companies). It also regulates limitations and exceptions to these rights, as well as digital rights management and (to a certain extent) sanctions and remedies.\textsuperscript{39} In practice, however, the InfoSoc directive has not achieved complete harmonisation. For example, the directive fails to define a common basic standard for copyrightability, i.e. originality. Regarding secondary uses, the directive also leaves the scope of the exclusive right to authorise modification or re-working of a copyrighted work unharmonised.\textsuperscript{40} In terms of introducing new exceptions to copyright, the InfoSoc directive regulates the maximum scope of the limitations and exceptions that member states can permit in national law. The directive provides an exhaustive list of non-mandatory exceptions, which the member states may choose to implement as they see fit.\textsuperscript{41} Of the 21 exceptions provided in the directive, only the exception for temporary acts of reproduction is mandatory (Art. 5 (1)). Since the directive only allows the exceptions listed, any exceptions other than those listed are, \textit{e contrario}, disallowed. At the time of drafting, practically of the exceptions in Article 5 were present in at least some of the member states. It should come as no surprise then, that the list is made up mostly (if not entirely) of a pool of all pre-existing national copyright limitations and exceptions.\textsuperscript{42} In the context of this current investigation, it is important to note that a provision permitting exceptions for transformative uses is not among the list in Article 5, although certain specific uses, which would certainly be regarded as partially overlapping with transformative uses (e.g. parody, review and criticism), are specifically permitted. But the permitting provisions deal only with these specific use cases, presumably on the basis of the their underlying purpose and effect; there is currently no provision permitting exceptions for secondary uses in a more general sense, e.g. on the basis of their transformative nature.\textsuperscript{43}

Judging by the wide-spread criticism against Article 5 and the InfoSoc directive in general, the harmonising effect they have had on copyright exceptions in the EU

\textsuperscript{38} See Mazzotti (2008), p. 52.
\textsuperscript{39} See Kur and Dreier (2013), p. 270.
\textsuperscript{40} See Mazzotti (2008), p. 54.
\textsuperscript{41} See the InfoSoc directive Article 5.
\textsuperscript{42} See Kur and Dreier (2013), p. 271.
\textsuperscript{43} More on these purpose-motivated exceptions below.
would appear to be modest at best.\textsuperscript{44} The InfoSoc directive \textit{does} limit the available exceptions to those listed, which at least limits the number of possible deviations (i.e. different combinations of exceptions between member states) to a finite number. However, that finite number is still remarkably large, given the 20 optional exceptions with which combinations can be made. Some states may eventually implement all exceptions. Others may have none of them, and most will probably continue to opt for a combination of their choosing. Note also that this is before even taking into account how the member states’ various forms and methods of implementation might affect the final form of every exception; these might result in even more inconsistency. As such, it becomes questionable whether Article 5 achieves any degree of noteworthy harmonisation in regards to copyright exceptions.

It should of course be noted that the InfoSoc directive’s effect on copyright exceptions is not without merit. Most notably, several member states have implemented new exceptions into their national systems, and have revised pre-existing exceptions, as a result of Article 5.\textsuperscript{45} But in regards to transformative uses, there are some problematic conclusions to be drawn from the current state of EU copyright law. Firstly, the territoriality of copyright law is still in full effect – with the specifics of copyright regulation, exemption, and enforcement ultimately left up to national law. But EU- and international law still restricts the ability of national law to implement copyright exceptions. Moreover, it is clear that the legal state of copyright exceptions remains largely unharmonised – with a mandatory maximum scope, a single mandatory minimum exception, and any number of combinations of 20 exceptions in between. There is thus a considerable mass of legal ground that EU law simply does not cover.

\textsuperscript{44} See Eechoud, Mireille van, Hugenholtz, Bernt, Gompel, Stef van, Guibault, Lucie, Helberger, Natali, Harmonizing European Copyright Law – The challenges of better lawmaking (2009), pp. 104-106.

\textsuperscript{45} See Geiger, Christophe and Schönherr, Franciska, Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis regarding Limitations and Exceptions (2012), p. 142.
2.4 What does EU law regulate regarding a possible copyright exception for transformative use?

2.4.1 The catalogue of exceptions

The InfoSoc directive currently limits the possible limitations and exceptions to copyright to a closed list of cases in Article 5. As mentioned, transformative use is arguably not among these cases, at least not as a concept independent of a specified use case or purpose. Granted, parody and criticism (both permitted exception cases under Article 5) can certainly be considered types of transformative use; but the legitimacy of these cases is (presumably) motivated on the basis of their merits as elements of free speech. In order to legalise certain forms of transformative uses on another basis than those specifically listed, a new exception would appear to be necessary. But because of the exhaustive nature of Article 5, there is currently no flexibility to create copyright exceptions in new areas.

The UK Gowers Review of Intellectual Property (2006), in connection to its proposal to introduce an exception for “creative, transformative or derivative works”, acknowledges that such an exception would currently be contrary to the InfoSoc directive – a conclusion that has since been confirmed by the European Commission.

The Commission has acknowledged that the optional exception in Article 5(3)(d), allowing quotation for purposes such as criticism or review, does provide a certain degree of flexibility. Thus, exceptions are possible for quotations other than criticism or review, provided these are in accordance with “fair practice”, and limited to “the extent required by the specific purpose”. However, it is subsequently noted that quotation in purpose of commenting not just on the work itself but on a wider issue might be considered unfair practice – thus implying that quotation for a purpose other than addressing the original work directly might not be covered by the exception.

The optional exception for caricature, parody or pastiche is also mentioned for allowing a degree of flexibility in transformative use. The exact definition of what constitutes parody still varies somewhat between jurisdictions. However, by

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46 See, for example, Spence, Michael, Intellectual Property and the problem of parody (1998), pp. 608-615.
50 Ibid, p. 20.
definition parody must *address the original work* in some way in order to be considered caricature, parody or pastiche – and thus be exempt.\(^{52}\) As such, the flexibility provided for quotation-related use and parody etc. is undoubtedly long way away from providing the necessary flexibility of allowing transformative uses in a more general sense.

It is worth noting the presence of what some call a “grandfather clause”, in Article 5(3)(o). The clause allows for limitations and exceptions of minor importance where such provisions already exist in national law, on the condition that they only concern analogue uses and do not affect the free movement of goods and services. This clause might be considered to remove some of the rigidity from the InfoSoc directive’s system of exceptions.\(^{53}\) But the provision’s limitation to analogue uses arguably invalidates its ability to be applied to most of the transformative use cases currently under debate.

It is also worth noting the exception for incidental use in Article 5(3)(i). If the use is so minor as to be considered a mere incident, it may possibly be exempt. This is often referred to as the “passing-shot principle”, in that it is intended to apply to a passing camera shot that unintentionally includes a copyrighted work. But this would appear to require that the use is just that – unintentional. In the case of many transformative uses, the intention to use part of the copyrighted work is plain to see and near impossible to argue against or disprove.

2.4.2 *The three-step test*

The aforementioned three-step test set out in the Berne convention has become an international standard, with which all limitations and exceptions to copyright must comply.

According to the Berne three-step test, any exception must:

(1) be confined to certain special cases,

(2) which do not conflict with normal exploitation of the work in question, and

(3) which do not unreasonably prejudice the legitimate interests of the author of this work.


\(^{53}\) See Eechoud et al. (2009), p. 103.
At the time of its inception, the purpose of the three-step test was primarily to strengthen the authors’ reproduction rights against phonographic piracy. But the test has seen use in a large number of legislative contexts since.

In the context of the Berne convention, the first “step”, restricting exceptions to certain special cases, entails that exceptions must be clearly defined and narrow in their scope and reach. The second step, i.e. not conflicting with the normal exploitation of the work, means not depriving the rightsholder of a real or potential source of income that is substantial. Finally, the third step, i.e. not unreasonably prejudicing the author’s legitimate interests, is passed if any prejudice caused is proportionate to the objectives of the exception. Unreasonable prejudice can also be avoided though adequate compensation for a licence.

The test’s requirement for exception only in “certain special cases” would seem to entail a need for exceptional circumstances or justifying reasons of public policy. However, in the context of the test in the TRIPS agreement Article 13, the WTO Panel has instead stated that the first step entails that a limitation or exception in national law should be clearly defined and narrow in its scope and reach. Additionally, the first step in the context of the TRIPS agreement does not imply passing judgement on the legitimacy of exceptions. The Panel has, however, been criticised for this interpretation – especially from scholars advocating a more qualitative approach than one focused on scope and reach.

The second “step”, i.e. that exceptions “should not conflict with the normal exploitation of the copyrighted work”, protects the rightsholder’s sources of revenue. According to the WTO panel, this should not be understood as including full use of all exclusive rights conferred by copyrights, since that would invalidate the applicability of the test. Concurrently, scholars have proposed that, in line with the preparatory works of the 1967 Stockholm conference (which revised the Berne convention Article 9), the goal of the contracting parties in regards to the second

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55 See Eechoud et al. (2009), p. 96.
56 Ibid, p. 96.
58 Ibid.
59 See Mazzotti (2008), pp. 81-82.
60 See World Trade Organization, United States – § 110(5) of the US Copyright Act, Report of the Panel, WT/DS160/R (2000). There have however been opinions raised against generalising the WTO Panel’s decision, since it deals with cases where no special public policy existed, see Ginsburg, Jane C., Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions.
61 See Mazzotti (2008), p. 82.
“step” was to preserve forms of exploitation which have or are likely to acquire considerable economic or practical importance.63

There are, however, certain inconsistencies in the representation of the three-step test in European law. Notably, there is no common interpretation of whom the test is supposed to apply to – i.e. the courts, the legislators, or both. Member states have appeared to interpret the test in various ways. Some have seen it as a requirement only for the legislator to follow during the codification of limitations and exceptions under the implementation of the InfoSoc directive. Some may even have interpreted the test as an additional basis of scrutiny regarding which exceptions in Article 5 to implement – reading the requirement for “certain special cases” as an obligation to further specify the scope of the implemented exceptions beyond that of the provisions in Article 5.64 Other member states have interpreted the test as a principle to be nationally codified itself, thus binding national courts as well.65 Even in some of the member states who did not codify it, there have evidently been several instances where national courts have referred to and applied the test.66 Roughly half of the member states have previously recognised the test as a norm to be applied by national courts.67

The application of the three-step test by courts has arguably had the effect of placing additional constraints on national exceptions, many of which may already have been more restrictive than the InfoSoc directive mandates.68 There may, however, be reason to believe that the normative purpose of the three-step test is falsely interpreted. The CJEU has implied, through judgements in the C-403/08 Football Premier League Association and C-5/08 Infopaq cases, that any use considered to have fulfilled the requirements of exception under Article 5(1)-(4), in doing so, also passes the three-step test in Article 5(5).69 Thus, the test would have fulfilled its role at the point of legislation, with the legislator (whether at EU or national level) having set forth the rule that all uses explicitly exempt from copyright automatically pass the three-step test. If so, the test (as expressed in the InfoSoc directive) may in fact have lost all normative content.70

63 See Senftleben, Copyright, Limitations... (2004), p. 177.
65 See Eechoud et al. (2009), p. 113-114.
66 Such as Austria, Finland, the Netherlands, and Belgium. See Eechoud et al. (2009), p. 114 and Hugenholtz and Senftleben, Fair Use in Europe (2011), p. 18.
70 Ibid.
2.5 Recent and future EU measures – the EU addresses transformative use?

So far, it has been concluded that EU law and international obligations, as they currently stand, severely limit the possibilities of introducing a new exception for transformative uses. But the need for facilitating transformative use has not only been acknowledged by academics and pro-user rights proponents; the EU Commission has also brought the subject up for discussion. In 2012, the Commission issued its Communication on content in the digital single market (IP/12/1394), announcing two intended tracks of action. On one hand, the Commission would complete the currently on-going effort to review and modernise the legislative framework for EU copyright as set out in the previous Communication on a single market for intellectual property rights. \(^{71}\) On the other hand, the Commission would hold a stakeholder dialogue. On the 13\(^{th}\) of November 2013, the final event in the structured phase of this stakeholder dialogue (coined “Licences for Europe”) was held. The participants made ten pledges regarding online content. The pledges included a common goal of easier licensing and identification of works and easier text- and data mining for non-commercial research, but the dialogue did not directly deal with transformative uses. \(^{72}\)

On the 5\(^{th}\) of December 2013 the Commission launched the public consultation phase of the on-going efforts to review and modernise the EU copyright system, inviting stakeholders to share their views on the Communication on content in the digital single market (IP/12/1394). As of this writing, this consultation is currently in progress, and is set to close on the 5\(^{th}\) of February 2014.

In the years preceding the current developments, the EU Commission has recognised the growing need for addressing UGC (termed User-Created Content), at least in the amateur-oriented sense of the concept. In its 2009 Communication on Copyright in the Knowledge Economy, the Commission expresses the intention to investigate solutions for more affordable and user-friendly rights clearance for amateur uses. \(^{73}\) But the Commission has also expressed the view that UGC is a nascent phenomenon, stating that stakeholders consider it too early to regulate the subject – at least at the time of the communication.

\(^{71}\) See Communication from the Commission on A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe (2011).

\(^{72}\) For more information, see http://ec.europa.eu/licences-for-europe-dialogue/.

\(^{73}\) See Communication From the Commission on Copyright in the Knowledge Economy (2008), p. 9.
But the fact remains that transformative use of copyrighted works is on the rise, and that it is very much a noteworthy interest for many users of digital media. It is also clear that the current legal situation for such uses is not promising, given the limitations imposed (primarily) by the InfoSoc directive. Some would argue that these limitations are currently skewing the balance of copyright in favour of the rightsholders. This potential imbalance has not gone unnoticed. In its Green Paper on Copyright in the knowledge economy, the Commission calls into question whether the current exhaustive list of exceptions actually achieves “a fair balance of rights and interests between […] the different categories of rightsholders and users.” The Commission calls for consideration on whether the balance provided by the InfoSoc directive is in line with the rapidly changing environment in a digital society – to which the rise of transformative uses is a significant factor. The Commission also confirms that the InfoSoc directive does not contain an exception which would allow the use of existing copyrighted content for the purpose of creating “new or derivative works” - admitting that the requirement to clear rights in order to make transformative content available could be considered a barrier to innovation, inhibiting new and potentially valuable works from being disseminated. But in regards to a possible exception, the Commission emphasises the need to consider the potential conflict that allowing the dissemination of such works would cause with the economic rights of the original creator.

As acknowledged by the Commission, transformative uses under the Berne convention would also have to pass the three-step test in order to be exempt from the copyright protection of the original work, given that they are primarily covered by the exclusive right to reproduction in Article 9 and the exclusive right of adaptation in Article 12 of the convention. According to the Commission, an exception would have to be precise, and refer to a specific policy justification or types of justified uses. Thus, one could determine that the Commission disqualifies a flexible approach such as US fair use. Moreover, an exception would have to be limited to the re-use of “short passages” that are not “particularly distinctive”, so as not to infringe on the exclusive right to adaptation. Even though certain current exceptions, in the Commission’s view, do allow for some flexibility regarding free uses of works, the fact remains that the majority of transformative uses currently fall

74 See Chapter 4.5 below.
76 For more on fair use and other approaches to copyright exceptions, see Chapter 3.3 below.
outside the specific use cases allowed for in the InfoSoc directive, let alone the exceptions that have actually been implemented into national law.\textsuperscript{78}

In its 2011 Communication on A single market for intellectual property rights, the Commission further acknowledges the growing need for easy and affordable means for end-users to use copyrighted content in their works. A simple and efficient permission system is specifically mentioned as a desirable solution. The Commission recognises the problem of non-commercial uses giving rise to infringement proceedings against amateur creators. The Commission subsequently expresses the intention to explore the issue further, in search of means for copyright to act as a broker between rightsholders and users, and for a solution that balances the rights of these two groups.\textsuperscript{79} It was announced that this investigation would primarily involve stakeholder consultation.\textsuperscript{80}

In light of the findings presented so far in this thesis, the conclusion can be drawn that international obligations, and especially EU law, currently do not permit exemption for transformative uses other than in certain specified cases, and not as a category of its own. Moreover, a specific exception for transformative uses would currently be impossible without amending the InfoSoc directive. Even so, there are many examples of transformative uses being either directly or indirectly exempt from copyright protection in national law. Chapter 3 will investigate this other side of copyright regulation more closely.

\textsuperscript{78} See Green Paper on Copyright in the Knowledge Economy (2008), p. 20.
\textsuperscript{80} See Kur and Dreier (2013), p. 289.
3 National law

3.1 What models for legitimate transformative uses exist on a national level?

This chapter will examine the legal approaches to transformative use on a national level in various countries. There is a multitude of underlying regulation, case law, systems and legal traditions in play here, and as such this examination by no means seeks to be exhaustive. By necessity, many of the discussions in this chapter will be relatively brief, and somewhat generalising – in favour of focusing on national solutions specifically surrounding secondary uses. As mentioned under 1.3, the following chapters aim to exemplify many of the various views currently held of transformative uses – and not to carry out a comparative study. The goal here is to examine what elements of such national approaches might be suitable to incorporate into a transformative use exception – whether in the context of EU law permitting the exception, of national codified law implementing the exception, or of guiding principles and guidelines for the application of the exception by courts.

3.2 Overarching views - copyright v. author right

In terms of overarching copyright systems, there can traditionally be said to be two main categories – systems which employ a droit d'auteur approach to copyright, and systems which employ a more utilitarian approach (such as those in Anglo-American copyright law). Droit d'auteur is typically based around the need to protect the ongoing creative and economic relationship between author and work – as the central purpose of copyright. As a result, exclusive rights tend to be broader, and exceptions tend to be narrower and more focused.\(^1\) The alternate approach, the clearest representative of which is the US copyright system, is defined by its traditionally utilitarian view of copyright. The US approach (at least originally) regards copyright as a means of ensuring that knowledge and information is continuously provided to society, and as a way to promote science and useful arts.\(^2\) Arguably, this approach leads to the default view that uses are free unless covered by rights, with exclusive rights being only so strong as to achieve the utilitarian goals of copyright.

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The utilitarian and droit d’auteur approaches to copyright legislation are understandably shaped by the underlying legal traditions of common- or civil law respectively. In many civil law droit d’auteur systems, legislators typically codify open and abstract legal provisions, stating the general rules without impeding courts from applying normative principles. In Anglo-American Common law copyright, the legislation exists more to constrain the courts’ application of common law, and the codified laws are thus typically more precise and extensive – limiting the common law courts’ extensive law-making power.\textsuperscript{83} It could be argued that this is the reason for why relatively few droit d’auteur systems contain a codified rule of fairness – since this was traditionally applied as a normative principle when interpreting and applying the relatively open norms. The US fair use doctrine, meanwhile, experienced more than a century of application by courts before it was codified.\textsuperscript{84}

Over the course of the last century, however, droit d’auteur laws have undergone a significant change in order to adapt to changes in society and technology, and to align with EU harmonisation. Some would argue that, in doing so, many droit d’auteur systems have lost much of their previously inherent elegance and openness.\textsuperscript{85} At the same time, the legislative cycle has become several times more lengthy and complex, given the European harmonisation obligations – all while the societal need for flexibility has steadily increased.\textsuperscript{86}

3.3 Systems of regulating copyright – exhaustive v. flexible regulation

3.3.1 Exhaustive regulation

Perhaps the most prevalent form of regulating copyright, not least since being introduced throughout the EU with the InfoSoc directive, is the exhaustive regulation approach to copyright. Most commonly associated with droit d’auteur systems, exhaustive regulation explicitly codifies what uses are exempt from copyright, often with several necessary and specific requisites for exemption. “Fairness” may in some cases be a factor to be considered, at least when such is implied by the exempting provision, but fairness is by no means the basis for copyright exemption. Rather, it is the specifically exempt use case (along with its purpose, extent or other explicitly

\textsuperscript{84} Ibid.
\textsuperscript{85} Ibid, p. 7.
\textsuperscript{86} Ibid, p. 7-8.
relevant factors) which determines whether a use is exempt from copyright. Perhaps a reason why many exhaustive regulation systems have traditionally been less tolerant of "fair" yet unauthorised uses lies in their roots in the droit d'auteur paradigm, where the main priority is to preserve the connection between the author and his or her work.

In theory, a system of precisely defined exceptions has significant advantages in terms of predictability and legal certainty, since the outcome of a case could be predicted on the basis of codified law with relative accuracy. This may also have been the case in Europe for a long time. But the legal security of the European national copyright systems has in many places been compromised by EU legislation and national implementation of the three-step test, enticing courts to re-examine and reinterpret existing exceptions in light of the test.87

3.3.2 Fair dealing

Unlike the exhaustive regulation of many droit d'auteur countries, and unlike the highly open-ended fair use doctrine employed by the US, The UK employs a system of exceptions for certain “fair dealings”, such as research, criticism, and news reporting.88 However, in addition to meeting one of the fair dealing purposes, the use in question must also be “fair”. It is in this portion of the fair dealings approach that similarities can be seen to the US fair use doctrine – in that the use should be fair e.g. in regards to the amount of the work used, the proportion of the use in relation to the original, and whether the resulting work competes with the original copyright holder.89

In the assessment of fairness according to UK fair dealing, several aspects need to be taken into account:90

- The purpose of copying
- The degree to which the use competes with the exploitation of the original
- The proportion of the copied portion to the whole work
- The motive of the copying (to compete with the original suggest unfairness)
- Whether the copied work is published or unpublished

88 Several other national systems also employ a system of fair dealings, including Australia, Canada, and New Zealand.
89 See Stokes (2009), p. 41.
Ultimately though, fairness is a criteria determined by the court (unsurprising in the cradle of common law). The court should judge the fairness by the objective standard of whether a fair-minded and honest person would have dealt with the copyright in the manner that the alleged infringer in question has done.91 Recent UK case law would suggest that the most important factor in determining “fairness” is commercial competition with the copyright holder’s exploitation of his or her work; the second most important factor would appear to be whether the use concerned an unpublished work (which would likely suggest that the dealing is “unfair”); with the third most important factor being the amount and importance of the work taken.92

UK fair dealing only really applies to certain cases, as uses are only permitted as fair dealings for a limited number of purposes. Once these requirements are met, further requirements and the fairness standard determine whether the defence is accepted. As such, UK fair dealing is not exceedingly far removed from the narrowly defined list of exceptions employed by many civil law countries (and EU law under the InfoSoc directive), at least compared to US fair use.93 Indeed, the UK is facing problems with an aging copyright legislation just like many other EU member states. The UK approach of fair dealings has been criticised as out-dated,94 failing to adapt to current societal changes brought on by advances in technology.

3.3.3 Fair use

Perhaps the most well-known principle in flexible copyright law (if not copyright law in general) is the US fair use doctrine. Fair use first came about through US case law, and was eventually codified in § 107 of the US Copyright Act of 1976 (USCA).95 A fair use of copyrighted material does not infringe the rightsholder’s copyright.

Contrary to exhaustive regulation, exemption based on fair use is not granted to certain explicitly codified use cases. While the principle is certainly most famous in its US manifestation, fair use exceptions exist in many other countries such as Bangladesh, Taiwan, Uganda, and South Korea.96 Other countries are currently considering introducing a fair use exception, such as Ireland and Australia.97

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94 See the Hargreaves report (2011), p. 44.
Contrary to most cases of exhaustive regulation and UK fair dealing, fair use is not limited to certain purposes or use cases. The purpose of the use is of secondary importance, and the concept of *fairness* is the main determining factor.\(^98\) USCA § 107 does exemplify certain use circumstances which might be exempt, but the listing is explicitly non-exhaustive and serves only as a possible guideline. Instead, courts are able to exempt certain cases of use of copyrighted works on the basis that the use (despite being unauthorised, uncompensated, or both) is considered fair. Judges might for example be able to exempt a certain use based on the legitimacy of the use in question.\(^99\) In determining fair use, courts must take into account the following factors:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished does not preclude fair use, provided the above factors are considered.\(^100\)

While the four factors mentioned above are used for determining the fairness of a use, the factors do *not* act as cumulative prerequisites for fairness. This factor-based approach is an important distinction to make *vis-à-vis* the criteria-based (i.e. requisite-based) approaches of most European systems. Instead of serving as individual pre-requisites, the factors of fair use are taken into account in a final *balance* of factors which determines whether the use is fair, and wherein the individual factors are also weighed against each other according to the circumstances of the case. Thus, even though one (or perhaps more) of the factors might suggest one outcome, this can potentially be out-weighed by the remaining factors if there are strong enough reasons for doing so; it is the conclusion of this balancing of factors which ultimately determines whether a use is fair or not.\(^101\) The internal hierarchy of the four factors is thus somewhat flexible, although it has been argued among US judges that the most significant factor for determining fair use ought to be whether the use negatively impacts the sales of the original work.\(^102\)

\(^99\) See the Hargreaves report (2011), p. 44.
\(^100\) USCA § 107.
\(^102\) See *Campbell v. Acuff-Rose Music* (1994).
The potential benefits of fair use have been discussed at length in legal academia. The UK Gowers review argues that the more open and flexible fair use system has opened up a commercial space wherein value can be created to a greater extent than here in Europe. The review argues that this openness is a major contributing reason for global software service giants such as Google having grown so large and successful.\textsuperscript{103} The flexibility the doctrine provides also allows US courts to tackle the shifts that developments in a digital society might cause to the value bases underlying copyright. There may also be reason to believe that the US system simply allows more (and more significant) secondary works to be produced and distributed. The US District court landmark ruling in Authors Guild et al. v. Google Inc. (2013) is a recent example.\textsuperscript{104} The case involved Google’s the mass scanning of books for the Google Books service, which the plaintiffs alleged was an infringement of their copyright. In November 2013, Judge Chin issued a summary judgement in favour of Google, stating that that the act was to be considered fair use and thus freely permitted.\textsuperscript{105} It is my understanding that a corresponding conclusion is unlikely to have been reached in Europe, had the same case been tried in a European court under European laws.

On one hand, US fair use allows for flexibility in the face of evolving use cases. By allowing greater flexibility to apply law in a way suitable to the concrete case in question, there is theoretically a greater chance of coming to a fair and balanced decision in each individual case.\textsuperscript{106} On the other hand, the doctrine can potentially cause greater legal uncertainty and legal security than an exhaustive exceptions system, the latter of which is able to be more transparent regarding the legality of uses.\textsuperscript{107} Fair use proceedings are also long and costly, and their ultimate outcomes are frequently unpredictable for both parties involved.\textsuperscript{108} Perhaps this shortcoming is a result of the wordings of USCA § 107. But more likely it comes at least partly as a result of US common law, given the law-making freedom US courts are thus given. Ultimately, the flexibility of fair use may also be one of its greatest weaknesses – for example in distributing transformative works. Many consider fair use to be, in reality, a weak, vague, and unstable ground for justifying secondary uses. As Professor Lawrence Lessig points out, few publishing entities are willing to rely on “such a weak doctrine” when running even the remotest risk of infringement claims by

\textsuperscript{103} See the Gowers Review (2006), p. 62. Specifically, the ability to exempt uses such as caching under fair use is cited by Google as a major factor for search engines having been developed in the USA, and not for example in the UK.
\textsuperscript{104} See The Authors Guild, Inc. v. Google Inc. (2013).
\textsuperscript{107} Ibid.
rightsholders. Concurrently, many creators might simply choose to not create transformative works, given the fear of rejection and even litigation caused by only having an uncertain fair use doctrine to lean on.

Regarding transformative use – the transformative nature of a use is a potentially decisive factor for the decision of whether the use is fair under the fair use doctrine. This seems to be primarily due to the standpoint that uses possessing a sufficiently transformative nature may support freedom of speech and cultural follow-on innovation. As was stated in *Campbell v. Acuff-Rose Music* (1994):

> The central purpose of this investigation is to see [...] whether the new work merely supersedes the objects of the original creation [...] or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative’.

The court also acknowledges that, although transformative use is not necessary for a finding of fair use, the central goal in copyright of promoting science and the arts is generally furthered by the creation of transformative works. Transformative use could also be understood as “productive” use, in that the re-used portions must be used in a different manner or for a different purpose than the original. A work that adds its own value, i.e. that transforms the original through new information, new aesthetics, or new insights and understandings, could be regarded as the very type of activity that the doctrine intends to protect in order to further the enrichment of society.

### 3.4 Adaptation and free adaptation

An important distinction to make when discussing transformative use is whether the overall use type discussed is a reproduction or an adaptation. Both concepts are often involved when discussing transformative works, but giving a definitive answer to which applies more is not easy. When discussing transformative works, the Australian Law Reform Commission expresses the difficulty in distinguishing

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transformative use from the making of an adaptation, and to what degree transformative works need to be creative and original. According to the Australian commission, an adaptation is a new and original work in its own right.114 Traditionally, adaptation (and the right thereto) has been used to address secondary works such as translations, or conversions of a work into another format or medium (such as a book to a play, or a film to a video game).

The exclusive right to reproduction is harmonised in the EU. But the exclusive right to adaptation, as set out in the Berne convention, is not. Hence there is a certain amount of inconsistency regarding the regulation of adaptations – with some EU member states regulating it as a part of the right to reproduction, while others regulate adaptation on its own and thus do not apply obligations under EU copyright law to it. It is likely this absence of harmonisation which has allowed for the continued existence of free adaptations.

The German copyright act traditionally allows adaptations of works to be free under certain circumstances – a privilege which has been retained even after the InfoSoc directive.115 An independent work created by free use of the work of another person may be published and exploited without the consent of the author of the used work, except for the use of a musical work where a melody has been recognisably borrowed from the work and used as a basis for a new work.116 The German free use privilege requires that the new work to have new features of its own.117 In Austrian copyright law, the use of a work in creating another work is free, provided such work constitutes an independent new work in relation to the work used.118 In Dutch copyright law, adaptations that constitute a new, original work traditionally fall outside the scope of the exclusive adaptation right.119 This has traditionally been the basis for the allowance of parody – a right which has been concretised by the Supreme Court of the Netherlands, stating that a parodist may not take more from the original work than is necessary for the intended critical statement of the parody. In Swedish copyright law, a new and independent work created in free connection to another work is free from the rights associated with this work.120

114 See the ALRC Discussion paper (2013), p. 209.
116 See § 24 of the German Copyright Act (Urheberrechtsgesetz).
118 See § 5 (2) of the Austrian Copyright Code (Urheberrechtsgesetz).
119 See Article 13 of the Dutch Copyright Act (Auteurswet).
120 See § 4 section 2 of the Swedish Copyright Act (Upphovsrättslagen).
There is notable overlap between the categories of adaptations, free adaptations, and transformative works. But not all transformative works are mere translations or conversions of the original, nor are they necessarily distanced enough from the original to meet the (typically quite strict) requirements of free adaptation. Thus, the current regulation for adaptations and free adaptations can not be said to fully encompass the category of transformative use.

3.5 Assessing secondary works – exiting and possible grounds for exemption

The coming discussion examines various questions posed regarding the legal scrutiny of secondary works within various national systems. The following questions are sometimes closely inter-related, and do overlap to a certain extent. But I believe that there is value in examining these criteria individually all the same. There are of course several more criteria that could be applied to transformative works, but I consider the following collection to be representative of some of the most commonly found grounds for assessment of secondary uses. Additionally, as explained under Chapter 1.4, this subchapter combines both descriptive and analytical discussion, as the applicability and significance of the discussed criteria in regards to secondary- and transformative uses is rarely set in stone, or even explicitly stated in the source material.

3.5.1 Quantity of re-used pre-existing material

If only a minimal portion of an existing work is re-used in a secondary work, then there may be reason to suggest that no unauthorised use of the copyrighted work has taken place. There can be several underlying reasons for such an exception. In US Law, the de minimis rule applies to cases where the amount copied is so small as to be permissible even without a fair use analysis. In Campbell v. Acuff-Rose Music (1994), the court came to a fair use conclusion based partly on the fact that only a small portion of the Roy Orbison song Pretty Woman had been re-used. However, in terms of musical sampling, the possibility for de minimis defence is considered by many to have been subsequently closed by the court ruling in Bridgeport Music, Inc.

121 The de minimis rule was applied in Sandoval v. New Line Cinema Corp., 147 F.3d 215 2d Cir. (1998). The copyrighted works in question (photos) were “virtually unidentifiable”.
122 See Campbell v. Acuff-Rose Music (1994). The other grounds were parodying purpose, transformation, and the fact that the two musical pieces shared only a few similarities.
v. Dimension Films (2004). It is important to note, however, that Judge Ralph Guy later adjusted this ruling’s strikingly absolute statement “[get] a license or do not sample” after a rehearing, noting that the court in fact gave no opinion of the applicability of a *fair use* defence for musical sampling, since only a de minimis defence was invoked.

In the UK, the fair dealing defence is only relevant when “a substantial part” of a work is taken, since otherwise no copying is considered to have taken place. In Swedish Law, a secondary use may be exempt from copyright if the portion of the copyrighted work used is so small as to not possess sufficient originality on its own. This latter approach focuses more on whether the re-used material is worthy of copyright protection in and of itself; a relatively large portion of a copyrighted work may be reused if the re-used portion itself is deemed incapable of being independently protected under copyright. The re-used material may be too generic or simple, or may otherwise display insufficient creative effort on behalf of its creator.

In the context of the Berne convention, so-called “minor exceptions” seem to have been largely accepted by the international community. These exceptions typically concern cases of de minimis use that do not affect the copyright owner, such as use for religious ceremonies or military bands. However, EU law under the InfoSoc directive does not seem to provide such flexibility.

It is possible that this principle – that re-use of a minimal or inherently unoriginal portion of a copyrighted work is permissible – may be implied in many legal systems, as a disqualification of copyright protection rather than an exception to it. If the material copied cannot be considered protected by copyright at all, then of course no exception is necessary.

In Australian law, the “substantial part” requirement appears to play a decisive role in the assessment of secondary uses. The criterion is assessed in relation to the copyright material used, rather than to the new work in which the sample has been incorporated. The ALRC has expressed scepticism over having a potential stand-

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127 See Eechoud et al. (2009), p. 96.
128 I.e. a “limitation” under WIPO’s definition presented under 1.6 above.
alone exception mandate that transformative uses of copyrighted content override
the “substantial part” requirement on the basis of the material’s incorporation into a
new work.129

3.5.2 Degree of transformation of the re-used material

Another possible ground for exception is that the re-used material has undergone
such a degree of transformation and alteration that it has become something
different. As mentioned previously, The inquiry in Campbell v. Acuff-Rose Music
(1994) focused on “whether the new work merely supersedes the objects of the
original creation, or whether and to what extent it is controversially “transformative,”
altering the original with new expression, meaning, or message”. According to the
court, “The more transformative the new work, the less will be the significance of
other factors, like commercialism, that may weigh against a finding of fair use”.130
The act of merely plucking a portion of a copyrighted work from its source and then
simply inserting it into a new work is clearly not as defensible as a process that
modifies and alters the original material into something new. The most frequently
stated criticism of the former behaviour is perhaps that it allows the secondary
creator to cut corners or “cheat” in his or her creative process at the expense of the
original creator.

A small degree of transformation to the re-used portion may suggest a

 corresponding low degree of creative effort on behalf of the secondary creator.
Conversely, the presence of extensive alterations and modifications might suggest
the opposite; the changes made may in and of themselves constitute a creative
action, depending on whether they are made as a part of the creative process or
simply as a means of concealing the source material.

But degree of transformation seems notably absent from most assessments of
secondary uses. The criterion is, after all, difficult to define – let alone assess without
further specifying what degree of transformation should permit a secondary use.
However, the situation becomes somewhat more manageable when the question of
“to what degree has the re-used material been transformed?” is rephrased into “how
recognisable is the re-used material?”, as elaborated below.

3.5.3 Recognisability of the original material, its characteristics, and the creative work of the original creator

The hypothetical criteria of recognisability allows for more extreme cases to be dealt with quite easily; if existing copyrighted material is used in such a way that it is considerably difficult or even impossible to even recognise it as re-used material, then the use becomes correspondingly difficult to dispute, prohibit, or even detect. There is also reason to believe that the original creator suffers little or no loss or damage from a secondary use in which his or her work is unrecognisable. There have been notable exceptions made to this, but the line of reasoning is certainly worth discussing.\textsuperscript{131}

It is often said that an artist’s work is the expression of his or her creativity, intentions, personality, and artistic spirit. It is this expression that is considered by many to be the core of a creative work – the very object of copyright protection.\textsuperscript{132} Swedish law, for example, places significance in whether this “inner form” of the original work has been copied, or if the secondary creator has developed a new “inner form” in the new work. The definition of inner form is by no means set in stone, but by contrast the “outer form” of a work could be said to be elements that do not define the central creative expression of the work. One might for example interpret this to mean that various common tropes and techniques can typically be said to be part of a work’s outer form.\textsuperscript{133}

The nature of the terms inner and outer form is inherently ambiguous, but they appear to represent an attempt to separate the most important aspects of a creative work from less defining elements. In most transformative works, the outer form of the original can be said to have been altered at least in some way. But some original works might possess certain defining, original, or unique characteristics, typically regarded as the fruits of considerable creative effort from the creator. These characteristics may warrant a higher degree of protection. If these unique characteristics are clearly recognisable in a secondary work, then there might be a greater risk of the secondary creator illegitimately profiting from the creative efforts of the original creator. Simultaneously this fact might suggest a lack of creative effort from the secondary creator. But if the original work’s underlying character, message,

\textsuperscript{131} Most notably, Bridgeport Music, Inc. v. Dimension Films (2004) regarded a case of musical sampling of a few seconds of audio which had undergone significant alteration (arguably to the point of losing all reasonable recognisability) as infringement.

\textsuperscript{132} See Goldstein and Hugenholtz (2012), pp. 4-5, and Olsson, Henry, Upphovsrättslagen: En kommentar (2009), pp. 36-37.

\textsuperscript{133} See Olsson (2009), p. 36 and pp. 93-94.
or defining aspects are not clearly found in a secondary work, this might mitigate a potential lack of change to the original’s outer form.

As noted above, the German copyright code requires that an adaptation of a work have new features of its own to be exempt as a free adaptation. One important aspect of these new features is that they must “make the individual features of the original work fade away.” The German Federal Court of Justice has confirmed that the principles governing these free adaptations can also be applicable to other transformations. Notably, the court seems to also have left the privilege of free adaptations open for application to certain cases where the original work has not been changed substantially. The “outer distance” from the original work (achieved by making the individual features of the original fade away) might be achieved through other means than a sufficient degree of alteration. If there is sufficient “inner distance” from the original, such as the distance created by a parodist’s mockery thereof, then this might be enough to allow the adaptation to be free.

It is my understanding that the Swedish concepts of inner and outer “form” should not be confused with the German concepts of inner and outer “distance”. The latter seems to deal more with the differentiation between the two works in a comparison, while the former seems to deal more with the creative effort and artistic soul of the original work (what some scholars refer to as the corpus mysticum). In this sense, one can discern significant connections to the concept of originality, which will be elaborated on below.

3.5.4  Originality of the secondary use and the secondary work

On a related note, a secondary work in which the secondary creator contributes his or her own creative effort and originality would suggest that the underlying use is not a slavish copy or a parasitic appropriation of the original creator’s efforts. A sufficient degree of originality in a secondary use (as a whole) might in some cases only require a re-contextualising the original material - if this has the effect of altering the meaning of the original (such as with many cases of parody). As such, there may be cases where the secondary use itself has some inherent originality.

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136 Ibid, p. 27.
The re-use of a portion of an existing work in a context where this portion plays a large and defining role would conceivably be less acceptable than cases of re-use where the material is but a small part of the creative context it is put into. If the secondary work is based around and defined by the re-used material, this might suggest that the secondary creator has merely made illegitimate gains from the creative efforts of the original creator, without contributing as much of his or her own creative effort.

This question could also be said to deal with the degree to which the re-used portion makes up a significant proportion of the new work. Taking a verse from a song and basing an entire new song around repetitions of that one verse would conceivably be a clear case of the re-used material playing a defining and central role in the new work, and would probably be more likely to be regarded as unoriginal unless the remaining elements of the new work provide their own creative identity. But if the re-used material only plays the role of a detail – a mere accent or augmentation to the other elements of the work – then the infringement is less obvious.

The most evident examples in which an individual re-used portion does not constitute the core of the final work are the various forms of artistic collages that consist of small portions of other works to create a new and different whole – where none of the parts in and of themselves define the new work but where the choice of, alterations to, and arrangement of these pieces are what constitute the artistic core, message, and effort behind the work. Another example might be musical mash-ups in which a not insignificant portion of a song might have been taken, but where that portion only end up playing the role of a small backing element in relation to the rest of the piece.

A similar perspective is the question of how original the new work is in its entirety. Even a use in which a re-used portion of a copyrighted work plays a significant role might be considered worthy of exemption, on the grounds that the new work is nonetheless new and original.

The Australian copyright system requires that a secondary use not be a “mere slavish copy” in order to be considered an original work in its own right, provided the creator has expended sufficient independent skill and labour in bringing the work
into material form.\textsuperscript{138} The ALRC points out that simply pasting two works together without further modification should not constitute a transformative work, but expresses uncertainty over what else should be required.\textsuperscript{139} The question is whether a “new” standard for originality would be required in order to properly regulate transformative works, which might lead to a great deal of uncertainty. The new Canadian exception for non-commercial UGC requires that the secondary use is carried out in the creation of a “new work”, but appears to require no more in terms of the work itself.\textsuperscript{140} This has not yet been the subject of actual judicial interpretation yet, but seems to provide quite a low barrier of entry.

It is clear that originality as a whole is a possible ground for defence against infringement claims, especially since it is a suitable summarising term for the criteria discussed so far. As mentioned, one of the primary concerns when examining secondary works is the degree of creative effort expressed by the work. But there may be cause for concern regarding courts engaging in artistic evaluation of works.\textsuperscript{141} An inquiry into a work’s aesthetic merit is arguably impossible to carry out in a wholly objective (and this consistently repeatable) fashion. This concern is no less relevant given the rise of completely new forms, genres, and manifestations of creative works in a digital context. There may then be reason for examining the constituent elements of a transformative work’s originality by asking the questions that have just been presented.

### 3.5.5 Purpose or intention of the secondary use

The underlying purpose and function of the re-use of a copyrighted work appears to be one of the most oft-examined grounds for exemption of that use, not least because exhaustive regulation systems typically categorise secondary uses by purpose and function. The InfoSoc directive reflects this, allowing specifically for exceptions regarding parody or pastiche, and criticism or review.

UK fair dealings are similarly only available for certain use purposes. In UK law, criticism and review are regarded as possible cases of fair dealing. This might involve the re-use of one work for the purpose of criticising another work, or a performance of that work. It is the purpose of criticism which determines the outcome. The

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\textsuperscript{138} See the ALRC Discussion paper (2013), pp. 204-205.
\textsuperscript{139} Ibid, p. 209.
\textsuperscript{140} Ibid, pp. 204-205.
\textsuperscript{141} See Goldstein and Hugenholtz (2012), p. 193.
criticism may involve the subject matter, style, or even the ideas found in the work; but cases where only ideas, doctrine, philosophy and events are criticised are not covered by the defence.\textsuperscript{142} The dealing or copying must also be directed at supporting or illustrating the review or criticism of the original work.\textsuperscript{143}

The main reason for the common exceptions for secondary uses like parody or criticism on the basis of their purpose is that permission might never be granted otherwise. The right for a secondary creator to use another’s work for parody or pastiche without prior authorisation is ultimately justified by the risk that such permission might not be granted by an especially conceited artist, hoping to avoid the resulting ridicule and mockery.\textsuperscript{144} It would appear that the main harm that society might suffer from such refusal is a stifling of free speech and expression, similar to what would happen if portions of copyrighted works could not be used for purposes of illustration in criticism or review. The EU right to quotation is similarly intended to “strike a fair balance between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.”\textsuperscript{145}

A transformative use serving a sufficiently different purpose than the original can in some cases be sufficient for a US fair use defence. In \textit{Warner and Rowling v. RDR Books} (2008), the US District Court of the Southern District of New York came to such a conclusion.\textsuperscript{146} The case regarded a Harry Potter fan site (Harry Potter – The Lexicon) as a fair use in that its purpose was for reference, as opposed to the entertainment and aesthetic purpose of the original works. The use was thus transformative, and did not supplant the original work. However, the verbatim copying of certain significant portions of the books, in excess of what the reference purpose required, led to the eventual conclusion that the use was not fair, as the material copied in excess of what was necessary did not support the transformative character of the work.\textsuperscript{147} The verdict thus eventually fell in the plaintiff’s favour, mostly due to the fact that the use of Rowling’s material was not consistently transformative, and that some of the original material already had a reference-like purpose of its own (in the case of the two Harry Potter companion books). The transformative character of the lexicon was thus diminished beyond the scope of the

\begin{footnotes}
\item[142] See Torremans (2012), p. 324.
\item[143] Ibid, p. 327.
\item[144] See Goldstein and Hugenholtz (2012), p. 393.
\item[145] See Case C-145/10 Eva-Maria Painer v. Standard Verlags GmbH.
\end{footnotes}
fair use defence, but the court maintained that a transformative purpose and transformative character may in some cases be sufficient for the use to be fair.

3.5.6 Damage and competition

Beyond the nature of the secondary use itself, the effect that the use has on the original work and the creator there of can (and often is) of significant importance. It could even be argued that the economic impact on the original work is the most significant factor when assessing the permissibility of a secondary work; even the three-step test clearly deals primarily with the economic exploitation (i.e. sales or licensing) of the original, along with the original creator’s “legitimate interests” in engaging in this exploitation. Damage may also be considered to be the most important factor in a fair use assessment, and cases of borderline fair use might in some cases be swayed towards fair use due to a low degree of commerciality.\textsuperscript{148}

If a secondary use has no harmful effect on the exploitation of the original work, then labelling the use as infringement would appear to lean more towards a matter of principle than of meeting a societally justified need. For example, it could be conceivable that the individual, non-commercial nature of much UGC (such as amateur remixes) might constitute a sufficient “inner distance” (akin to a parodist’s mockery) under German Law - enough to justify the use being considered a free adaptation. If the work is an amateur work with a clear lack of profit motive, the contrast to the original would likely be obvious.\textsuperscript{149}

Harm or damage to the original and its creator might take several forms. Beyond purely economic damage, the secondary use might harm original creator’s moral rights to attribution and the preservation of his or her artistic integrity. The most evident example is that which results from the secondary work competing directly with the original. As such, the sales of the original work might suffer from this competition, especially if the secondary work acts as a substitute for the original.

But it is in the middle ground between harmless use and direct market substitution that the analytical difficulties lie. Clearly, there are cases of secondary uses which might cause significant damage to the sales and exploitation of a creative work, as well as to the reputation of its creator, but which are currently permitted under copyright law; parody, criticism, and review can be counted among these uses. Thus,

\textsuperscript{149} See Senftleben, Breathing Space... (2013), p. 90.
although economic and moral harm might be considered among the most significant factors in assessing secondary uses, it is clearly possible to exempt uses which cause such harm on the basis of a more significant societal need.

When a secondary use is transformative, it becomes at least less clear that it causes market substitution or replacement of the original. In these cases, market harm is not so easily inferred. But one difficulty with assessing the market impact of a secondary use is admittedly the delineation of the respective markets of the work and that of the original. One could argue that the market for a musical cover or other secondary work should be understood as separate from that of the original. If so, then the new work would be unlikely to compete with (and thus potentially damage the sales of) the original work. If, as discussed previously, the secondary work serves a different purpose than the original then there may be further reason to regard their markets as non-overlapping, and to assess the potential market harm accordingly.

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4 Issues with the current state of law

4.1 An imperfect system

The EU copyright system is by no means a flawless construction, as this chapter will clearly illustrate. As suggested above, the EU copyright *acquis* is still very much a work in progress. Many of the problems faced by the system have some effect on the prospects for creating and disseminating secondary- and transformative works, both directly and indirectly. Although primarily concerned with secondary and transformative uses, this chapter aims to employ a somewhat broader focus – in order to also discuss the *wider* issues which may adversely affect the possibility of creating and disseminating these works. However, given the number of issues covered by this discussion, many of them will unfortunately not able to be elaborated on in exhaustive detail.

4.2 Problems with disharmony

One of the guiding purposes of EU law harmonisation efforts (including that of the InfoSoc directive) is to help eliminate burdens on free movement and distortions of competition caused by national disparities. However, current EU law clearly does not fully harmonise the regulation of secondary works. There is also no common standard for originality, nor is there a common notion of “transformative work”. As such, the legal situation modifying or re-working existing works can and does vary from one member state to the next. Despite previous efforts, large portions of copyright law remain unharmonised – particularly limitations and exceptions. Even areas that are considered harmonised often contain discrepancies; member states have made different use of the implementation options available, and implementation efforts have naturally been affected by national legal and linguistic traditions.

The prevailing territorial nature of copyright in the EU can cause considerable problems, such as when works are distributed in a borderless online environment. Licensing can become incredibly complicated given the territorial nature of EU copyright. The *Schutzland* principle means that the law of the country where

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151 Originality has only been expressly harmonised for computer programs, databases, and photographic works. See Kur and Dreier (2013), p. 315.
152 See Mazzotti (2008), p. 54.
protection is sought governs cases of infringement. At worst, this means that online distribution of a work might require licences to be cleared in all 27 member states.\textsuperscript{154} Ultimately, there is a risk that the differences in exceptions implemented among member states, and the resulting situation where different rules apply to a single case across the union, will result in serious impediments to cross-border services – potentially compromising free movement.\textsuperscript{155} Additionally, there are fears that the differences between the implementation of copyright exceptions might result in differing treatment of citizens of different member states – conflicting with the principle of non-discrimination in TFEU Article 18.\textsuperscript{156}

As will be further discussed in the following chapters, there may be reason to believe that copyright protection is set to expand further in the coming years, rather than be subjected to further limitations. There are fears that a further expansion of copyright protection might in fact harm the establishment of an internal market, given copyright’s territorial nature.\textsuperscript{157} The CJEU has previously recognised that territorial exercise of intellectual property rights harms the free movement of goods; this effect is a major contributing reason to the implementation of Community-wide exhaustion (currently codified in the InfoSoc directive Article 4), allowing for parallel imports of (physical) goods within the EU.\textsuperscript{158}

\section*{4.3 Problems with lack of clarity / legal uncertainty}

Copyright-related scenarios in a digital environment have given rise to considerable legal uncertainty for the last few decades. Originally, most problems can be said to have related to the inherent copy-reliant nature of digital uses and distribution – many of which have since been solved by exceptions for transient copies. But courts and legislators are still regularly faced with situations where laws designed for an analogue environment must be applied to a digital use case – often creating uncertainty as to whether the underlying principles and purposes of the law in question still apply. The digital age has also brought about a considerable social change regarding copyright, with the unprecedented access to content and means of sharing and distribution provided by the internet. Uses which had previously been widely ignored by many rightsholders (given their private and analogue nature) such

\begin{footnotesize}
\footnotesize\textsuperscript{154} See Hugenholtz, P. Bernt, Harmonisation or unification of EU copyright Law (2012), p. 195.
\footnotesize\textsuperscript{155} See Eechoud et al. (2009), p. 105.
\footnotesize\textsuperscript{156} For example, a person suffering certain disabilities may invoke certain copyright limitations in France, but perhaps not in the UK, where only the visually impaired are exempt. See Eechoud et al. (2009), p. 106.
\footnotesize\textsuperscript{157} See Hugenholtz, Harmonisation or Unification... (2012), p. 93.
\footnotesize\textsuperscript{158} See Case 78/70 Deutsche Grammophon v. Metro-SB-Großmärkte.
\end{footnotesize}
as sharing music, amateur mash-ups, collages etc., are now more prevalent (and more easily tracked) in a digital environment. Given the resulting rise in litigation, the regulation surrounding many potentially infringing uses have been brought to the forefront in recent years. But even so, a great deal of uncertainty seems to remain.

There may be reason to fear that the legal uncertainty surrounding secondary works may damage the collective creativity of society, with creators not daring to create or distribute their work for fear of litigation. In the EU Commission’s own words:

Consumers expect more freedom and flexibility to express themselves [through user-created content and interactive services]. They also want to be clearly informed whether their activities are compatible with third party copyright and under what conditions they could derive commercial revenues from their own creations.\textsuperscript{159}

The problem is that citizens willing to follow copyright rules are frequently left confused by vague and uncertain responses from member states and the Commission.\textsuperscript{160} Similarly to the previously discussed legal uncertainty surrounding fair use, few may wish to take the risk of infringement claims when there is such an unstable ground for defence.

4.4 Problems with inflexibility

Perhaps the most common complaint levelled against the current EU system for copyright exceptions is that it is ill-equipped to adapt to changes in society. Indeed, it is hard to argue against such criticism, given the explicit limitation in the InfoSoc directive Article 5 places on possible new copyright exceptions. A fixed list of exceptions might lack the flexibility necessary to take into account future technological developments.\textsuperscript{161} Granted, a large number of the exceptions allow for some flexibility in their application (many are intentionally worded vaguely to allow for flexibility in implementation).\textsuperscript{162} But it would appear that this flexibility exists only within the boundaries of the exception provision, and (in turn) only within the immovable walls of the closed catalogue. There is also a notable lack of flexibility to adapt certain use exceptions to a digital context, and several of the uses mentioned

\textsuperscript{160} Ibid, p. 10.
\textsuperscript{161} See Eechoud et al. (2009), p. 104.
in Article 5(5) are expressed in technology-specific language.\textsuperscript{163} For example, what many consider to be a safety valve, i.e. the grandfather-clause in Article 5(3)(o), is currently limited to only analogue uses – as previously discussed.

The inflexibility caused by the exhaustive nature of Article 5 of the InfoSoc directive is perhaps the main cause for concern. If a member state sees a way in which a new exception (not explicitly permitted by Article 5) might remedy technologically instigated legal problem – that member state might be unable to implement such an exception without violating EU law. The only means of pursuing the implementation of such an exception would be to raise the issue at an EU level by amending the directive – a slow and unpredictable process to say the least. Even if the Community agrees on an accepted exception the directive will need to go through the motions of amendment, possibly taking 3 years or more, before it the exception is possible.\textsuperscript{164}

Current EU- and international law imposes strict and strong minimum standards for copyright protection on member states and signatories respectively, and part of this strong minimum standard involves moderating copyright exceptions. This moderation is particularly potent in the EU, given the combination of a narrowly and specifically defined list of possible exceptions and the additional application of the three-step test in individual cases. As a result, it would appear that a new use must first fit into one of the “pigeon holes” in the catalogue of exceptions, and must then also pass the three-step test in the individual case in order to be exempt. This results in a notably restrictive approach to exempting new use cases, and makes it less likely that available exceptions can be applied to situations arising from new and developing technological circumstances.\textsuperscript{165} The reason for this restricting use of the three-step test may have been the sheer number of available exceptions eventually settled on by the EU member states. The expansion of the list of possible exceptions to the final number of 21 (with 20 being optional) may have prompted the proposal that the three-step test should serve as a counterbalance, limiting the application of the exceptions.\textsuperscript{166} But it is admittedly somewhat questionable whether such a usage would be in line with the intended purpose of the test as originally manifested in the Berne convention.

There are concerns that any new forms of “copying” made possible by advances in technology are \textit{de facto} regarded as unlawful under the current approach in EU Law.

\textsuperscript{164} Ibid.
\textsuperscript{165} See Torremans (2012), p. 335.
Indeed, even uses permissible under the InfoSoc directive must still be implemented and developed by national legal institutions to meet the resulting new needs.\textsuperscript{167} As will be discussed in the following subchapters, there is reason to suggest that a rightsholder-centric view currently permeates copyright in many parts of Europe – a view that may well affect every step of the EU legislation and implementation process. Given the tendency of many states to “over-implement” EU directives (also known as \textit{gold-plating}), this may become a cause for concern if current developments continue.\textsuperscript{168}

There are clearly many advocates for revising current copyright exceptions to adapt to and accommodate new forms of use. There may be reason to fear that current regulation is holding back creativity and artistic innovation in society. Such a concern has, for instance, been expressed regarding present UK copyright exceptions – i.e. that these are currently too narrow, and are restricting new creators from producing works and generating new value.\textsuperscript{169} But revising copyright law to address such an issue does not currently appear to be a national prerogative. Even small adjustments to the upper limits of the exceptions system have to be made at a European level, and may thus take many years to carry through.\textsuperscript{170} In response to this shortcoming, there have been views expressed that the EU ought to introduce an open norm in regards to limitations and exceptions to copyright allowing member states to introduce exceptions other than those listed in Article 5, provided they comply with the three-step test.\textsuperscript{171} Some of the inflexibility caused by the closed exception norm and the cumbersome amendment process would thus be mitigated.\textsuperscript{172}

\section*{4.5 Problems of imbalance and external pressure}

\subsection*{4.5.1 A rightsholder-centric perspective}

Ever since the signing of the Berne convention, international copyright law has called for a balancing of the interests of rightsholder and society. But there may be reason to believe that this equilibrium is currently weighted to the favour of the former party. There seems to be a growing tendency worldwide towards regarding IP rights as “property” – to be regulated and treated the same as physical property. This

\begin{itemize}
  \item See the Hargreaves report (2011), p. 43.
  \item See further Chapter 4.5 below.
  \item Ibid, p. 39.
  \item See Eechoud et al. (2009), p. 129. The proposal has similarities with that of the Gowers Review (2006), which proposes a transformative use exception (also subject to the three-step test).
  \item As will be elaborated on in Part II.
\end{itemize}
tendency (which some argue is the result of economic theories and powerful lobbies), seems to further entrench the economic rights of the rightsholder as absolute. The theory is that – just as rights to physical goods warrant complete control, permit practically no unauthorised uses, and do not expire – so intellectual property rights should rightly be allowed the same standards of protection.  

Paradoxically, the rightsholder-centric imbalance may even be exacerbated by the drive for European unity and coherence. In harmonisation, it is not uncommon for the levels of protection to exceed those of pre-existing national systems. We have in many cases seen how EU harmonisation efforts have not only resulted in implementation, but have exceeded the commitments for copyright protection set out in the original obligation – be it the Berne or EU Law. For example, Sweden has frequently chosen to “gold plate” (i.e. over-implement) several EU directives, perhaps in an effort to promote European cooperation.  

There is an overall trend towards strengthening copyright protection, likely in pursuit of the goals of strengthening the European industry for copyrighted works mentioned previously. With this goal in mind, one could see how stronger rights and more predictable limitations and exceptions might be regarded as more desirable than promoting civil creativity and artistic expression. It could also be argued that it is simply easier to scale up certain member states’ existing copyright protection standards than to scale national standards back. On a national level, strong protection often confers advantages to the exporting of creative content, and convincing member states to part with that advantage may be considerably more difficult than strengthening current rights.  

The application of the three-step test in EU law is also an apparent cause of imbalance, since it would not seem to provide judges with enough room to properly consider other interests than those of the rightsholder. The test appears to require that all three steps be passed in turn in order to exempt a use; if one of them is not passed, then the use is prohibited. The second step (“does not conflict with the normal exploitation of the work”) is perhaps the most problematic. The interpretations of this step vary greatly, but many agree that very little is required in

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174 See Clarifying Gold-Plating – Better Implementation of EU Legislation, a report from the Board of Swedish Industry and Commerce for Better Regulation (NNR) and the Swedish Better Regulation Council (Regelrådet) (2012).
176 Ibid.
177 The InfoSoc directive expresses the national-economic advantages of strong copyright, stating that a high level of protection will foster substantial investment in creativity and innovation, and in turn lead to growth and increased competitiveness of European industry. See the InfoSoc directive preamble, Recital (4).
order to conclude that a secondary use conflicts with this normal exploitation.\textsuperscript{179} Moreover, it is believed that the second step can not be mitigated through adequate remuneration – unlike the third step (“unreasonably prejudice the legitimate interests”) which can.\textsuperscript{180}

The EU Parliament and Commission are of course not the only law-making bodies for European copyright law. The Court of Justice can be called upon to interpret the meaning of the EU directives, and is able to do so without many of the political aspects involved in the legislative process of EU Law. Ideally, the CJEU would recognise the potential shortcomings of EU law, and seek to remedy them. One would hope, then, that the Court would address the apparent problems facing users as a result of the current system for copyright exceptions in EU law.\textsuperscript{181} But the CJEU has instead shown a clear tendency towards interpreting the exclusive rights broadly, and the exceptions thereto restrictively.\textsuperscript{182} The same tendency can be seen on the national level in many member states – suggesting an overall inclination towards the interests of the rightsholder.\textsuperscript{183} One major criticism raised against the CJEU in this regard is that the court has in essence generalised the principle of narrow interpretation for copyright exemptions as a prevailing judicial standard. The establishing of this principle has even been accused of being a form of covert harmonisation – of a principle that is not set out in any of the EU directives.\textsuperscript{184} Such measures could easily be seen as undemocratic.\textsuperscript{185} This trend also raises the question of who it is that will hold up the societal and user-related side of the balance of interests previously discussed; if the EU legislative bodies and courts appear to favour the rightsholder, then it becomes difficult to see how this balance of representation might be achieved.

Even so, it should be noted that the judicial principle of narrow interpretation of exceptions is not absolute; later decisions have noted the need to take the objective of the exception, as well as the different interests of users as well as rightsholders, into account.\textsuperscript{186} This principle has since been applied to both mandatory rules and non-mandatory rules such as those found in Article 5.\textsuperscript{187} But it is yet unclear to what

\textsuperscript{180} Ibid.
\textsuperscript{181} As expressed by Griffiths, Jonathan, Unsticking the centre-piece – the liberation of European copyright law? (2010), p. 88.
\textsuperscript{183} See Geiger and Schönherr (2012), pp. 144-145.
\textsuperscript{184} The EJC does claim that this interpretation is supported by Article 5(5).
\textsuperscript{185} See Griffiths (2010), p. 88.
\textsuperscript{186} See Case C-429/08 Football Association Premier League v. QC Leisure, and Geiger and Schönherr (2012), p. 149.
\textsuperscript{187} See Case C-145/10 Painer, regarding application of the principle to Article 5(5)(d).
extent taking these factors “into account” balances out what many still consider to be a prevailing trend of favouring rightsholder interests.

4.5.2 The perceived illegitimacy of secondary uses

When making legislative changes, the relevant underlying interests are often significantly influenced by the viewpoints of significant stakeholders. In this regard, a notable problem with proposing an exception for transformative use is the longstanding derision, and even outright opposition, to secondary uses expressed by a large and vocal number of content creators and rightsholders. Secondary uses have been called everything from unimportant, to parasitic, to culturally trivial, to outright harmful by representatives of the content industry. As major stakeholders in most copyright law reforms, such views are quite likely to affect the legislative process of copyright amendments in some way – potentially bleeding over into the views and opinions of the legislator.

It is perhaps unsurprising that institutions whose business models are based around a certain model for creation, distribution, and consumption of media would oppose a societal shift towards another model. In the spirit of a free market, it might even be unjust to deny them that right. But the indication remains that some of the most vocal stakeholders in copyright law are still firmly rooted in a market model from which society seems to be moving away from. Professor Lawrence Lessig has helped coin the phrase “read-only culture”, of which most of these rightsholders could be considered representatives of. It is this model – in which creative content is created by one section of society (i.e. by professional content creators) and consumed by the rest of society – which is currently seemingly undergoing a shift towards what Lessig calls “read-write culture”. In this latter model, content consumers not only receive the fruits of, but also actively participate in, the creation of works in society. Consumers not only create their own content, but also re-work and re-interpret existing content, in a form of creative dialogue not typically seen in the sort of pure read-only culture which has permeated western society for the last few decades. According to this view, the traditional borders between (professional) creator and consumer are beginning to blur, offering considerably more room for overlap between the two. 

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188 A recent Swedish government investigation regarding (among other matters) freedom of press for online media, expressed the view that the significance of the “so-called citizen journalism” (medborgarjournalistik), was grossly exaggerated. See SOU 2012:55 p. 210. See also Scassa, Theresa, Acknowledging Copyright’s illegitimate Offspring: User-Generated Content and Canadian Copyright Law (2013), p. 435.

It is probably the traditional distinction between the professional creator and the consumer (or “user”) of the content which has given rise to the term user-generated content. The definition of the term is not universally agreed upon, but during the last decade it is perhaps the most oft-used term regarding transformative use in discussions on liberalising copyright. In its most restrictive sense, UGC can be defined as content created by and/or disseminated via users of a platform or service – typically an online environment such as YouTube or Facebook – for the purpose of being consumed in that environment.\textsuperscript{190} It is this view of the growing number of transformative uses – of being predominantly amateur content akin to home videos – which some consider to lie at the root of the often derisive or belittling views expressed regarding UGC and transformative uses in general.\textsuperscript{191} In most cases, UGC is more broadly defined, e.g. as “activities engaged in by those typically seen not as cultural producers but cultural consumers”, or content created by users and which in some way incorporates copyrighted works of others.\textsuperscript{192} It is also widely agreed upon that corporate entities cannot be considered to be “users”.\textsuperscript{193} In its 2009 reflection paper, the EU Commission defines “user-created content” as “content made publicly available through telecommunication networks, which reflects a certain amount of creative effort, and is created outside of the professional practices”.\textsuperscript{194} In its broadest sense, UGC could be defined as content which has not gone through the typical channels of funding, approval and publishing by “traditional cultural industry gatekeepers”.\textsuperscript{195} Regardless, UGC is a form of content that does not follow the traditional market model of a read-only society.

\textbf{4.5.3 Lobbying}

Amending or introducing any new property legislation will invariably attract the attention of stakeholders, both within and outside of structured dialogues. Consulting all relevant stakeholder categories is an important part of a thorough and balanced legislative process, but achieving fair and even representation of stakeholders’ interests is no easy task, even on an isolated national level. The process of EU harmonisation is more difficult still, given the vast number of parties and

\textsuperscript{190} Under this definition, an mp3 file created by an artist and distributed via an online platform as a downloadable file playable on other users’ devices, able to be burned to CD’s etc. is not necessarily UGC. In contrast, a video published to YouTube is typically only consumable via that platform – meaning it is produced and/or published by a user of YouTube to be discovered and consumed by other users within the YouTube platform.

\textsuperscript{191} For example, the recent UGC exception in Canadian law has derisively been dubbed “the YouTube clause”. See Scassa (2013), p. 434.


\textsuperscript{193} Ibid, pp. 436-439.

\textsuperscript{194} See Reflection Paper on Creative Content (2009), p. 3.

stakeholders involved in the EU legislative process. It is therefore understandable that the harmonisation process has often been accused of lacking transparency, especially given the necessary interplay between all the legislative powers in the union. There have been concerns raised about such complexity and lack of transparency being especially receptive to lobbying and rent-seeking; that hidden political agendas are too easily allowed to influence harmonisation’s legislative process, distorting the democratic nature of the resulting law. But external influence may also be of detriment to the resulting law itself. Pressure from powerful lobbying groups and external trading partners may often rush the legislative process, making it difficult to achieve high-quality and thoroughly crafted legislation.\(^{196}\) The InfoSoc directive specifically has been accused of being rushed through the legislative process under pressure from copyright industries and the United States.\(^{198}\) Given how important the purpose of trade is to the European Union, it is perhaps understandable that harming international trade relations would be among the least desirable outcomes of a legislative process. But failing to stand up to external pressure may eventually be to the detriment to member states and citizens, if it is allowed too much influence over legislative content and proceedings.

4.6 Problems in the market and in society

4.6.1 Problems with illegitimacy and unfairness – the societal impact

With unauthorised and unremunerated re-use and re-workings of copyrighted material on a seemingly steady rise (and a legal system in place that typically does not permit such uses) one must eventually examine the societal impact of what might in equal parts be considered a cultural rebirth and (in another sense) an international crime wave. Without venturing too deeply into the fundamentals of jurisprudence, one can at least settle for a common view that law should always aim to reflect the values and interests of society. Given the dichotomy described, one might come to question the legitimacy of prohibiting actions which many view as both harmless and victimless. This basis of argumentation is, of course, a slippery slope: just because a large enough portion of society commits a wrongful act does not mean that that act is justified. But suffice to say that there is at least reason to


\(^{197}\) Ibid, pp. 193-194.

discuss the problems that can arise from a very large portion (some would even argue, the majority) of society habitually breaking the law.

There is evidence, according to the Gowers Review that copyright law is suffering from an increasing lack of legitimacy – that it is being perceived by the public as being overly restrictive and ineffective, while most infringements are seen as relatively victimless. Copyright law has historically proven to be notoriously difficult to enforce in a digital context. This problem is clearly made worse by new (and, in the eyes of the public, fully legitimate) secondary uses being stifled due to the inability of the law to adapt to accommodate such uses.

We clearly have a situation where a large portion of the population commits copyright infringement, while seeing governments impose what many would consider to be increasingly draconian methods – methods that do not in fact lead to a reduction in infringement. It may not be too far-fetched to see some truth in Lawrence Lessig’s comparisons between the war on digital copyright infringement and the US “war on drugs” – which Lessig notes has caused far greater problems than any it has been able to solve. Lessig also notes the worrying implications of branding such a large portion of the population as criminals. Without delving too deeply into sociological crystal-gazing, one must at least admit that the implications this has for societal well-being and an effective and balanced rule of law are not good.

4.6.2 Contractual issues

Many aspects of copyright are currently able to be adjusted, transferred, or overridden by contract. But there is also currently little regulation in EU law governing copyright contracts. In terms of rights transfer, “all-rights” (i.e. buyout) contracts are becoming more common, but are not accounted for anywhere in the InfoSoc directive. This is a potentially decisive factor for anyone hoping to create and distribute a transformative work. Judging by what can be seen in the industry and in case law, it would at least appear that the vast majority of copyright complaints and litigation is carried out not by the author, but by the organisation

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200 I.e. in the sense that the collateral damage to society, innocent citizens, and (arguably) human rights has proven to have a greater societal impact than the actual beneficial effects of both wars of prohibition. Lessig is also quick to point out that he in no way endorses drug use. See Lessig, Free Culture (2004), pp. 161-168.
201 See Lessig, Remix (2008).
202 See Hugenholtz, Why the Copyright Directive is Unimportant... (2000), p. 3.
which has later acquired the rights to that author’s work. It would hardly be implausible to assume that publicly owned rightsholder organisations are less likely to grant permission to reuse a work for which they own the copyright than the original author is – at least without demanding significant licensing fees. Granting such rights freely would simply not be “good business”, and would arguably run against corporate leaders’ responsibilities to their shareholders. It could also be argued that a copyright which has passed entirely from its author to a new rightsholder (with the exception of non-transferrable moral rights), is no longer quite as important an object of protection as a copyright that resides with the author of the work. This discussion also relates to the long-running academic discussion of whether intellectual property rights should be regarded as property akin to tangible property – of which a deeper discussion unfortunately lies outside the scope of this thesis. But it is still a highly relevant issue in regards to transformative use, not least because of the controversial practise of so-called "sample trolls" i.e. companies whose entire business involves acquiring rights to musical pieces, and using these rights to sue infringers for damages or demand compensation to settle out of court.\(^\text{203}\) Regardless of what stance one has on copyright, it is difficult to see how such business practices are in line with the underlying purposes of copyright. Granted, these practices are less common outside the US; but they still serve as a potent reminder to be watchful regarding potential misuse of the current copyright system.

The rise of online mass-market distribution has allowed for the proliferation of restrictive end-user licensing agreements (EULA’s). These EULA’s will typically limit the possibilities for secondary use of the works distributed, and/or simply entail that the rights to any secondary works belong to the rightsholder of the original work. There is currently very little in the EU acquis governing such EULA’s.\(^\text{204}\) The reason for this may be that contractual law has typically been considered to fall under the competence of the individual member states, and that the current mass-market prevalence EULA’s is still a relatively recent phenomenon.\(^\text{205}\)

Most notably however, there seems to be no rule governing the priority between contractual agreements and statutory copyright exceptions. A proposal was put forward during the InfoSoc directive’s legislative process to include a provision prohibiting contractual agreements from conflicting with limitations and exceptions

\(^{203}\) Perhaps the most infamous “sample troll” is Bridgeport Music Inc. – not least given the landmark music sampling case Bridgeport Music, Inc. v. Dimension Films (2004).

\(^{204}\) With the exception of computer programs and databases.

\(^{205}\) See Eechoud et al. (2009), p. 106.
implemented under Article 5. But such a provision was never included in the directive, and it can thus be assumed that nothing in EU law prevents contractual agreements from overriding the exercising of exceptions to copyright. Currently, Portugal is the only member state to adopt measures prohibiting contractual clauses that prevent statutory copyright exceptions from being exercised to the detriment of the end-user.

While not the ultimate deciding factor for the future viability of a transformative use exception, the fact that EU law currently does not regulate any aspects of the mentioned contractual possibilities may definitely be of some importance. Most significantly, the ability to override statutory exceptions by forcing users to agree to EULA’s before gaining access to certain works could potentially invalidate many exceptions – especially since this could potentially become a regular practice in the content industry. Lawful end-users may then have to give up most of their rights under copyright law in order to even gain access to works. Currently, the only means of disputing abusive contractual clauses seems to be competition and consumer protection laws – which, it is argued, are poorly suited to meet the needs of users of copyrighted works in a digital environment.

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206 The Database directive and the Computer programs directive also both contain provisions that prohibit the circumvention of exemptions via contract; see Article 15 and Article 8 respectively.
207 See European Parliament, Committee on Legal Affairs and the Internal Market, 17 January 2001, PE 298.368/5-197.
5 Conclusions on the current conditions for transformative uses

5.1 Observations, conclusions, and summary

In light of the previous discussions, I have come to several conclusions and observations regarding the legal status of secondary and transformative uses. These will be presented and summarised in the following sub-chapters, thus concluding Part I and my investigation into the current state of law for transformative uses.

5.2 The general permissibility of secondary uses

In the following discussions on a potential exception for transformative uses in Part II, it would be useful to have an understanding of the general level of support or opposition to such an exception – which I will attempt to present here. If such an exception is widely permissible from a global (and especially a digital) perspective, then this conclusion would favour an exception in EU law. If the combined views on secondary uses examined in the previous discussions are cumulated and generalised, then one can begin to discern a fairly cohesive hierarchy of permissibility for various secondary use categories. Such a “global” indication of the legal views on secondary works would be useful in discussing the future permissibility of transformative uses.\(^{210}\)

In regards to secondary use without permission and remuneration, and judging by legislation, government publications, and academic analyses, legislators certainly appear to regard some categories as more easily permissible than others. Some categories are currently more widely permitted in some systems, or are actively being discussed as possibly permissible in other systems in the near future. Other uses are more globally permissible, or are more unanimously regarded as dependent on pre-existing rights. The categories of secondary uses might be thus be organised on a scale of permissibility, based on the philosophical “distance” that needs to be crossed in order to permit the use to be carried out freely:

\(^{210}\) Note that these are my own conclusions and observations, and by no means a definitively applicable standard.
The most widely agreed upon section of this scale is adaptation. Traditional adaptations include translations and “conversions” of copyrighted works into new formats. The exclusive right to adaptation is not harmonised through the InfoSoc directive, but is covered under the Berne convention Article 12 and the TRIPS agreement Article 12. Hence, the situation for adaptations varies among member states. But practically all systems will typically require permission and/or remuneration for the creation and distribution of a copyrighted work, if this use is considered an adaptation. As such, adaptations can be placed on the far side of the scale of permissibility, as the least (freely) permissible form of secondary use.

On the opposite side of the scale are exempt secondary uses under the InfoSoc directive Article 5. These uses, such a parody, criticism, or incidental use, can be considered to be the most widely permissible. Even though not all exceptions are currently in place in all member states, the European member states have explicitly come to the agreement that the exemption of all uses in Article 5 is fully acceptable. Several member states have also implemented all of the possible exceptions into national law.

Just short of the level of permissibility of exempt uses, one finds the category of free adaptations. The most obvious case of free adaptations is when the creator of a work has merely drawn inspiration from a previous work, but has not copied any of the elements therein. The term can extend (depending on applicable national law) to secondary uses which have undergone such a degree of alteration and
transformation that the characteristics of the original work have faded away, leaving an independent and new work. In systems which allow some form of free adaptations (such as Germany, the Netherlands, Austria and Sweden) free adaptations are, at least in theory, the most widely permitted form of secondary use. Systems which do not allow for this privilege are still able to implement a corresponding provision, as EU law has not yet harmonised the exclusive right to adaptation. But there has been no explicit unanimous agreement on the permissibility of free adaptations, and these uses do not exist in many member states. As such, free adaptations are most suitably categorised as the second most permissible secondary uses.

Between adaptation and free adaptation can be placed the remaining two use cases, i.e. user-generated content and transformative works. Depending on one's viewpoint, user-generated content can either be a full subset of transformative works, or an overlapping category. In the distinction made here, UGC is defined as secondary works made by non-professionals, typically made for non-commercial purposes. Since not all secondary works made by non-professionals and for non-commercial purposes are necessarily transformative in their use of copyrighted material, I consider the two categories to overlap partially, but not completely.\textsuperscript{211}

It is apparently the non-commercial and non-professional nature of UGC which has prompted the Canadian legislator to introduce the recent exception for non-commercial UGC. In countries with a flexible system for exceptions, such as the United States, the same could likely be achieved through a court assessment of fairness – even though, in the case of US fair use, other fair use factors of the case at hand would have to either support fair use or be overshadowed by the factors that do.\textsuperscript{212} There are thus national systems where user-generated content is at least permissible, if not explicitly permitted. The EU, meanwhile, currently does not permit exceptions for user-generated content, unless it meets the specific criteria of exceptions such as parody and pastiche, quotation, incidental inclusion, or criticism and review. In summary, it seems suitable to place UGC closer to the side of free adaptations than adaptations in terms of permissibility.

Finally, there is the category of transformative works as a whole. All of the uses mentioned could in some way or another be said to overlap with this category, but

\textsuperscript{211} See Graphic 2 below.
\textsuperscript{212} No definitive norm on the degree of permissibility of UGC (built mainly on the basis that the use is non-professional and non-commercial) has yet been established in the US, but such a norm could conceivably be only one landmark ruling away from emerging.
none of them are defined by their transformative nature alone. Adaptations are defined by being the same work as the original, only in a new format. UGC, in the definition used here, is defined by being non-professional and non-commercial. Free adaptations can typically be said to be characterised by their originality, and by the fact that they have made the defining characteristics of the original fade away. Transformative works are not currently permissible under a stand-alone EU law exception, although the permissibility of transformative works is under discussion in many contexts. In comparison to UGC, however, there is clearly a greater philosophical distance that needs to be crossed in order to permit transformative works as their own category.

5.2 The regulation of transformative works in Europe

As has been discussed, there are several categories of secondary uses which are currently regulated in Europe. We have also concluded that there is currently no regulation in European copyright for transformative works as a category. However, since many other secondary uses are often transformative in nature, one could say that parts of the transformative use category are indirectly regulated as illustrated here:

![Graphic 2: The (lack of) regulation of transformative works]

Certain transformative works are currently to some extent either regulated or potentially soon-to-be regulated as part of certain exempt uses, adaptations, free adaptations, and UGC. But transformative works as a stand-alone concept are not currently regulated in Europe.

The exempt uses under the InfoSoc directive Article 5 are generally exempt on the basis of their specific use case and purpose. But many of these exempt uses are typically transformative in nature, such as parody. So, even though these uses are typically not exempt on this transformative basis, the regulation surrounding them does indirectly regulate part of the transformative works category. Many adaptations have transformative elements, even though they are still considered derivatives of the original work. This is especially true when it comes to borderline cases, when it is questionable whether the adaptation is in fact just the original work in a new form.
Likewise, the borderline cases for free adaptations (wherein it is not fully clear whether all of the defining characteristics of the original have faded away) can certainly be said to overlap with the category of transformative works. Finally, UGC as defined here is frequently transformative, although many uses qualify to the category of UGC on the basis of their non-professional nature rather than their degree of transformation.

To revisit the purpose of this discussion – what this thesis fundamentally seeks to address is the possibility of filling the legislative void shown above with an exception for transformative uses. The fact that transformative works are to some extent regulated indirectly does admittedly alleviate some of the problems with this legislative vacuum. But, in my opinion, one should not take the above graphic’s implied a state of consistency and clarity at face value; it is not able to depict how uncertain and undefined many boundaries and implications of these regulated areas are. As discussed in the previous chapters, the state of copyright regulation in Europe is neither cohesive, nor consistent, nor predictable. It is therefore questionable whether one can rely on indirect regulation based on such unstable ground to handle transformative uses in a satisfactory manner – given the problems the system currently has.

5.3 Problems revisited

The current system for copyright in the EU evidently has issues with a lack of clarity and consistency. Copyright remains territorial, and thus subject to the individual needs and desires of national legal systems. Norms such as the three-step test are used and interpreted in several ways, and exceptions are implemented with varying scope and reach. Rules regarding the legal standing of secondary works, particularly those set out by EU law, are often vague and confusing to professionals and laymen alike.

The current system seems to suffer from a troubling lack of flexibility – given the current regulations of the maximum scope of limitations and exceptions to copyright, and the specific and narrowly defined exceptions therein. National trends of over-implementation of EU law and narrow interpretation of exceptions, as well as the restricting application of the three-step test, make the system more rigid still.
Overall, there seems to be a greater imbalance in the system’s regard for stakeholder interests, to the benefit of rightsholders and (quite possibly) to the detriment of society at large. The scope of copyright protection appears to be treated extensively, whereas limitation thereof seems to be treated restrictively. Legislative and judicial trends, as well as external pressure, appear to aggravate the situation further. This leads to the further problem of an increasing lack of perceived legitimacy and fairness in society. Furthermore, the possibility of circumventing limitations and exceptions by contractual means could be considered to tip the balance even further off-centre.

On a fundamental level, it is troubling to consider what implications these problems, along with the incomplete regulation of secondary uses, will have for the collective creativity and innovation in European society. The ever-increasing prevalence of read-write culture might be considered to represent one of the most significant cultural developments of the century. As mentioned initially, secondary use of pre-existing works for the purpose of creative re-workings is hardly a product of the digital revolution – it could easily be argued that it been going on for as long as there has been any form of creative expression. The societal tendency for people to express themselves using pre-existing works as tools and material has naturally been carried forward into the digital era, and the increased opportunities for such expression are regarded by many as one of the greatest advantages in a modern society. But it is only now that significant large-scale action is being taken against such use. Combined with the legal uncertainty caused by the digital context in which many such uses take place, the penalisation of uses which had hitherto gone unpunished (if not unnoticed) is causing a great deal of confusion and concern among users and advocates for user rights.

The prevalent view seems to be that the rightsholders are the victims of a crime wave, meaning that their interests should typically carry more weight than those of the rest of society. But a significant problem arises when uses of copyrighted works get clumped together, with creative transformative works becoming subject to norms and regulations developed for another purpose, e.g. to fight online piracy. There may be cause for concern that the war on piracy is causing considerable collateral damage to the creative community – a community which is arguably larger, more prevalent, and more inter-connected than ever before in human history. The purpose of limitations and exceptions to copyright protection is, after all, to prevent exclusive rights from stifling uses which the law (and thus ideally society) views as legitimate, necessary, and important.
In light of Chapter 4’s investigation into the broader issues facing EU copyright law, I consider it highly possible that the current lack of regulation of transformative works is but a part of a larger system-wide imbalance. Introducing an exception for transformative works in the current climate might therefore risk being largely ineffective, given the problems discussed. It may even be impossible to carry through on its own under the current system for copyright in the EU. As such the discussion of such an exception clearly calls for a discussion of the greater context of EU copyright, rather than just a stand-alone exception. In part II, this thesis will examine possible solutions for exempting transformative uses, and for simultaneously addressing many of the problems with the current system for copyright in the EU – in hopes that a potential exception would thus be less likely to be completely ineffective.
Part II

Possible solutions and opportunities for exemption
6 Proposed and available solutions

6.1 To continue, to reform, or to re-make?

This chapter will discuss various proposed solutions to the current problems faced by the EU copyright system. These solutions can be categorised into three overall tracks: re-making the system completely, reforming it and opening it up, or continuing on the current path of harmonisation.

6.2 A unified system

6.2.1 The case for an alternative to harmonisation

The EU Commission and member states have so far taken a piecemeal approach to harmonising copyright law, resulting in incomplete harmonisation. A number of disadvantages relating to this have already been discussed, but perhaps the most significant problem with the piecemeal harmonisation approach in general is that the principle of territoriality remains in effect. EU copyright law is currently made up of 27 independent systems. Even if extensive harmonisation were to erase most of the disparities between member states’ copyright law, the directives doing so would still need to be implemented individually in each national system, meaning that true consistency would be unlikely. It is unclear whether the harmonisation route, particularly the harmonisation in the spirit of the InfoSoc directive’s exception system, is able to address most of the problems discussed in Part I. Getting the member states to agree upon a more uniform route of harmonisation has evidently proven difficult, given that the current list of 20 (optional) exceptions seems to have been the closest thing to a coherent system that the member states could agree upon in terms of exceptions. The member states do appear to have reached agreement on the mandating of basic rights however, calling into question the balance of interests within the system. The Commission has acknowledged the problem of EU copyright law mandating basic economic rights while merely permitting certain limitations and exceptions, stating that a regulation approach would better permit rights and exceptions to be balanced.

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213 As recognised by the CJEU in Case C-192/04 Lagardère Active Broadcast v. SPRE (2005).
215 See Reflection paper on Creative Content (2009), p. 18.
There is no question that harmonisation has an inherent difficulty in achieving true legal unification. Political compromise often leads directives to be vaguely formulated, leaving notable discretion to the member states regarding how to implement them. This is especially true when introducing new concepts or terminology, which a transformative use exception would almost inevitably have to do.\(^{216}\) When these shortcomings are considered in combination with the legal uncertainty that arises from the need for national and EU courts to provide a “true” interpretation of harmonised rules, one might begin to question whether harmonisation really solves more problems than it creates. Doubts have been raised regarding whether a harmonising effect is even achieved when member states are allowed such freedom in implementation that they are able to “pick and mix” provisions, such as with the catalogue of exceptions in the InfoSoc directive.\(^{217}\) It comes as no surprise then, given all of the shortcomings of recent harmonising efforts regarding copyright, that there are those who call for caution and restraint when considering future initiatives of harmonisation by directive.\(^{218}\) Keeping in mind the current goals in EU copyright legislation to strengthen the growth and competitiveness of European industry, there is cause to question whether the current (and as of yet unsuccessful) method of unifying copyright law through harmonisation can ever hope to propel European industry into a position where it can truly compete with IP giants such as the United States. Systems where copyright is governed on a (as the case may be) federal level, pre-empting state-level protection, will naturally have an advantage over systems where copyright is ultimately governed by individual autonomous systems.\(^{219}\)

### 6.2.2 An EU copyright regime

There may well be an alternative to current harmonisation methods – the establishment of a centrally governed EU copyright system. TFEU Article 118 empowers the Council and Parliament to implement Community IP rights.\(^ {220}\) It also allows for the simultaneous abolishment of national titles.\(^ {221}\) Enacted through EU regulation, a Community copyright would avoid the problems associated with implementation (and the resulting discrepancies). It might also solve the previously discussed lack of consistency and clarity. Even more significantly for transformative

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\(^ {217}\) Ibid. See further Guibault (2010).  
\(^ {219}\) Ibid, p. 200.  
\(^ {220}\) See Kur and Dreier (2013), p. 246.  
uses, it would potentially allow for a new system of handling copyright exceptions, which could potentially address the previously mentioned problems of inflexibility. Additionally, it would allow for the possibility of addressing the problem of illegitimacy; by providing a “clean slate”, it would conceivably be easier to achieve an overall more balanced and realistic approach to online acts which are currently regarded as copyright infringement.

A necessary side effect of implementing a functioning overarching EU copyright is that it would likely require that national copyrights be overridden, emptying them of all of their substance.\textsuperscript{222} Unlike industrial property, where new rights (e.g. EU trademarks) are secured through registration and can thus coexist with their national equivalents, copyright arises from the act of creation itself. As such, national laws on the granting of copyright would have to be abolished in favour of a common EU legislation – in order to prevent the case where a national law allows for stronger protection than the Community copyright, thus prevailing over the Community copyright and undermining the unification it seeks to achieve.\textsuperscript{223} Copyright would likely have to be governed in a way similar to federal law – such as in Germany, Belgium, and the United States.\textsuperscript{224}

There has been significant scholarly activity regarding the potential for a truly unified European copyright system. The most notable achievement is perhaps the Wittem project’s drafted framework for a possible future Community copyright code.\textsuperscript{225} The code is not a complete regulation, but is a suggested framework on which the Community might build a unified copyright regulation upon. The code seeks to address many of the problems with the current approach to limitations and exceptions to copyright, such as imbalance. In its preamble, the drafters emphasise the need for balancing the protection of authors’ moral and economic interests with those of the public, and the need for at least a minimum level of flexibility. The draft has been praised in particular for attempting to break through the rigidity of EU copyright law to favour uses where the interests of the public outweigh those of the rightsholder.\textsuperscript{226} The code consolidates and clarifies the exceptions in the current EU copyright directives, and adapts them to current media practices; the code also distinguished between uses which require remuneration and those which do not.\textsuperscript{227}

\begin{footnotesize}
\begin{enumerate}
    \item See Mazzotti (2008), p. 53.
    \item See Kur and Dreier (2013), p. 319.
    \item Ibid, pp. 319-320.
    \item See http://www.copyrightcode.eu.
    \item See Ginsburg, Jane C., European Copyright Code – Back to First Principles, p. 3.
    \item See Geiger and Schönher (2012), p. 162.
\end{enumerate}
\end{footnotesize}
The code additionally drops the analogue-only requirement for the “grandfather clause” in the InfoSoc directive Article 5(3)(o).

The European copyright code allows for the introduction of new exceptions which are similar to existing ones, under certain conditions. These conditions mirror the two “steps” of the three-step test, regarding conflict with normal exploitation of the work and unreasonable prejudice of the rightsholder’s legitimate interests. But the code notably also requires that legitimate interests of third parties also be taken into account. The code’s system of exceptions aims to bridge the gap between common law’s open-ended approach and civil law’s exhaustive enumeration.228 This is attempted mainly through the aforementioned permission for new limitations and exceptions – which, while open ended, is narrowed down by the restriction that new limitations and exceptions be “comparable” to those expressly mentioned. The code also uses the three-step test to open up the system of limitations and exceptions, by employing it as a means of control when implementing new exceptions (which is arguably more in line with the spirit of the test).229

But a common Community copyright might ultimately be difficult to achieve. Despite the explicit permission in Article 118, there is a chance that the obligation for member states to give up their individual legal traditions regarding copyright might be considered to conflict with TFEU Article 345 – which prohibits EU law from prejudicing national systems of property ownership. Additionally, a mandatory EU copyright might be considered to negatively impact the flowering of cultural diversity in the EU, thus possibly conflicting with TFEU Article 167.230

There is also a worry that a unified Community copyright might further distort the balance of interests between rightsholders and society – particularly if the EU legislature continues its trend of ever longer exclusive protection and erring on the side of the rightsholder.231 In the face of the difficulties with reaching agreement in current EU copyright, it might be questionable whether an EU copyright regime is even possible to achieve; there seems to be a lack of political will to abandon national legal traditions of copyright protection.232 A possible alternative might, after all, be to continue the current harmonisation efforts, unifying the concepts of

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228 See footnote 48 to the European Copyright Code, p. 19.
229 See Geiger and Schönherr (2012), p. 164. The three-step test is discussed further under Chapter 6.2.3 below.
originality and copyright limitations and exceptions.\(^{233}\) Alternatively, one might look for solutions in between the two, as discussed below.

### 6.2.3 Re-purposing the three-step test

As discussed previously, the international three-step test has been implemented into EU law in such a way that it currently acts as an additional limit on the exemption of certain uses from copyright. Through national implementation and CJEU application, the three-step test as expressed in the InfoSoc directive currently serves a wholly restraining function. No new exceptions can be implemented under the current directive, and in many cases national legislators and courts have proven to apply the test to further narrow the scope of the limitations and exceptions currently possible (and currently narrowly defined in their own right).\(^{234}\) There have been suggestions to re-purpose the three-step test, from its current role as “an additional negative constraint” on the application of existing exceptions, to a “positive” mechanism allowing existing exceptions to be applied to new circumstances, provided they comply with the test.\(^{235}\) Dr Bernt Hugenholtz and Dr Martin Senftleben emphasise that the international three-step test was originally perceived and intended as a flexible framework, allowing national legislators to preserve national limitations and exceptions, as well as balance domestic social, cultural and economic needs. It should thus not be (or as the case may be, ever have been) interpreted as a straitjacket on limitations and exceptions to copyright. Indeed, the agreed statements on WCT Article 10 state that contracting parties are permitted to “carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne convention”, and that “similarly, these provisions should be understood to permit contracting parties to devise new limitations and exceptions that are appropriate in the digital network environment.”\(^{236}\) But this breathing space provided by the three-step test has subsequently been eliminated in EU copyright law.\(^{237}\)

Kamiel Koelman suggests that one option for re-purposing the EU three-step test would be to “soften” the possibly problematic second step, similar to what the drafters of the TRIPS agreement did when transposing the test into patent law.\(^{238}\)

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236 Agreed Statements concerning the WIPO Copyright Treaty, adopted by the Diplomatic Conference on December 20, 1996.
238 “Conflict with normal exploitation”. 
The TRIPS agreement Article 30 adds the prefix “unreasonably” to the phrase “conflict with a normal exploitation”. Unlike the current test, this would allow for sufficient public interest to potentially override the second step.\textsuperscript{239} Superficially, the change is a minor one – and given the international legislative precedent for such an adjustment, it might thus prove possible to implement.

There appears to be a significant amount of scholarly support for a re-purposed three-step test in general. A large group of legal scholars have even initiated and signed a unanimous Declaration on A Balanced Interpretation of the “Three-step test” in Copyright Law (2010), proposing that the balance of interests in current state of the test be restored.\textsuperscript{240} The declaration naturally has no direct legal effect in and of itself, but it does represent a unison standpoint from a large and very prominent portion of legal academia. Recognising the increasing reliance on the three-step test, while perceiving an undue influence from restrictive interpretations thereof, the signatories declare several steps that are necessary in order to re-balance the test. Article 2 of the declaration proposes that the test does not require limitations and exceptions to be interpreted narrowly; they are to be interpreted according to their objectives and purposes. Article 3 states that the test does not prevent the introduction of open-ended exceptions or the analogous application of existing limitations and exceptions by legislators and courts. The declaration maintains that the interests of rightsholders (original and subsequent) shall be taken into account, but emphasises that the test must be interpreted in a way that respects the legitimate interests of third parties. These interests explicitly include human rights and fundamental freedoms, and interests in competition – as well as public interests such as scientific, cultural social, or economic development.\textsuperscript{241}

In order to properly address the previously discussed problems of imbalance and illegitimacy, I concur that the enabling and balancing function of the three-step test ought to be restored within EU copyright law. The declaration may provide a suitable initial framework for such a re-balancing.

\textsuperscript{239} See Koelman (2006), p. 411.
\textsuperscript{240} 30 legal professors, associate professors, and scholars from around the world, including the director of the Max Planck institute, signed the declaration. See further Geiger, Christophe, Hilty, Reto, Griffiths, Jonathan, Suthersanen, Uma, Declaration: A Balanced Interpretation Of The “Three-Step Test” In Copyright Law (2010).
\textsuperscript{241} Ibid, p. 121.
6.2 A more open norm

6.2.1 Introducing a flexible exception

The current exhaustive system in EU copyright law clearly has a number of downsides, not least regarding its lack of flexibility and adaptability. There have thus been voices raised in legal doctrine in favour of a more open norm, by which exceptions not currently covered by EU law might be considered.\textsuperscript{242} Such a solution might allow for the current problems with inflexibility to be addressed head-on. An approach which encompasses the concept of fairness, as a possible basis for exempting unauthorised but fair (or borderline fair) use cases, might also be able to address the current problems of illegitimacy and imbalance. A flexible approach would allow the system to adapt to rapid technological and societal advancements, in a way that the European closed system of narrowly and specifically defined exceptions can not.\textsuperscript{243}

The use of the specific term “fair use” is not necessarily representative, however. It is my understanding that many scholars who propose a “fair use” or “fair use-inspired” model are actually suggesting the implementation of an open norm based on a productive re-purposed three-step test, rather than a system of factors analogous to US fair use. The former is also likely to be more palatable than an emulation of US fair use, especially to those whose legal traditions are firmly rooted in an opposing view of copyright.\textsuperscript{244}

But there are certainly cases where more direct analogies are proposed; implementing an open norm directly inspired by US fair use is hardly a novel suggestion.\textsuperscript{245} During the discussions leading up to the establishment of the InfoSoc directive, the Dutch government, with support from the Scandinavian countries, proposed the introduction of a general copyright exception modelled in the same fashion as the US fair Use doctrine. The proposal was rejected, but its underlying reasoning has proven to become no less relevant with time; the main argument for such an approach was that a rigid and exhaustive system would not be appropriate in a digital context, where new uses and business models arise rapidly and continuously.\textsuperscript{246}

\textsuperscript{242} See Geiger and Schönherr (2012), Griffiths (2010), Koelman (2006), and Senftleben, Breathing Space... (2013).
\textsuperscript{243} See Torremans (2012), p. 335.
\textsuperscript{244} See Griffiths (2010), p. 90.
\textsuperscript{245} See Hugenholtz and Senftleben, Fair Use in Europe (2011).
\textsuperscript{246} See Mazzotti (2008), p. 79.
There are several ways in which a more open norm might be applied to EU copyright law. As mentioned previously, an overhaul of the EU copyright system might include an open norm for exceptions. The three-step test might, for example, be re-purposed as a productive norm (either in conjunction with this reform, or on its own), thus permitting additional exceptions not currently allowed under the InfoSoc directive. One way of re-purposing the test would be as an alternate ground for exemption, in the sense that a use which is considered to pass the test is considered “fair”, and thus permitted even if it does not meet the specific criteria of an exempt use case. This could then, in essence, be said to constitute one form of European fair use. On the other hand, by interpreting the InfoSoc directive’s three-step test as a set of open-ended factors, in a way more directly similar to the US fair use doctrine, Article 5(5) might potentially become a better tool for achieving the all-important balance between rightsholders and society.247

As proposed by Professor Paul Torremans,248 a future open norm would have to entail a requirement that the so exempt use be “similar” to the one intended to be exempt under the existing exception that is being invoked. It would also have to comply with the three-step test. Finally, the concept of “fairness” should then be used as “the ultimate yardstick” in this enabling application of the three step test, in the sense that a balance between the interests of all parties affected and involved should play a deciding part.249 According to Torremans, factors in such an open norm would have to address the need to foster competition on secondary markets (i.e. markets for secondary works), the protection of fundamental human rights, and the need to promote technical innovation, and the ongoing economic and moral connection between author and work.250 This would be different from the US principle of fair use, as it would in no way involve copying the fair use clause (in fact, the degree to which this constitutes a truly analogous concept to fair use is perhaps questionable). Rather, it would adapt the flexible approach to exemption from copyright protection that the fair use doctrine constitutes.

Another option, proposed by Jonathan Griffiths, involves a more analogous version of the fair use approach, along with an adaptation and expansion of the assessment factors to specifically address important European concepts. As Griffiths suggests, a future open norm could originate in a modified version of US fair use: the relatively uncontroversial factors of USCA § 107 could be supplemented with factors
addressing fundamental European values such as the moral and economic interests of the author, and the explicit EU goals of promoting technological development and fostering competition.²⁵¹

Koelman is of a similar opinion – that the inherent court-based purpose of US fair use makes it far better suited for application by courts than the three-step test – which was originally intended as a diplomatic compromise more than anything else.²⁵² Koelman suggests that the three-step test (contrary to what is suggested in the previous chapter) should be re-purposed in a way that turns the three “hurdles” into more free-form factors akin to those in US fair use. This would allow courts to weigh public interests in a way which trumps the factor of harm to the rightsholder, in cases where such interests are significant enough to warrant such a conclusion.²⁵³ Koelman also point out that this solution would allow courts to issue damages in cases where harm befalls the rightsholder, instead of always defaulting to issuing an injunction.

The advantage with this sort of approach is the combination of the open ended-ness and flexibility of the US fair use doctrine with a respect for fundamental European copyright principles. However, drafting the specific terms governing this approach, and achieving effective application in European courts would be immensely challenging.²⁵⁴ It is questionable whether political agreement and political will to so radically renegotiate the directive even exists.²⁵⁵ There are also other problems to be considered, as will be discussed below.

### 6.2.2 Problems with fair use

The US solution for transformative uses evidently has complications, which must be taken into account before considering the introduction of a similarly open norm. The fair use model (at least one closely modelled after US fair use) has some inherent problems with clarity, legal security and transparency.²⁵⁶ There have been criticisms regarding frequent reversals of judgements of fair use, and accusations of judges

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²⁵³ Unlike the current application, which would cause such an evaluation to result in prohibition in the face of the second or third step, regardless of highly important public interest in allowing the use in question.
²⁵⁵ Ibid, p. 337.
²⁵⁶ These might eventually be mitigated through sufficient case law precedents, but this effect would take many years to achieve. See Hugenholtz and Serflieben, *Fair Use in Europe* (2011), p. 8.
merely employing the statutory factors as a means of justifying a subjective conclusion that they have already reached.

Indeed, a straight transplantation of a fair use exception has traditionally been regarded with significant scepticism. UK businesses have proven to be largely hostile to the idea – stating concerns regarding legal uncertainty (due to the doctrine’s reliance on US case law), an increase in costly litigation, and market confusion regarding copyrighted works.\textsuperscript{257} But the creative industry in the US is inarguably still going strong and, as previously stated, there are many who consider fair use to be a significant contributing factor to US prominence in creativity and innovation. All the same, many US businesses are also quick to dissuade from the adoption of similar fair use doctrines in Europe. Similarly, there is natural opposition to be expected from countries with systems based around droit d’auteur (with its focus on the ongoing link between author and work) regarding the adoption of a norm central to a system which historically balances the interests of rightsholder and of society somewhat differently.\textsuperscript{258}

The benefit of a fair use-like model would be a more open legal situation. But it would also undoubtedly bring with it at least a certain degree of uncertainty – especially in the absence of the decades of fair use experience of the US judiciary. US judges (arguably) have considerable familiarity with fair use, and the delicate balancing act required to assess it. Moreover, the judges all share a common starting point in US law. In contrast, European judges typically lack such experience, and come from disparate legal and cultural backgrounds.\textsuperscript{259} This means that a harmonious implementation of a fair use system might prove difficult, and perhaps unlikely. US fair use already suffers from a degree of uncertainty and unpredictability, and the risk of even greater divergence in case law that a straight EU implementation might lead to an even worse situation. As such, it could potentially take many years before any legal certainty is obtained in an EU “fair use” system.

However, in regards to the wise-spread reproach against fair use for its excessive uncertainty, Griffiths is of the opinion that many of the criticisms might be significantly over-stated. The most common criticism is that the subjective nature of the fair use analysis results in a disproportionately large number of reversals in courts of appeal. Another is that US judges frequently tend to first draw a subjective

\textsuperscript{257} See the Hargreaves report (2011), p. 44.
\textsuperscript{258} See Griffiths (2010), p. 93.
\textsuperscript{259} See Torremans (2012), p. 334.
conclusion regarding fairness, and then apply the fair use factors to rationalise that conclusion. However, a study conducted by Professor Barton Beebe suggests that this might not be the case. Beebe found that the reversal rates in US courts associated with fair use analyses were not substantially different from estimates of overall court reversal rates. He also suggests that judges do not tend to only use the fair use factors to rationalise their prior conclusion. A later analysis by Professor Pamela Samuelson supports this view. Samuelson's investigation into over 300 fair use evaluations yielded signs of distinct decisional patterns in different categories of fair use, such as those involving freedom of speech, or uses of copyright to promote dissemination of knowledge and creation. According to Samuelson, fair use is apparently successful in most transformative and productive use cases, as long as the amount re-used is proportional to the purpose of the secondary work – and especially in cases involving free expression and promotion of authorship. Samuelson therefore suggests that critical judges and commentators look to these commonalities, rather than lamenting the alleged uncertainty of fair use.

Perhaps, then, the usual resistance to fair use might be worth reconsidering, at least given the undesirable situation that Europe currently finds itself in. At the very least, the expected difficulties associated with introducing an open norm should not prevent the development of such an approach from being investigated. Griffiths is clearly of that opinion, and questions the tendency to limit proposals of an open norm merely to the bounds of the three-step test. Griffiths instead rebuts by calling into question the wide-spread confidence in a test which originated as an intentionally vague political compromise – whose actual meaning and requirements are still uncertain. According to Griffiths, the legal uncertainty of a potential fair use exception in Europe is matched, if not surpassed, by that of an open norm based on the three-step test. An open, fair use-like approach is clearly being used, implemented and considered by a considerable number of countries besides the United States. And there must therefore be at least some merit to the fair use doctrine at least worth considering in a discussion of a potential reform of EU copyright law.

262 Ibid, pp. 574-575.
266 Ibid, p. 2621.
268 See Band and Gerafi (2013).
6.3 Continued harmonisation

Perhaps a better approach to addressing the problems discussed here is to continue using the tools that have crafted the current system – merely taking the “next step” in harmonisation by gradually amending the problematic provisions in the InfoSoc directive. While suffering from several shortcomings, the current system of exceptions may in fact not be wholly responsible for the inflexibilities currently experienced in EU copyright. Hugenholtz and Senftleben argue that the EU exception system, in reality, contains a number of “hidden flexibilities” that have become practically invisible due to overly cautious and restrictive implementation over the years. They also point out that few national legislators have chosen to exhaust all of the flexibilities available when implementing the InfoSoc directive - aiming to safeguard individual national traditions.269

One proposal, given by Professor Mireille van Eechoud (et al.), is that a specific two-tiered approach to harmonising limitations and exceptions might resolve many of the weaknesses and inconsistencies currently suffered.270 First, certain limitations and exceptions would have to be made mandatory, thus providing a measure of consistency and commonality for exceptions among the national systems. Secondly, the “exhaustiveness clause” in Article 5(5) would have to be repealed – allowing member states to implement additional exceptions, subject to the three-step test and on the condition that it not compromise the internal market. The European Commission may eventually have to decide whether to expand current harmonisation efforts, extending the legal basis of the harmonising provision in TFEU Article 114 while circumventing the restriction on intervening in national property systems, laid out in TFEU Article 345.

A problem with harmonising such a provision, which in a sense scales back copyright protection standards (by reinforcing limitations and exceptions), is that it might be interpreted as going against the current of copyright reinforcement currently seen in the EU, and even against the goals of strengthening the European copyright industry. There is a clear reluctance among legislators and member states to “weaken” copyright protection. An exception for transformative uses would also undoubtedly be viewed by many (of the commonly represented) stakeholders as an undesirable risk to authors’ rights.

270 See Eechoud et al. (2009), p. 304.
7 Conclusions on possible solutions

7.1 Conclusions, suggestions, and evaluations

In this chapter, I will present my final conclusions based on the prior investigation. I will present my views on what a transformative use exception could or should contain. In doing so, I will provide a hypothetical exception provision for illustrative purposes. These exemplary provisions should, however, not be regarded as literal suggestions for an exception, but merely serve to illustrate the general structure and content of the approaches discussed. Closing out this thesis, I will discuss, evaluate, and analyse the various legislative paths to exempting transformative uses.

7.2 The content of the exception

7.2.1 A concrete, criteria-based approach

One of the original goals of this thesis was to investigate the possible contents of a future stand-alone exception for transformative use. But throughout the current investigation, it has become increasingly clear that it may be problematic to achieve a stand-alone exception that is based around a work fulfilling concrete and necessary pre-requisites in order to be exempt. For starters, it is quite widely agreed upon that judges should not make decisions regarding a work on the basis of its artistic merit, or any other largely subjective criteria. But assessments of transformative uses on the basis of abstract concepts such as transformation and originality are difficult to carry out while simultaneously avoiding these pitfalls. It might also be problematic to force Judges to apply definitions such as remix and mash-up, should such terms be used in the provision or explicitly be encompassed by it.

In its review, the ALRC eventually rejects a stand-alone transformative use exception, stating that transformative uses are far better suited for consideration under a (therein jointly proposed) fair use exception; this would allow a range of factors to be balanced. According to the Australian commission, framing a stand-alone exception in Australian law would be problematic in terms of having to produce a satisfactory definition of transformative use, and determining the extent to which the exception would apply to commercial uses.271

In my opinion, it is warranted to pursue a solution which includes some manner of differentiation between works with underlying creative effort, and works which are either slavish copies or obvious cases of “creative shortcuts”. If nothing else, this relates back to the underlying question of originality – a certain degree of which is required for obtaining copyright for any literary or artistic work. Some dividing line would need to be drawn between an adaptation, which is subject to a licence, and a work that is transformative. To illustrate, a hypothetical exception based on the currently discussed approach might have the following structure:

```plaintext
[...] use of one or more previous works, which does not merely create a substitute for the previous works, and which displays sufficient originality and transformation of the source material as to be considered an independent and original work in its own right.
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But in practice, determining the presence and nature of the above characteristics would be no mean feat. In conclusion, I must admit that I am unsure of whether it is feasible to draft a stand-alone transformative use exception that relies on placing down definitive barriers to exemption. The question of where exactly to place the bar in terms of concepts such as originality and transformation might simply be too difficult to get right in a codified provision; reaching agreement between member states even on the concrete and explicit exceptions currently regulated in EU law has apparently been difficult enough. There are also so many new incarnations of transformative use continuously appearing that an exception based around concrete pre-requisites might never be able to fulfil its intended purpose.

### 7.2.2 An open, and/or factor-based approach

Another possibility for a transformative use exception would be to introduce it as a more open norm. Here, in turn, there are two possibilities. Either the exception is drafted as a catch-all solution, allowing the exemption of uses which do not fit the criteria of existing exceptions but still fulfil certain necessary requisites – or as a factor-based approach, allowing courts to exempt or prohibit a secondary work based on a balancing of relevant characteristics, consequences and interests involved in the use.

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272 The preceding provision and its contents will depend on the avenue of legislation used – either mandating or allowing member states to introduce an exception for such a use, or codifying in national law that such a use is exempt. See further Chapter 7.3 below.
Notably, the former solution is still at risk of suffering the same problems as discussed above in 7.2.1, if it is based around criteria such as originality or transformation. It is far more feasible that the framers for such an exception would instead look to the consequences of the use – most likely by examining whether the use passes the three-step test. In my opinion, this is a valid option. Re-purposing the three-step test into a catch-all exception would allow for a great deal of flexibility and a possibility to alleviate a portion of the current problems with imbalance – even more so if the second “step” is softened as previously suggested by Koelman. A hypothetical exception based on the catch-all solution might thus have the following structure:

[...] other uses which do not unreasonably conflict with the normal exploitation of the original work, and which do not unreasonably prejudice the legitimate interests of the rightsholder.

But this solution would still lead to a large number of arguably legitimate transformative uses falling between the cracks of the exception system, e.g. cases when some slight-to-moderate harm is suffered by the rightsholder but there are significant public interests in favour of allowing the use.

The second option (a factor-based exception) would conceivably be able to address far more cases of transformative use. This approach could allow factors such as transformation, (low) quantity, originality, purpose, and context to trump a degree of competition with normal exploitation and/or prejudice of legitimate interests – provided the former factors are strong enough to warrant such an outcome in the case at hand.273 Even though such a solution is clearly inspired by US fair use, I hesitate to specifically use the term “fair use” in this context – not least because of the wide-spread mistrust of the fair use doctrine. A more suitable term for the EU solution, not so closely affiliated with the (admittedly quite unique and foreign) US copyright system, would likely be preferable in a European setting. But for the purpose of illustration, I will include fair use in the hypothetical exception below. For practical reasons I will also employ a similar structure to USCA § 107 in order to illustrate my hypothetical concept for such a provision:

273 The ALRC concluded in their review that transformative uses would be most suitably covered under such an exception. Under the proposed Australian fair use approach, transformation purpose and character of the use would fall under the inquiry into fairness – as would commercial aspects such as effect on the potential market for, or value of, the original work. See the ALRC Discussion paper (2013), pp. 208-209.
Uses which are determined to be [fair uses] are not an infringement to copyright. In determining whether a use is [fair], the following factors are to be taken into account:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2. the nature of the copyrighted work;
3. whether the copyrighted work has been published;
4. the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
5. the originality of the new work in relation to the original work, whether as a result of transformation or otherwise;
6. whether the use conflicts with the normal exploitation of the original work;
7. whether the use unreasonably prejudices the legitimate interests of the copyright holder of the original work; and
(N) [other factors determined to be suitable for inclusion and consideration].

It is important to note that, even though this approach is clearly inspired by US fair use, there are several more elements to the US fair use doctrine than the factors in USCA § 107 (which are included in the example above). An EU open exception might, for example, mandate that certain factors weigh heavier than others by moving them to a second list of especially significant factors. The framers would have the option of implementing certain limitations on the scope of the open norm, perhaps making it somewhat more reminiscent of UK fair dealing.

A factor-based approach may in some ways be superior to an explicit, requisite-based exception. This way, courts would not have to assess specific or abstract terms such as mash-ups or remixes, laboriously trying to fit them into a tightly-worded exception. Legislators would likewise not have to draft solid boundaries around abstract concepts such as originality or transformation. But there is no denying the fact that framing such an exception is likely to be difficult in practice. In the end, I do not propose anything resembling a full emulation of US copyright law. Even if US and European systems were fully compatible, US copyright law faces severe criticism for its own lack of balance between the interests of society and of rightsholders.275 But I do believe that inspiration might be drawn from fair use’s flexibility and its (arguably) greater capacity for truly balancing the interests of society with those of the rightsholder. A satisfactory middle-ground might be achievable. In retrospect it might, for example, be more feasible to employ a catch-all exception based around

274 Note that I have chosen to not include the previously mentioned “softened” version of “second step”, as this is arguably unnecessary given the open factor-based nature of the provision.

275 See for example Lessig, Free Culture (2004), and Remix (2008).
a re-purposed three-step test. In my opinion this approach would have the greatest capacity for solving current issues with copyright exceptions and transformative use – at least without introducing as many if not more additional problems of its own.

7.2 The legislative paths to exemption

7.2.1 An exception through EU directive

The solution of amending current harmonising instruments is perhaps the most accessible path towards exempting transformative use. But the problem with amending Article 5 of the InfoSoc directive to allow the implementation a transformative use exception is that such an exception might never end up being implemented. If such uses are added to (or otherwise incorporated into) the existing catalogue of optional exceptions, then there is no guarantee that most member states would even end up implementing the exception – especially if their legal traditions and national stakeholders strongly oppose what might be considered a “liberalisation” of copyright, running contrary to the tradition of droit d’auteur.

The remaining option would be to harmonise a transformative use exception in a mandatory fashion. But based on legislative history in EU copyright law, any expectations of member states coming to such an agreement would have to be tempered considerably. Given that the current system of optional exceptions came about as a compromise resulting from the reluctance among member states to give up their national laws on the matter, a binding mandatory exception might be difficult to accomplish. In the end, the philosophical distance that needs to be crossed in order to permit transformative use in general sense may simply prove too great. If so, a non-commercial UGC exception akin to the Canadian version might be a better option. Although such an exception is not technically the subject of this thesis, it would at least allow for a greater number of transformative works to be created and disseminated, as long as they also fall within the scope of UGC.

An amendment to the three-step test in Article 5(5) is, in my opinion, potentially the most viable solution. If agreement can be reached that the test should act as a safety

277 The Canadian legislation has come under criticism by legal scholars, such as Prof. Barry Sookman, whose main concern seems to be that the exception for non-commercial user-generated content is unlikely to be considered a “certain special case”. See Bowden, David, International Aspects of the New User-Generated Content Exception in the Copyright Act (2013).
278 See graphic 2 above.
valve, allowing new and warranted exceptions to be codified, then this would address many of the problems discussed previously. Greater flexibility to account for new uses would be provided, and depending on the form the provision takes there may be room for re-balancing the interests served by copyright exception provisions. This solution might also allow national courts to apply the three-step test as a more open norm – allowing new uses to be permitted, provided they pass the test.

7.2.2 An exception through national law

After what has been discussed so far, it would seem that implementing a transformative use exception is completely blocked by the InfoSoc directive. And indeed, exceptions to the exclusive rights to a reproduction of a creative work, as well as communication to the public and making available to the public, are limited by Article 5.

Hugenholtz and Senftleben nonetheless propose that a notable degree of openness might be achievable even under the current InfoSoc directive. The application of the open criteria of the three-step test, combined with a literal copy of all the permissible exceptions into national law, might lead to a semi-open norm that in a way resembles open-ended solutions such as those previously discussed. This would be the most flexible implementation currently permissible under EU law, and would conceivably not require any amendments to be made to EU legal instruments. Other, more open implementations of the InfoSoc directive might also yield greater flexibility and balance. By, for example, expanding the scope of current exceptions such as parody, one might be able to encompass a greater number of transformative uses – provided the boundaries are not stretched so far as to risk violating Article 5.

But there may be more indirect routes to allowing more breathing space for transformative use. The InfoSoc directive notably refrains from harmonising the right to adaptation, which therefore falls outside current EU law. Hugenholtz and Senftleben have noted that the InfoSoc directive can be understood to cover only literal reproduction of works – and that regulation of transformative uses which alter the underlying creative body of the work is thus left to national law-making.

Professors Silke von Lewinski and Michel Walter maintain a similar standpoint – noting the possibly controversial absence of the adaptation right in the InfoSoc directive – as compared to the database directive and the computer program directive which both explicitly include the adaptation right.\(^{281}\) The InfoSoc directive could have included the separate adaptation right in the WCT.\(^{282}\) But, since the right to adaptation is currently not harmonised, member states (who are also Berne convention and WCT signatories) are free to choose how they implement this right. For example, it is possible to include the right to adaptation as part of the right to reproduction.\(^{283}\)

This would explain the allowance of free adaptations in several EU member states. As mentioned previously, the German free adaptation rule has survived the InfoSoc directive, implying that the German legislator has made use of the freedom left by the directive to regulate the right to adaptation independently. The Dutch allowance of free adaptations is somewhat more restrictive than the German approach. But the existing Dutch tradition of breathing space for parody could (according to Hugenholtz and Senftleben) serve as a basis for a broader free adaptation rule, encompassing transformative uses in general.\(^{284}\) Senftleben proposes that breathing space for adaptations might result from open-ended copyright exceptions supporting transformative use, and free adaptation rules supporting secondary works that maintain a sufficient “inner distance” to the original.\(^{285}\) Broader free adaptation rules might allow more transformative works to be created and disseminated, but one must keep in mind that the rules currently in place are notably narrow – typically being aimed at cases of inspiration rather than re-use. But it seems possible that some cases of sufficient transformation would conceivably be permissible under such rules, thus allowing works bordering on the intersection between free adaptations and transformative works to be permitted.\(^{286}\)

Finally, if the conclusion is reached that a national non-commercial UGC exception is the only viable option for exempting transformative uses, then such an exception might in fact be possible under current EU law. The ICRC recently suggested the introduction of a version of the Canadian UGC exception. Although this proposed exception was criticised as being possibly incompatible with the InfoSoc directive, the

\(^{282}\) WCT Article 1(4) mandates compliance with the Berne convention; Berne convention Article 12 mandates the creator’s exclusive right to adaptations, arrangements, and alterations.
\(^{283}\) See Walter & Lewinski (2010), p. 1479.
\(^{284}\) See Hugenholtz and Senftleben, Fair Use in Europe (2011), p. 27.
\(^{285}\) See Senftleben, Breathing Space... (2013), p. 90.
\(^{286}\) See Graphic 2 above.
committee maintains that Article 5(2)(b) ("reproductions on any medium for private use and non-commercial purposes") through a teleological interpretation, allows for an exception for non-commercial UGC.\textsuperscript{287}

7.2.3 \textit{An exception through EU regulation}

The EU admittedly still seems far from completely overhauling the EU copyright system in favour of a unified copyright regulation. But such an option is definitely worthy of consideration, given the myriad of problems that might be addressed thereby. Many problems regarding inconsistency, territorially, and lack of clarity might finally be put to rest through the direct effect of a regulation. A regulation would also allow for the EU to finally introduce a clear, fair, and balanced implementation of the three-step test – rather than leaving its interpretation up to national legislators and courts. As such, if a more decisively open norm is to be implemented consistently, it seems that EU regulation is the most effective way to go.

If a factor-based open approach to copyright exceptions is to be adopted, then clear rules and guidelines would only really be achievable through regulation – since the national implementation process of a directive mandating such a rule would likely cause too much inconsistency and confusion. But these suggestions are hypothetical – an actual agreement among member states to give up their national copyright traditions in favour of uniformity appears more distant in the face of the difficulties in reaching agreement so far. To also implement such a radical change as a factor-based exception may unfortunately prove far too much for many member states to stomach – even when faced with the pressing and obvious problems and imbalances of the current system. But the discussion is important to carry on nonetheless. With more and more tangible solutions being presented (such as the EU Copyright Code), there may yet come a day when the EU achieves a unified, coherent, and balanced copyright system – able to compete with current giants of the global creative industry.

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\textsuperscript{287} See the ICRC report (2013), pp. 63-64.
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