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

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

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

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

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

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

Åsa Hellstadius & Frantzeska Papadopoulou

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

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

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

The concepts of freedom of expression and freedom to conduct a business will prompt readers to think of fundamental rights: Articles 11, 16 and 7 of the Charter of Fundamental Rights of the European Union mandate the protection of, respectively, freedom of expression, freedom to conduct a business and the respect of personal and private life. And, indeed, fundamental rights operate as an external control mechanism. The Court of Justice of the European Union has increasingly referred to the need of balancing intellectual property protection with third-party fundamental rights, eg in relation to the topic of copyright enforcement (Telekabel, C-34/12).

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

These include the idea/expression dichotomy and exceptions and limitations. Copyright is also subject to external limitations, including the respect for fundamental rights: If it became apparent that there were systemic shortcomings in the protection of a fundamental right vis-à-vis copyright, the validity of copyright would be affected and the question of legislative amendment would then arise. However, there may be exceptional cases where copyright, which, in other circumstances, could quite legitimately enjoy legal and judicial protection, must yield to an overriding interest relating to the implementation of a fundamental right or freedom.

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

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

Enjoy this new issue of the Review!
ABSTRACT
The worldwide revenues from the sale and licensing of patents have soared into the hundreds of billions of dollars in recent years. Consequently, the market for patents has become an important strategic option for firms to stay competitive, both by allowing them to leverage their own intellectual property rights (IPR), but also as a way of accessing important external technology. This article analyzes markets for patents in Sweden past and present by presenting and examining data on the market for patents in the 17th century as well as recently available data. We show that the origins of technology trade can be traced back to the 18th century and that an active national market for patents emerged by the end of the 19th century where intermediaries such as patent agents and specialized matchmakers helped bring buyers and sellers of inventions together. By contrast, today the domestic Swedish markets for patents are relatively insignificant, but Swedish firms instead act on international markets for patents. More firms are active on the demand side than on the supply side of the market, which indicates that the impact of a few large firms on the aggregate number is potentially large.

1. INTRODUCTION
On December 10, 2018 William D. Nordhaus and Paul M. Romer were awarded the Sveriges Riksbank Prize in Economic Sciences for their work on endogenous growth theory. What is perhaps less known is that Nordhaus early in his career also worked on an endogenous theory of economic growth.1 Even less known to the general public is probably that Nordhaus placed patents in the center of his analysis and that he probably was the first to introduce patent length as a parameter in patent policy design.2 In Nordhaus’s model of invention, he stressed that inventions are produced within the economic system, that any invention is potentially an indivisible public good, and that an inventor is given a monopoly over the invention (i.e. a patent). In his analysis, he followed Schmookler’s work concerning the role of the economic forces of the market as determinants of inventive activity.3 However, Nordhaus emphasized how what he denoted “markets for invention” create incentives for technological change. According to Nordhaus, the royalty each invention receives in the market, relative to general market price, induces technological change.4 Accordingly, this analysis puts markets for technology (MfT) at the center of economic growth as an important mechanism through which economic activity can determine inventive activity.5 Such a conception requires that inventions (equated with patents) can be traded or licensed on a market and royalties can be earned. In this paper, we ask questions about markets for patents in Sweden by looking at how these markets have emerged and evolved in Sweden. How did and do markets for patents function in Sweden? Who have been the main actors on markets for patents? What are the perceived effects of these markets? How do these factors contribute to differences in the effects that can be discerned in Swedish markets for patents? The article presents an overview of markets for patents in Sweden, past and present. The aim is threefold. First, we aim to provide an overview of markets for patents, focusing on the market structure and corporate strategy.6 By stimulating trade in technology, considering markets for patents a sub-category of such markets. Second, the article aims to provide empirical evidence of patent markets in the Swedish context by making use of data collected from the Swedish National archival (Riksarkivet) as well as the archives of the Swedish Patent Office (PRV) and by providing historical and contemporary examples of how these markets were used. Our third aim is to point out directions for future research on markets for technology and markets for patents.

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

2. MARKETS FOR TECHNOLOGY
MfT, that is, trade in technology disembodied from physical products, have received increased attention by scholars during the last 15 years due to their effects on industry structure and corporate strategy.7 By stimulating trade in intellectual resources, property rights and ideas, MfT open up industries, especially knowledge-based ones. There are parallel discussions, both internationally and in Sweden, in spread of the open innovation paradigm, which argues for increased technology trade and external knowledge acquisition by firms.8 One of the main determinants of this development is widely seen to be the emergent intellectual property rights (IPR), such as patents, which enables the separation of the intangible technology from the tangible (the product) and makes it possible for economic forces of supply and demand to act upon this type of property.9 Technology trade thus allows for increasing economic efficiency by reallocating property rights to actors who are better at commercializing the technology because of their better access to complementary assets. Arketti et al emphasize this role of MfT in ‘correcting the miscalibration of ideas across firms’ and that MfT also may influence firms’ R&D decisions.10 In this way, such markets are conducive for specialization of inventive activity as productive inventors may profit from their inventions through the market.11 This type of specialization in invention does not take place within internal R&D labs of large firms, but through the use of property rights provided by the patent system to furnish an active market. MfT can also stimulate the diffusion and use of existing technologies. Codification of technology into an intellectual property right (IPR), for instance a patent, implies that it will be easier for potential buyers and suppliers to make use of new inventions and technology through licensing. In these markets, several actors are active: firms, inventors who buy and sell their inventions and ideas, as well as intermediaries who facilitate technology transactions. The potential welfare effects have been estimated to be large. Arketti et al find that a shutdown of MfT would decrease economic growth in the US, while a situation where each seller matches with a perfect buyer has the potential to increase the growth rate of the economy by up to 50 percent conjoint with significant welfare improvements.12 While the notion of MfT has made it possible to investigate the effects of such markets, critical voices have been raised regarding MfT status as proper markets.13 The inter-active nature of the innovative process from conception to marketable product calls for further investigation of different subsets of MfT, and who are acting in such sub-markets. This feature points to the diversity of MfTs and what type of marketplaces can facilitate trade technology, where Arketti et al note that “[h]ow online interfaces of intellectual property platforms have failed to arbitrage the market.”14 Instead, these authors emphasize the role of the patent agents in MfTs, since patents are often sold and bought through intermediaries due to the sensitivity of IPR.

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2 Department of Business Studies, Uppsala University and Department of Management and Engineering, Linköping University.

3 Department of Business Studies, Uppsala University.


7 More formally, Nordhaus stated that assuming that inventions are technically independent, i.e. the contribution to total productivity (A) per invention does not depend on whether other inventions are used, the ith invention contributes to total productivity by A_i. If this holds, then the royalty of the ith invention (s_i) as a proportion of the market price is equal to the ratio of the change in productivity due to the ith invention such that: A_i / p = s_i / A_i.

8 Nordhaus used the term “markets for invention”.


11 There are parallel discussions, both internationally and in Sweden, in spread of the open innovation paradigm, which argues for increased technology trade and external knowledge acquisition by firms. Nordhaus used the term “markets for inventions”.


22}
The authors summarize salient features as “small-numbers bargaining,” “imperfect information and opportunism,” “uncertainty,” “risk aversion” and “transaction costs.” The interaction of these characteristics causes imperfections in MFTs, and make them susceptible to market failures. Since the mid-1990s, scholars concerned with the economics of innovation have paid increasing attention to the now pervasive phenomenon of technology licensing and have developed theories to understand it. The increasing variety of opportunities for unhampered innovation in Sweden has meant that the Kingdom. As a result, the King granted Bagge a privilegia exclusiva in 1762 under the condition that Bagge would leave a copy of the invention to the Swedish nation. As a result, Bagge was also allowed to transfer rights to foreigners as long as they promised to pay the licensor a royalty. The first recorded IPR trade in Sweden involved the Swedish botanist Carl Linnaeus. Linnaeus was a professor at Uppsala University between 1723 and 1725, and is renowned for developing the botanical classification system. Linnaeus had little interest or business acumen to fully exploit the invention, so he prepared to pay a significant amount of money in advance in order for its right of use and the right to exclude others from the use of the invention or process. Despite the term assignment is used interchangeably with transfer in the literature. The late 19th century saw an important part of legislation regarding the early privilegia exclusiva. In the first Swedish patent law that was in force by 1838, it was clearly stated in the sixth paragraph that “privilegia exclusiva can only be transferred to another Swedish citizen”. In 1856 however, it was also allowed to transfer rights to foreigners as long as they used a Swedish agent. Arora and Fosfuri introduced: Trading under the Buttonwood—A Further to the Markets for Technology and Ideas,” Industrial and Corporate Change, 9, no. 4 (2000): 686–708. Arora, Fosfuri, and Sokoloff, “Market Trade in Patents in Imperial Germany,” The RAND Journal of Economics 47, no. 1 (2016): 74–90. Arora and Gambardella, Markets for Technology Licenses,” The Journal of Industrial Economics 48, no. 1 (2000): 103–35; Arora, Fosfuri, and Gambardella, Markets for Technology: The same thing could arguably have been said about Naomi Lamoreaux and Kenneth Sokoloff’s pioneering work in inventors, firms, and the market for technology in the late eighteenth and early nineteenth cen-
turies (Lamoreaux and Sokoloff 1999). Richard E. Nelson and Peter Klynig, “The Importent Market for Technology Licenses,” Oxford Bulletin of Economics and Statistics 63, no. 3/4 (2001): 241–257. (Cambridge University Press, 2014). 24 At this point in time, privilegia exclusivas were regulated by article 27 in the general legislation on manufacturing privileges from 1729. 25 J. A. Markman, “En Uppfinning Av Linné,” Stockholms och Södermanlands Historiska Sällskap 2, no. 4 (1845): 323–324. 26 Kongl. Maj:ts nådiga förordning angående allra eldare Konst-förbättringar . Stockholms och Södermanlands Historiska Sällskap 2, no. 4 (1845): 323–324. 27 See Swedish Code of Statutes (SFS) 1834:41, §18 and 1856:49, §1 and §11. 28 Madiès, Guellec, and Prager, Patent Markets in the Global Knowledge Economy: Theory, Empirics and Public Policy Implications. 29 See Swedish Code of Statutes (SFS) 1834:41, §18 and 1856:49, §1 and §11. 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Arora and Fosfuri introduced: Trading under the Buttonwood—A Further to the Markets for Technology and Ideas,” Industrial and Corporate Change, 9, no. 4 (2000): 686–708. Arora, Fosfuri, and Sokoloff, “Market Trade in Patents in Imperial Germany,” The RAND Journal of Economics 47, no. 1 (2016): 74–90. Arora and Gambardella, Markets for Technology Licenses,” The Journal of Industrial Economics 48, no. 1 (2000): 103–35; Arora, Fosfuri, and Gambardella, Markets for Technology: The same thing could arguably have been said about Naomi Lamoreaux and Kenneth Sokoloff’s pioneering work in inventors, firms, and the market for technology in the late eighteenth and early nineteenth centuries (Lamoreaux and Sokoloff 1999). Richard E. Nelson and Peter Klynig, “The Importent Market for Technology Licenses,” Oxford Bulletin of Economics and Statistics 63, no. 3/4 (2001): 241–257. 3. MARKETS FOR PATENTS IN SWEDEN IN THE 19TH CENTURY The shaded parts of Figure 1 above also contextualize the article empirically as we move from theory to data. In the following two sections we present data on the markets for patents in Sweden, focusing on patent transfers and licensing, but with an emphasis on patent transfers. The historical data is based on a newly constructed database consisting of all granted Swedish patents and privileges 1890-1944. In addition to detailed information on patent characteristics, inventors and patentholders, the database also contains information on around 5,000 patent transfers. Along with digitized data from Swedish industry journal Norden we use this data to show how a marketplace for inventions was created in Sweden at the turn of the 20th century. Following this, we move to the present to show the development of markets for patents in Sweden 1990-2010. 3.1 Early developments The first recorded IPR trade in Sweden involves the Swedish botanist Carl Linnaeus. Linnaeus was a professor at Uppsala University between 1723 and 1725, and is renowned for developing the botanical classification system. Linnaeus had little interest or business acumen to fully exploit the invention, so he prepared to pay Linnaeus 6,000 silver daler (approximately $45,000 today) under the condition that he was given the sole right to the invention and would be allowed to practice it unhindered by the King without intrusion by others. Bagge further asked that this right would be inherited by his descendants and promised to use the invention in the manner possible for the good of the kingdom. As a result, the King granted Bagge a privilegia exclusiva based on Linnaeus invention on September 7, 1762 under the condition that Bagge would leave a copy of the described invention to the parliamentary committee for future use. What happened to Linnaeus’ new method after this transaction was made is not clear, but the privilegium
Even though the transferability of IPR thus has a long history in Sweden, the beginning of the 19th century saw relatively little activity in markets for patents. The relative quiet market, both in absolute and relative terms, could in part be attributed to relatively weak property rights and a high propensity to litigate, which in turn increased uncertainty about the value of granted patents.28 Based on data collected from the Swedish National Archive and the archives of the Swedish Patent Office, Figure 2 shows the evolution of patent transfers during the 19th century and to the start of World War II. As can be seen, before 1870 there were few transfers of granted patents taking place. However, in the 1880s this changed and patent transfers steadily increased. In total about 12 percent of all granted patents 1885–1914 were transferred at least once.29 Transfers steadily increased. In total about 12 percent of all granted patents 1885–1914 were transferred at least once.29 Figure 2 shows the evolution of patent transfers during the 19th century and to the start of World War II. As can be seen, before 1870 there were few transfers of granted patents taking place. However, in the 1880s this changed and patent transfers steadily increased. In total about 12 percent of all granted patents 1885–1914 were transferred at least once.29

The “Inventor Exchange” made it possible for anyone to publish advertisements (up to three times free of charge) for the sale or acquisition of inventions. The popularity of the journal indicates that this was most likely one of the most efficient ways to attract attention to your inventions. During the next twenty years the “Inventor Exchange” received more than a thousand advertisements for the sale, license, or acquisition of different inventions. It seems however, that secure property rights were indeed a prerequisite for the marketplace to function. Andersson and Tell found that no less than 741 advertisements included references to granted patents.30 The Inventor Exchange was not a “lemons” market and seems to have been a relatively successful marketplace. Patents for sale in the marketplace on average was of higher quality than other patents measured as number of patent fees paid.31

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

As patenting and patent transfers increased, the actors involved realized that using a market for patents involved transaction costs, including those associated with finding buyers or sellers of relevant patents, ascertaining patent quality and usefulness, and the enforceability of property rights. The appearance of such transaction costs induced initiatives to structure and facilitate the operation of a marketplace. The recently established patent agencies of the time became one significant actor in trying to achieve this objective. Early Swedish patent agencies such as L. A. Groth & Co and Stockholms Patentbyrå Zaccu & Bruhn were important intermediaries in the Swedish market for patents. These patent agencies seized the opportunity to make patent trade an important part of their business model.32 Some patent agencies, like the Wawrinsky agency, even produced their own journal where they published advertisements for patents for sale. Not only patent agencies emerged as providers of marketplaces for technology, where they could act as brokers. The Association of Swedish Inventors (Sveriges uppfinnareförning) took further measures and founded an “Inventor Exchange” (Uppfinnarebörs) in 1886 in prominent industry journal Norden, publishing the Swedish Journal of Patents and Trademarks as a weekly supplement.33 Acknowledging the problem of transaction costs the inventors’ association wrote in the first edition that: “An exchange, a marketplace, where those who wish to acquire or sell inventions can find their customers still does not exist in our nation and in this we find one of the reasons why inventors in spite of our relatively good patent law in general obtain little benefit from their inventions. It is often observed that he who has managed to produce a valuable invention only occasionally possesses the traits required to bring it to the market…/…/… It would therefore be of mutual benefit, and foster the industrial life, if these two categories of intellectual workers had a somewhat more secure way to find each other than merely by chance.” (authors’ translation) (Norden, Journal of Patents and Trademarks, May 28, 1886, p. 33).

The market for patents has also left its mark on Swedish business history and has at times played a crucial role in the very formation of noteworthy Swedish industrial enterprises. Although Swedish industrialist and inventor Gustav de Laval was one of the founders of AB Separator to exploit his improved milk separator in 1878, the basis of the firm was in fact a patent transfer and the division of labor made possible by markets for patents.34 De Laval’s
Another well-known Swedish firm based on a patent transfer is Atlas Copco. The firm AB Diesels Motorer, which together with AB Atlas, was to form what today is Atlas Copco, in 1947, acquired a patent, application 1463, in connection with a patent application in 1892 of Swedish inventor, Carl von Bechthold. According to Larsson and Tell, Alfa Laval’s patent strategy was crucial to the success of the firm and clearly influenced the market for patents as emphasized by Gustaf de Laval himself.43

Even though we do not have time series data on actual prices paid for transferred patents, some examples do exist which indicate that the sums involved were considerable even today’s standards. For example, the Rudolf Diesel patents acquired by the Wallenberg family was valued at SEK 150,000 in 1898 (approx. $12,144 today). On another occasion, the firm AB Separator bought the inventions made by mechanic Carl August Johansson from him and his two partners. Separator reportedly paid SEK 20,000 (approx. $167,000 today) in 1886.44

4. The present Swedish market for patents: domestic and international observations

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

4.1 Swedish and international markets for technology

The current situation with respect to Swedish markets for technology is, to a great extent, a story about Swedish telecom firm Ericsson that has been actively monetizing IPR during the last 15-20 years. In 2012, the company passed the billion dollar mark in revenue from the sale and licensing of their patents and this business continued to increase in the years thereafter, resulting in a ten-fold nominal increase between 2005 and 2015. Ericson’s dominant position is also evident in patent counts where the company, including subsidiaries, makes up almost half of the total number of patent applications made by Swedish firms over the period 2000-2016, its patenting more than doubles that of the second most active Swedish firm, Astra Zeneca.45 Ericsson has mainly generated revenues from different licensing deals. Former company CEO, Carl-Henric Svanberg, stated that Apple’s iPhone was one of the greatest things to happen to Ericsson, since Apple was required to reach a licensing agreement with Ericsson in 2009 in order to be able to launch the first version of its smartphone.46 A new licensing agreement with Apple was reached in 2015. On the other side of the Baltic Sea, Nokia, once the leading firm in the mobile phone industry, sold its telephone division to Microsoft in 2011.47 However, the Finnish company held on to their 30,000+ patent portfolio, which meant that Microsoft had to pay a 10-year license on the patents to be able to use Nokia’s inventions in mobile phone technology. Previously, Nokia had only used their patents defensively to protect its phone business. Using the market for patents however turned out to be a shrewd business move as other mobile phone manufacturers such as LG soon had to license Nokia’s patents as well and on February 1, 2006 they reached a similar license agreement with mobile phone giant Samsung, reported worth up to $1.4 billion.48

Table 1: Important patent deals

<table>
<thead>
<tr>
<th>Owner/Buyer/licensee</th>
<th># of patents</th>
<th>Total Value</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nortel</td>
<td>6,000</td>
<td>$35 bn</td>
<td>2011</td>
</tr>
<tr>
<td>Motorola</td>
<td>24,500</td>
<td>$12.5 bn</td>
<td>2011</td>
</tr>
<tr>
<td>Novell</td>
<td>902</td>
<td>$162 mn</td>
<td>2010</td>
</tr>
<tr>
<td>Nokia</td>
<td>Microsoft/LG/Samsung</td>
<td>$30,000</td>
<td>$1.4 bn 2013-2016</td>
</tr>
<tr>
<td>IBM</td>
<td>1,023</td>
<td>N/A</td>
<td>2011</td>
</tr>
<tr>
<td>Ericsson</td>
<td>Novell</td>
<td>$7,000</td>
<td>SEK 2-6 bn 2015</td>
</tr>
<tr>
<td>Google</td>
<td>217</td>
<td>N/A</td>
<td>2012</td>
</tr>
<tr>
<td>Kodak Intellectual Ventures</td>
<td>1,100</td>
<td>$527 mn</td>
<td>2013</td>
</tr>
</tbody>
</table>

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

However, even though licensing is more common, large acquisitions of blocks of patents is also frequent and an important part of companies’ IPR strategies. The last ten years have seen the striking of several massive patent deals, which has drawn the attention of the public. The most well-known is probably Google’s 2011 acquisition of Motorola Mobility along with its patent portfolio of 24,500 patents for $2.5 billion to protect the Android ecosystem. A year earlier, Microsoft, Apple, EMC and Oracle bought a portfolio of 882 patents from software firm Novell for $450 million and only six months later in 2011 some of the same firms acquired 6,000 patents from Canadian telecom firm Nortel for $4.5 billion. In addition to its acquisition of Motorola Mobility, Google also secured 1,023 patents from IBM the same year.49 Table 1 summarizes some of the largest and most publicized patent deals in recent years.

With exception of these high profile patent deals, gauging the total size and value of markets for patents today is inherently difficult since many transactions occur between affiliated actors. Another reason being that pa- tent transactions are often taking place as bilateral agreements made under conditions of secrecy.46 However, some data is available that can help us get a picture of the potential size of these markets. According to the International Monetary Fund, payments for the use of IPR passed $400 billion globally in 2017.50 This data also fit reasonably well with some of the earlier estimates made by Athreye and Cantwell, and Arora and Gambardella.45

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41 Klaus Wohlert, Wohlert, Klaus. Framväxten Av Alfa-Laval Och Separatorindustrin 1876-1914. 78. Although the patents are not available online, according to Larsson and Tell, the company started its operations in kommerskollegium before it was housed in kommerskollegium.37 Furthermore, the real breakthrough for Alfa Laval in 1882.

43 Swedish patent granted 1876-07-03 and transferred to business partner Oscar Lamm 1879-06-07.

44 Konsistoriet was responsible for issues regarding patents in the Swedish Patent Office was founded in 1885 which in turn was housed in kommerskollegium before it became independent and becoming a national government agency in 1912.

45 See Swedish patent no. 2708.


47 Järbrink, Gustaf de Laval’s separator patent Source: Riksarkivet, Kommerskollegium, Huvudarkivet, Ingående diarier.

48 Using the market for patents however turned out to be a shrewd business move as other mobile phone manufacturers such as LG soon had to license Nokia’s patents as well and on February 1, 2006 they reached a similar license agreement with mobile phone giant Samsung, reported worth up to $1.4 billion.

49 However, this data also includes the use-through licensing agreements, of produced orphans or prototypes, such as copyrights on books and manuscripts, computer software, cinematographic works, and sound recordings and related rights (such as for live performances and television, cable, or satellite broadcast). An interesting fact is that according to the IMF data, the world in total seems to be running a deficit in the charges for the use of IPR, meaning that payments are larger than receipts. In theory of course, these should be equal. See https://doi.org/10.1016/j.respol.2006.11.002;

50 Swea Arthuery and John Cantwel, “Creating Competition?: Globalisation and the Emergence of New Technology Producers,” Research Policy 36, no. 2 (March 1, 2007): 299-316, https://doi.org/10.1016/j.respol.2006.11.002. However, this data also includes the use-through licensing agreements, of produced orphans or prototypes, such as copyrights on books and manuscripts, computer software, cinematographic works, and sound recordings and related rights (such as for live performances and television, cable, or satellite broadcast). An interesting fact is that according to the IMF data, the world in total seems to be running a deficit in the charges for the use of IPR, meaning that payments are larger than receipts. In theory of course, these should be equal. See https://doi.org/10.1016/j.respol.2006.11.002;
We know that Ericsson represents an important part of Sweden's share of markets for technology. But what about Swedish firms in general? The Swedish data from the EU led Community Innovation Survey (CIS) can give us an indication of to what degree Swedish firms use IPR and participate in activities in the market for technology. The survey is based on a population of 36,039 firms with more than ten employees, from which a sample of 9,297 firms was randomly drawn. The survey had a response rate of 82%, which means that the data below is based on 7,624 Swedish firms. According to Statistics Sweden 52% of these firms were involved in some kind of innovative activity during 2014-2016.

Figure 6 shows the use of different IPR by Swedish firms by number of employees. About, 20% report that they had applied for a patent, while about 13% had applied for a trademark and as much as 42% had registered a design. Since IPRs are important assets in the market for technology this can give us an indication of the number of potential Swedish firms on the supply side of the market without taking into consideration that past activities can of course play an important role in influencing firms' strategic positions. Furthermore, the CIS data also do not give us information on the number of IPRs applied for or registered.

A more direct measure of participation in MfT is to consider to what extent Swedish firms leverage their internal IPR or use externally developed technology in their businesses. Figure 7 gives a glimpse of this by showing the number of Swedish firms that have either licensed out or sold IPR or licensed in or bought IPR by number of employees. The data reveals that there are more firms that buy or license-in IPR than firms who sell or license-out IPR. Recall that Figure 7 shows the number of firms and not the total value. About 6,5% of all firms are part of the supply side of the market, while ca. 12% of all firms form part of the demand side of the market. This is of course not to say that one firm can't be active on both sides of the market, this is most likely often the case. However, the data indicates that in general more Swedish firms do seem to be on the demand side. This emphasizes the significance of large Swedish high-tech firms driving the large volumes of Swedish technology exports through IPR. This indicates that although on a general level Sweden is performing well in the markets for technology, in mere numbers more Swedish firms actually rely on and pay for externally developed IPR.
Second, the historical and contemporary empirical observations reported here indicate that markets for patents can be conceived as a case of MIT. As suggested by theory, patents are a form of IPR that allows for commercial trade, which, in turn induces division of innovative labor. Aggregated data and selected examples reveal that technology trade had beneficial economic effects. It is more difficult to ascertain the more precise workings of these markets, for instance in terms of search and enforcement costs, as well as price levels for IPR transfers and licensing. This predication alludes to, as exemplified both in historical and contemporary data, a valuation problem regarding the transactions on these kinds of markets. Information on the real value of licensing deals and patent acquisitions is scarce and not available in any organized fashion. Here we believe there is a real opportunity for research, both by economic historians and scholars in economics of innovation and technology, to make important contributions.

Third, at least historically, there was a role for intermediaries such as patent agencies to act as brokers and market makers. Our discussion shows how patent agencies, as well as the inventors’ associations, at the turn of the last century made efforts to facilitate and organize markets for patents. From what we can gauge drawing upon aggregate data on volumes of patents transferred, their efforts were not in vain. All of the patent agencies mentioned in this article are still active in Sweden today, but there is little systematic knowledge on what their roles in contemporary market for patents are.

In contemporary MIT a more complex picture of emerges, where firms such Sandvik have their own IPR companies, but where patent aggregators, IPR investors and open innovation intermediaries are active as well.

5. CONCLUDING REMARKS

In this article, we have presented and discussed historical and contemporary data on markets for patents. First, as with the example from Carl Linnaeus, the transferability of IPR has a long history in Sweden going back all the way to the 18th century. The rapid increase in volume relating to the use of IPR in general, but also the growth in patent transfers in the 1990s, bear similarities to the rise in patent transfers starting in the 1880s. Not surprisingly, increases in patent transfers happened concurrently with patenting booms. The surge in patenting that took place in the 1890s is sometimes referred to as the "pro-patenting era" and scholars such as Granstrand have referred to the 2000s as the "pro-licensing era". Perhaps a more accurate description would be to refer to the more recent period as the "second pro-patenting or pro-licensing era. Whatever the label, it seems to indicate that there was a first emergence of markets for patent during the late 19th century and then a second re-emergence in the late 20th century. This begs the question of what happened in between? Our historical data ends in 1994 and does not pick up until 1995, which directs attention to a large empirical deficit and data gap covering most of the 20th century. Thus, there is a void in our knowledge about the role of IPR during post-war industrialization in Sweden.
To what extent should uses of public architectural works be permitted under European copyright law?

By Katherine Galilee

ABSTRACT

This paper argues that the optional exception to copyright law contained in Article 5(3)(h) of Directive 2001/29/EC should be extended to clearly include commercial uses of architectural works, and should be made mandatory across the European Union. Copyright law must therefore be reformed to reflect this. It is argued further that the distinction between commercial and non-commercial uses is unworkable following the digital revolution, and that an unharmonised panorama exception is incompatible with the European Union’s Digital Single Market Strategy and creates uncertainty amongst European citizens.

1. INTRODUCTION

Architectural works were first legally recognised as deserving protection under copyright law with the revision of the Berne Convention in 1978. In the use of copyright law as a mean of giving creators certain exclusive rights over their literary and artistic works, it was thereafter accepted that architecture is not for public use. Even private works of architecture have the ability to take on some public significance when forming part of the overall physical landscape of society, as is reflected in the use of planning regulations in the control of private use of land. Architectural works, however, are always of interest under the context of Article 5(3)(h), and Directive 2001/29/EC introduced an optional exception to the exclusive right of reproduction and communication to the public under Article 5(3)(h) for reproductions and communications of architectural works. This is commonly known as the ‘freedom of panorama’. This article will argue that freedom of panorama under European copyright law does not go far enough to protect the public interest in using copyrighted works of architecture. Crucially, it will be argued that the ‘panorama exception’ must be extended to both commercial and non-commercial uses, and be made mandatory throughout the European Union. This will be argued on two primary bases. First, architecture has a particularly central role in society, both in the context of the everyday lives of European citizens, as well as forming part of the ‘discourse’ about society itself. Second, it will be argued that enforcing copyright law in the context of public works of architecture runs contrary to developing social norms and practices, particularly in the digital era. It will also be argued that, in failing to harmonise this exception to copyright law, thereby allowing a distinction between commercial and non-commercial works to sub-sist in certain European Member States, the European Union is hampering its own efforts to create an internal market in the digital age.

First, it is necessary to lay down a standard against which copyright law in the European Union can be assessed. Part 2 of this Article will therefore discuss the basis on which copyright law is justified. It will be argued here that copyright law is only justifiable to the extent that an appropriate balance is struck between the interests of right holders and those of the public. Therefore, to the extent that copyright can be found to have failed to strike such a balance, reform is required. Following this, so as to justify the implementation of a mandatory exception for uses of public architectural works in the European Union, a key question to be answered is how architecture and other protected works should be treated if the law does not protect the works so as to warrant a difference in treatment. Part 3 of this article will seek to answer this question by reference to the standard laid down in Part 2: an appropriate balance reached between private and public interests? As such, it will be argued that the public has a particularly strong interest in using copyrighted works of public architecture, due to the central role of architecture in public and private life, as well as the relatively recent development of internet as a key tool in the dissemination of knowledge. Finally, Part 4 of this article will consider the potential implications of leaving the ‘panorama exception’ non-harmonised in the European Union. This will include examining such impact within the context of the internet, educational initiatives, and the European internal market. It will be argued here that leaving the law non-harmonised creates a lack of legal certainty, an increasing gap between the law and social norms, and the potential to inhibit cross-border educational initiatives.

2. THE JUSTIFICATION OF COPYRIGHT LAW

In this chapter it will be argued that copyright protection over architectural works is only justified to the extent that it strikes an appropriate balance between the private interests of copyright holders and the public interest. It will be argued that, to the inherently monopolistic nature of copyright, its integration into the European legal system requires justification. Such justification is generally made on the basis that intellectual property rights provide an incentive for creators to create new works, and that this is ultimately in the public interest due to these works eventually passing into the public domain and furthering human technological and creative progress for all. To the extent that public interest cannot be shown, however, or to the extent that public interest can be shown to be greater where there is freedom to use copyrighted works, this justification for copyright law breaks down.

2.1 Justifications for copyright

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

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

In artificially imposing exclusivity to an intellectual work, copyright law attaches an otherwise non-existent (or at least low cost) to the transfer of intellectual works for all persons but the right holder. As such, it is submitted that the exclusive rights provided by copyright law can be considered as a monopoly, a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors. Despite this, the copyright system is widely considered to be a justifiable aspect of the European legal system, on two primary bases. First, copyright is justifiable in that it provides an incentive for creators to create works that will eventually enter the public domain and further the public interest. The second, related, justification is that copyright acts as a reward for those who invest their time and resources into, hypothetically, furthering human progress. We will now examine these in further detail.

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Copyright as an incentive

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

Without such protection, creators will be unable to capture the value of their work, and may be deterred from innovating further in future. This is the clear dynamic benefit of copyright law – future innovators know that, if they work hard, they may benefit from this innovation.

2.1.2 Copyright as a reward


Law for the Protection of Copyright and Neighboring Rights (Supra note 62), Article 77 and 70.


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Similarly, Italy has a culture that focuses on the preservation of cultural goods, including strong copyright and moral rights over such goods.47 However, the ‘incentive’ argument of political scientists that public interest in the protection and ownership of products of literature and art (©) excludes works of architecture and public monuments from the central standard of copyright protection.48

The current version of the law has been in place since 1965, and is widely acknowledged as ‘established case law’ that the extent of a work of art in public places expresses that the public interest is given too little consideration. Even where there is an understanding of the public interest in participating in and experiencing cultural works such as architecture, for instance in Italy, it is the public interest that the copyright laws are aimed at. There is a limit to which the public benefit (and therefore the justifiability) of copyright law can be ensured. Civil law jurisdictions such as France and Italy place significant weight on the interests of authors to the extent that it is the author who innovates the exclusive right to exploit their creations and as such it is submitted that it should be maintained in law only to the extent that it can be justified by reference to public benefit. It is on this basis – the necessity of justifiability – that this article proceeds.

This is reflected in the Infosoc Directive’s list of optional exceptions – the law recognises that there are indeed cases where the restriction on the public arising from copyright goes too far, and areas of freedom should be carved out of the law to rectify this. However, due to the option nature of these exceptions, there is a limit to which the public benefit (and therefore the justifiability) of copyright law can be ensured. Civil law jurisdictions such as France and Italy place significant weight on the interests of authors to the extent that it is the author who innovates the exclusive right to exploit their creations and as such it is submitted that it should be maintained in law only to the extent that it can be justified by reference to public benefit. It is on this basis – the necessity of justifiability – that this article proceeds.

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Going back to architecture as a form of ‘discourse’, in revealing what it is that these social housing projects ‘say’ to us, is helpful to turn to the thought processes of the architect. Le Corbusier, architect of the famous Unité d’Habitation in Marseille and Berlin, who inspired a multitude of high rise social housing projects throughout Europe and beyond, stated that ‘we create a mass production state of mind’. Le Corbusier pursued in his architecture a ‘new world order’ in which the needs of society – food, sun, and ‘necessary comforts’ – are centred. However, the construction of such buildings was now in the communal power of the citizen, not simply the political and economic interests of the state. In 2008 Bauhaus Award for architecture specifically adopted as its theme solutions to housing shortages internationally, to be worthy of copyright protection.

This interest in designing buildings to pursue social and political aims is still alive and well today, with the award title ‘Minimum subsistence level housing’ was given the example of Ringstrasse in Vienna, the buildings along which were constructed by a new liberal middle class that, instead of ‘palaces, garri-
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If social housing architecture is ‘discourse’ as to the organisation of society, and political aims is still alive and well today, with the Bauhaus Award for architecture specifically adopting as its theme solutions to housing shortages internationally, to be worthy of copyright protection.

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3.2.2 Visual depiction of location in tourism, film, and advertising
While Sweden’s implementation of freedom of panorama includes commercial uses that take place offline, such as books, calendars, and postcards, other states such as France and Italy prohibit such commercial uses. As we can see from the case Buren et Drevet v. Lyon, even postcards are too small a cause for complaint by architects; they can see from the panorama to communicate geographical setting and history of a state, this becomes somewhat problematic.

For example, in 2015 a French court ruled that beer fountains at the Christ the Redeemer statue in Brazil, and the Château de Chambord, could not even be used as shared photos.

As commentators have noted, the sharing of information generally (as was noted by the Advocate General of the European Court of Human Rights in the case Buren et Drevet v. Lyon [2015, Brussels: European Parliament) 18. This is because architecture plays a far more central role in society. And in assessing the justification of copyright law, it is submitted that maintaining a commercial/non-commercial distinction in individual Member States, or implementing this distinction in wider European copyright law, would absolutely fail to strike an appropriate balance between the interests of right holders and those of the public.

3.2.4 The encroaching appropriation of public visual space
Indeed, prohibiting even explicitly commercial uses of copyrighted works does not go far enough to protect the interests of the public in a fair and balanced way. 

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

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

3.2.3 The difficulty of defining “commercial uses” in the digital economy
The reality of the internet in 2018 is that most online platforms - a technological basis for delivering or aggregating services/content (in digital format) - are commercial. Revenue may be derived from direct payment, advertising, the sale of end-user data, or acquisition.

As was noted in a report for the Committee on Economic and Monetary Affairs, the digital economy is increasingly intertwined with the offline economy, with some components basing their business model entirely around user-generated content such as shared photos. In the context of the internet, therefore, the distinction between commercial and non-commercial may result in a wide range of behaviours falling afoul of copyright law. Particularly in the context of MOOCs, this may inhibit socially useful activities and prevent further innovations in online education.

As we can see from the example above, sharing taking place in jurisdictions which have not extended the panorama exception to cover ‘commercial’ protected works may be infringing copyright law, particularly considering the undeniably profit-focused nature of widely used social media platforms.

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4. A PROPOSAL FOR HARMONISATION

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

4.1 Effects of an non-harmonised panorama exception

A central aim of the European Union is the establishment of the internal market - an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured.110 In pursuance of this aim, the creation of uniform rules throughout the Union, and thereby the fostering of legal certainty, transparency, and predictability, has been key.111 The Infosoc Directive is clear in its emphasis on the need for legal certainty in copyright and related rights that can be understood by all EU citizens.112 The European Parliament has “a duty to promote a clear legal framework for all citizens”.113

Indeed, in the European Commission’s report on the public consultation on the panorama exception, it is clear that, whether or not an individual personally experiences problems in uploading potentially copyrighted images of architectural works, there is uncertainty as to whether their actions are legal or illegal.114 While this issue of legal certainty can only be totally remedied with full harmonisation of copyright law, such as through a single European copyright title or a full list of mandatory exceptions, this is not currently on the horizon.115 The Commission has stated that an “incremental approach is required to slowly take the European Union closer to full harmonisation.”116

4.1.1 Digital Single Market Strategy

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

- access to digital goods and services, creating an environment for the flourishing of digital networks and services, and maximising the growth potential of the digital economy - the Copyright Society of the United Kingdom, it is important that copyright law allows educational establishments to take advantage of new technology to educate pupils regardless of their education.118 Indeed, as this report notes, copyright law that inhibits online educational uses has the potential to disadvantage disabled students or others who are unable to attend classes on campus.

Turning to the second and third of the three pillars – creating an environment for the flourishing of digital networks and services, and maximising the growth potential of the digital economy – the current state of the panorama exception also conflicts with this. If online educational initiatives are at risk of infringing copyright law if they utilise online third party platforms, this introduces the possibility that platforms may be selected to be used for these initiatives not based on ease of use, quality, or the existence of new and desirable platform features, but on their non-commercial nature. This has clear potential to inhibit innovation in digital education, particularly as digital uses almost always carry the potential for revenue raising.119 One obvious example of how restrictive freedom of panorama has inhibited the flourishing of digital networks and services can be found in BUS v Wikimedia, in which private interests were explicitly privileged over the public interest in an online database facilitating dissemination of knowledge.120 This problem is worsened by the lack of legal certainty arising from a non-harmonised copyright law. The risk of falling afoul of copyright law and having to potentially pay compensation to right holders may also present the possibility of copyright law inhibiting protected architectural works, particularly when one considers that a European citizen may be subject to a range of legal norms of varying familiarity when operating online.

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

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112 Recitals 4, 6 and 7.
114 College of Europe (2017) 15.
116 College of Europe (2017) 15; See also Chapter 4.2.1.
119 College of Europe (2017) 15.
126 College of Europe (2017) 15.
127 College of Europe (2017) 15.
128 College of Europe (2017) 15; See also Chapter 4.2.1.
129 Ibid.
130 Ibid.
131 Ibid.
4.1.1.2 Changing consumer behaviour

The need for harmonisation is particularly strong when we consider the gap between social norms and legal reality that has been exposed by the rise of the digital society.131 It is particularly clear that the interests of right holders are to be afforded a high standard of protection. The report on the public consultation on the panorama exception revealed that visual artists and collective managers expressed concern that the mandatory panorama exception as having the potential to deprive them of substantial revenues.132 They argue that those who contribute to the embellishment of European cities should be able to be remunerated for the public display of their works.133 Concerns have also been raised as to what it could mean to shift copyright law away from this high level of protection. One director of a Belgian collective society expressed concern that a mandatory panorama exception could act as the first step on a path to generally weakened copyright protection – “the next step will be to get the right of reproduction of music and films. You will see: by now pressing the freedom of panorama, they will want more.”134 While digital technology may have changed consumer’s expectations regarding the ability to access information, this expectation might, from the perspective of some, have little respect for the copyright system as a whole.

As Westkamp notes, across all fields of EU harmonisation, the principle of freedom of panorama is the most contested issue.135 Several current Member States and the public consider too restrictive. Additionally, a 2015 report on the panorama exception in European law can be viewed as one such example of where cultural differences have been taken into account. Member States with a strongly public ‘interest’ oriented approach to copyright law, or with a history of the panorama exception in general, have implemented the optional exception to its fullest extent.136 On the other hand, Member States with a tradition of protecting the rights of authors, or with a particularly strong economic interest in preserving cultural heritage, have limited their implementations of the exception.

The existence of optional exceptions to copyright law in the Infosoc Directive can be taken as clear evidence that legislative diversity is still valued in the EU. The EU is designed as a union of nation-states – while the aim is to harmonise copyright law as much as possible, the law has maintained a margin of appreciation within which Member States can adapt the laws to suit their own legislative traditions. Additionally, in recent political events such as the financial crisis, the migrant crisis, and Brexit, Rahmatian argues that the EU should be cautious about harmonising European law to a too great extent.137 Though opinions on the EU are generally favourable, one 2017 report shows that a median of 55% across nine Member States support a national referendum on their country’s EU membership.138 Insisting on one particular law, with no room for national variations, may carry the risk of EU citizens identifying less with the EU legal system.139 This being said, it is not clear that opinion is particularly divided on freedom of panorama, even among legislators.140 In the words of Commission Günther Oettinger, “25 or 26 EU nations” were in favour of freedom of panorama, with France being the only Member State to oppose it.

Another point to note in any argument for a mandatory panorama exception is that, while European copyright law does require a balance between private and public interests, it is not always clear that the interests of right holders are to be afforded a high standard of protection. The report on the public consultation on the panorama exception revealed that visual artists and collective managers expressed concern that the mandatory panorama exception as having the potential to deprive them of substantial revenues. They argue that those who contribute to the embellishment of European cities should be able to be remunerated for the public display of their works. Concerns have also been raised as to what it could mean to shift copyright law away from this high level of protection. One director of a Belgian collective society expressed concern that a mandatory panorama exception could act as the first step on a path to generally weakened copyright protection – “the next step will be to get the right of reproduction of music and films. You will see: by now pressing the freedom of panorama, they will want more.” While digital technology may have changed consumer’s expectations regarding the ability to access information, this expectation might, from the perspective of some, have little respect for the copyright system as a whole.

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4.3.1 Certain special cases

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

4.3.2 Not in conflict with normal exploitation of the work

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

The three-step test was created before the digital world was even conceived of. As Westkamp notes, the test is intended as a way to prevent exceptions to copyright protection from eroding existing markets, and to prevent future uses that may reduce the commercial value of the copyrighted work. While the three-step test operates to ‘reserve’ markets for existing operators, this may be counterproductive in reproducing copyrighted works to be privileged above the expectations of the author.

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

5. CONCLUSION

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

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

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

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

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

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

Indeed, a mandatory full panorama exception is a necessary step towards the adaptation of European copyright law to the new realities of the digital revolution, such as changing behaviours among European citizens on the internet.

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

By Astrid Wilson Roldão

Case Note

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

1. INTRODUCTION

In the summer of 2018, the Court of Justice of the European Union (“CJEU”) ruled in two interesting, and rather different, trade mark cases. The question of whether or not Louboutin’s iconic red sole could be the subject of trade mark protection was at least partly answered by the CJEU in a preliminary ruling on the 16th of June. Just over a month later, on the 25th of July, the CJEU passed its ruling in the “Kit Kat” case, bringing this chocolate bar battle to an end.1

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

2 LOUBOUTIN

In the case of Louboutin’s red sole, the District Court of the Hague (Rechtbank Den Haag) requested a preliminary ruling during the infringement proceedings between, on the one hand, Mr Christian Louboutin and Christian Louboutin SAS (hereinafter together “Louboutin”) and on the other, Van Haren Schoenen BV (“Van Haren”). The case before the referring court concerned Van Haren’s sale of shoes with red soles which, according to Louboutin, infringed the trade mark that had been registered in 2010 (pictured below). The trade mark owned by Mr Christian Louboutin was registered as a Benelux trade mark and was described in the application as a mark consisting of the colour red (Pantone 18-1663TP) applied to the sole of a shoe. Moreover, it was stated that the contour of the shoe was not part of the trade mark, but was intended to show the positioning of the mark.

Van Haren responded by claiming that Louboutin’s trade mark was invalid on the basis of Article 2(6) of the Benelux Convention. In the main proceedings, the question thus arose whether or not the exception set out in Article 3(1)(e)(iii) of Directive 2008/95 was applicable to the mark – a mark consisting exclusively of the shape which gives substantial value to the goods shall be a ground of refusal. The referring court pointed to the fact that the trade mark in question consists of a colour applied to the sole of a shoe and that it is thus an element of the product.

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

3 KITKAT

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

In 2011, the Cancellation Division of EUIPO declared the trade mark invalid on the basis that it was devoid of inherent distinctive character. This decision was however annulled by the Board of Appeal who argued that Nestlé had shown that the trade mark had acquired distinctive character in accordance with Article 7(3) of Regulation No 207/2009.2

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

The General Court thus annulled the decision of the Board of Appeal in its entirety. Both Nestlé and Mondelez, as well as EUIPO, appealed against the judgment.

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

4 BALANCING TWO DIFFERENT SETS OF RULES WITHIN THE TRADEMARK FRAMEWORK

In the Louboutin case, the CJEU noted that, while the shape of the product “plays a role in creating an outline for the colour”3, a sign is not a shape when registration is not sought for the shape itself but, rather, for the protection of the colour of a specific part of the product. The CJEU further explained that when the main element of a sign is a specific colour, the sign “cannot be regarded as consisting ‘exclusively’ of a shape.”4 Following this, the CJEU answered the question posed by the referring court by concluding that Article 3(1)(e)(iii) of Directive 2008/95 must be interpreted as meaning that a sign consisting of a colour applied to the sole of a high-heeled shoe, such as that at issue in the main proceedings, does not consist exclusively of a ‘shape’, within the meaning of that provision.5

In the KitKat case, the CJEU came to the conclusion that evidence must be provided that the trade mark has acquired distinctive character through use in the part of the EU where it lacked inherent distinctiveness.6 It is thus not sufficient to show that the trade mark has acquired distinctive character in a significant part of the EU. However, the CJEU also stated that “it is not inconceivable that the evidence provided to establish that a particular sign has acquired distinctive character through use is relevant with regard to several Member States, or even to the whole of the European Union.”7 Hence, it is not necessary to establish evidence in respect of each member state if the evidence submitted is “capable of establishing such acquisition throughout the Member States of the European Union.”8

Case Note

1 This case commentary was written during the author’s 2018 LL.M placement at Vinge Law Firm in Stockholm, after rapid and discussion with Jon Dr. Richard Wessman, lawyer at Vinge.

2 C-163/16 para. 24.

3 C-163/16 para. 26.

4 Joint cases C-163/16 P, C-82/17 P and C-95/17 P, para. 79.

5 Joint cases C-163/16 P, C-82/17 P and C-95/17 P, para. 80.

6 Joint cases C-163/16 P, C-82/17 P and C-95/17 P, para. 83.

7 Joint cases C-163/16 P, C-82/17 P and C-95/17 P, para. 84.

8 Joint cases C-163/16 P, C-82/17 P and C-95/17 P, para. 78.

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Parody in European copyright law and the two sides of the coin
By Ana-Maria Barbu

ABSTRACT
The purpose of this article is to examine the complexity of the concept of parody from dual perspectives, namely as a copyright defence provided by the InfoSoc Directive in Article 5(3)(k) and as a manifestation of the freedom of expression which is guaranteed by the Charter in Article 11. Mainly, the research identifies if there is a justified need of the European legislator for intervention on the current provisions that concern the European treatment of parody and examines whether the Commission’s Digital Single Market intervention is an adequate step forward to modernizing the EU copyright framework.

1. INTRODUCTION

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

The outcome of this approach has been criticized by some critics, who have stated that “the effect is of rough harmonization only”. Particularly, some scholar voices considered that the optional nature of the list in Article 5(3) converted the InfoSoc Directive into a total failure regarding harmonization. Perhaps not coincidentally, AG Verica Turenjak referred to the InfoSoc Directive as being a compromise that takes into account the different legal traditions and legal views in the Member States of the European Union, including in particular the common law and the continental European concept of copyright protection. Far from being subjective, it is noticeable that the InfoSoc Directive is sometimes contradictorily when it deals with the exceptions and limitations provided to the copyright protection. Naturally, existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced given the further development of transborder exploitation of works and cross-border activities. As the EU legislator stated, Article 5(3) InfoSoc takes due account of the different legal traditions in the Member States while, at the same time, aims to ensure a functioning internal application of these exceptions and limitations.

The history of copyright is a complex and rich subject, considering the role that copyright law plays in shaping the notion of authorship, or the impact that copyright has on particular cultural practices. While it is understandable that lobby groups use or abuse the various justifications to further their ends, more problems arise when people begin to believe the rhetoric and assume that copyright law is determined and shaped by these philosophical ideas. It is a fact that one of the currencies of the social world is the entertainment content people spread via the Internet, often as mimicry or for humorous purposes, concepts, catchphrases and pieces of media also known as Internet memes. From a copyright protection perspective, these works may raise debates that acquire primarily the assessment of whether a parody defence can be used in justifying their creation.

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

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

1.2 Exceptions and Limitations to Copyright in the InfoSoc Directive

From an EU law perspective, the copyright protection is concerned with the production and availability of information and creative content for the benefit of society: Modern digital applications such as blogs, podcasts, video, and video sharing, enabled users to become active actors in the process of content creation and knowledge dissemination. Article 5(3) of the InfoSoc Directive sets out that “the exceptions and limitations provided for in para- graphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder.”

While the text expressly refers to “limitations” and “exceptions”, it is fair to consider that in practice the meanings overlap. While the text expressly refers to “limitations” and “exceptions”, it is fair to consider that in practice the meaning of these two terms is not clear in practice. In particular, the need of the utilitarian approach of the common law is that the term “exception” is preferred in the continental systems of law.

The common law copyright model is said to be primarily concerned with encouraging the production of new works. In contrast, the civil law Droit d’auteur model is said to be more concerned with the natural rights of authors in their creations. This is reflected in the fact that the civil law model not only aims to secure the author’s economic interests but also aims to protect works against uses that are prejudicial to an author’s spiritual interests, through moral rights.

1.3 What is a Parody Under the InfoSoc Directive?

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

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

1.3.1 Definition of Parody as an EU Autonomous Concept

The InfoSoc Directive does not define the term “parody” and it does not include an express reference to the national law instruments of the Member States for this purpose. In this regard, the CJEU stated in its Padawan judgement that: “[A]ccording to settled case-law, the need for a uniform application of European Union law and the principle of equality requires that the terms of a provision of European Union law which makes no express reference to the law of the Member States for determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the objective of the relevant legislation.”

17. Idem, pg. 164.
The disputed work

The analysis issued by AG Cruz Villalón in the Deckmyn case, when asked by the national judge to assess its nature and meaning under the facultative exception of InfoSoc, this decision is topical in the EU debate on copyright exceptions and limitations in Article 5 of the InfoSoc Directive, as well as in the discourse around activism – rather than mere activity – of the CJEU in this area of the law. The Court clarified that the term must be regarded as an autonomous concept and interpreted uniformly throughout the EU as:

“[M]eaning that the essential characteristics of parody, are, first, to evoke an existing work, while being noticeably different from it; and, secondly, to constitute an expression of humour or mockery. The concept of ‘parody’, within the meaning of that provision, is not subject to the conditions that the parody should deploy an original character of its own, other than that of displaying noticable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; that it should be directed to the original work itself or mention the source of the parody.”[20]

1.3.2 Structural and Functional Features of the Parody

The analysis issued by AG Cruz Villalón in the Deckmyn case begins with the reminder that any EU law concept must be interpreted by considering the usual meaning of the terms of the provision in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part. He assumed that it might be difficult in a specific case to assign work to caricature, parody or pastiche when these concepts are not in competition with one another. All these concepts have the same effect of derogating from the copyright of the author of the original work, which in one way or another is present in the derived work. The AG believed that it is not necessary to distinguish between these concepts since they are all aimed at setting an exception to the copyright protection.[21]

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

As regards to its structural dimension, a parody must strike a certain balance between elements of imitation and elements of originality, on the basis that the inclusion of unoriginal elements, in fact, corresponds to the intended effect of the parody.[22] The opinion of the AG is fundamentally grounded in the fact that a parody is a dualistic concept:

“To a greater or lesser extent, a parody is always a copy, for it is a work that is never completely original. On the contrary, a parody borrows elements from a previous work (regardless of whether or not that work is, in turn, entirely original), and in fact the AG did not provide further comments on the comic requirement of a parody, limiting himself just to state that the national courts have broad discretion when it comes to determining whether the work in question has the status of a parody.”

Some commentators have found the Opinion sometimes confusing and contrary, as a matter of principle, these borrowed elements are not secondary or dispensable but are, rather, essential to the meaning of the work, as there will be occasion to see. The earlier work, some of whose characteristics are copied, must at the same time be “recognizable” to the public at which the parody is directed. That is also a premise of a parody of an author’s work. In that connection, a parody always entails an element of tribute to, or acknowledgment of, the original work. (...) In addition, a parody is, naturally, always a creation. The alteration to some degree of the original work is part of the genius of the author of the parody. In short, it is the latter, who, ultimately, has the most interest in that no confusion should arise between "his" parody and the original, even if he is the author of both.”[23]

Although relevant for an abstract interpretation of the concept, this distinction does not provide enough instructions on how to practically assess the creativity requirement of a parody. The AG only concluded that it is for the Member States in which the exception provided by Article 5(3)(k) InfoSoc has been implemented to determine whether a parody entails sufficient creative elements about the parodied work or whether it is little more than a copy with insignificant alterations.[24]

The AG also explained the functional feature of the parody, by distinguishing between “parody of” i.e. when the intention of the parody is directed at or concerned with the original work, and “parody with” i.e. when the intention of the parody is directed at a third-party, individual or object, by using the original work. In his analysis, he noticed that criticism of customs, social criticism and political criticism have also, from time immemorial and clearly for conveying a message effectively, made use of the privileged medium entailing the alteration of a pre-existing work, which is sufficiently recognizable to the public at which that criticism is directed.[25] The CJEU did not, however, refer in their decision to this category breakdown.

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

“It is that – so to speak – a selective reception that must of itself have a particular effect on the addresses, at the risk of being a complete failure.”[26]

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

“[H]olders of rights have, in principle, a legitimate inte- rest in ensuring that the work protected by copyright is not associated with such a message” (a.n. discrimination based on race, colour and ethnic origin).[27]

The CJEU clarified though that a parody that is discriminatory might not rely on the parody exception as this would not constitute a fair balance of the rights of the author of the original work compared with the freedom of expression of the person creating the parody.[28]

2. PARODY IN THE LIGHT OF FUNDAMENTAL RIGHTS

There are authors who believe that intellectual property rights can create scarcity in some types of expression when copyright owners can entirely suppress some forms of speech by seeking injunctions against those who want to express themselves using unauthorized uses of copy-right-protected material.[29] This situation is likely to happen in legal systems where the parody exception is not implemented, or when it can be counter-claimed on the grounds of moral rights.

The Charter regards intellectual property and freedom of expression as human rights of equal importance, as both are protected under Article 17(1), respectively Article 11. As a result, whenever there is a potential conflict between copyright and freedom of expression, the balance between these two rights must be achieved. Torremans considers human rights law as the intellectual property’s new frontier.[30] The author is not surprised that the European Court of Human Rights (ECtHR) did not develop a case law on the conflict between the copyright and the freedom of expression, believing that there is enough room for individuals to express themselves freely by taking the ideas or non-original expressions or even the protected expressions of one’s work, by exercising an exception if the work has fallen in the public domain.[31]

The first case ever heard by the ECtHR on this issue was in 2013, when the Court explained that a conviction based on copyright law for illegally reproducing or publicly communicating copyright protected material could be regarded as a violation of the freedom of expression and information under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such interference must be by the three conditions enshrined in the second paragraph of Article 10 of the Convention. This means that a sanction based on copyright law, restricting a person’s freedom of expression, must be pertinently motivated as being necessary for a democratic society, apart from being prescribed by law and pursuing a legitimate aim.[32]
2.1 The ECHR’s View on Copyright and Freedom of Expression

According to Article 2 TFEU:

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

Further on, Article 52(3) of the Charter is aligned to at least the threshold of protection guaranteed by the Convention, whenever the right corresponds to both instruments. This compatibility has been recently confirmed by the practice of the CJEU and ECHR. The Charter has a strong influence on the interpretation of legislation by the CJEU, particularly with its reference to the principle that intellectual property shall be protected. It is clear from the European provisions that in addition to constitutional protection under Member States’ domestic laws, copyright, as an integral part of intellectual property, enjoys protection under the umbrella of human rights guaranteed by the Convention. In Scarlet Extended v SABAM, the CJEU reminded that in the context of measures adopted to protect copyright holders, national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures.46

The Court considers that an injunction to install the contested filtering system is to be regarded as not respecting the requirement that a fair balance be struck between, on the one hand, the protection of the intellectual-property right enjoyed by copyright holders, and, on the other hand, that of the fundamental rights of that Internet Service Provider’s (ISP’s) customers, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Articles 8 and 13 of the Charter respectively.47

Some authors believe that in cases of parody, intellectual property shall be protected.48 Particularly with its reference to the principle that intellectual property enjoys protection under the umbrella of human rights, the Convention is relevant for our topic as the ECtHR reminds of the need to protect the fundamental rights that might lead the Contracting States to restrict other rights or freedoms also enshrined in the Convention which becomes a challenge to the national authorities to balance these potentially conflicting interests between two rights.49

Following Ashby Donald, the ECHR examined a new application that raised the question whether the information by sharing copyright protected material, in the case of The Pirate Bay. In examining the case, the ECHR took into account various factors, for example, the nature of the competing interests involved and the degree to which those interests require protection in the circumstances of the case, and concluded:

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

2.1.1 Freedom of Expression as a Human Right

The tensions between copyright law and the freedom of expression were examined by the ECHR in the case of Ashby Donald and others v France.50 When they reiterated that the freedom of expression guaranteed as Article 10 of the Convention is intended to apply to communication using the Internet, whatever the type of message is intended to convey and even when it is the fact of creation.51 This case is relevant for our topic as the ECHR reminds the Member States that freedom of expression is one of the essential foundations of a democratic society, one of the essential conditions for its progress and the fulfilment of everyone and it should be restricted only in situations that imply a so-called ‘pressing social need’, i.e. when the restriction is prescribed by law, pursues a legitimate aim and is necessary for a democratic society.52

The interpretation of the Court is far from meaning that freedom of expression is an absolute right, as this Decision restates that the need to protect the fundamental rights might lead the Contracting States to restrict other rights or freedoms also enshrined in the Convention which becomes a challenge to the national authorities to balance these potentially conflicting interests between two rights.53

Following Ashby Donald, the ECHR examined a new application, that raised the question whether the requirement that a fair balance be struck between, on the one hand, the protection of the copyright-related rights enjoyed by copyright holders, and, on the other hand, that of the fundamental rights of that Internet Service Provider’s (ISP’s) customers, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Articles 8 and 13 of the Charter respectively.54

Some authors believe that in cases of parody, interferences with the right of freedom of expression and information, based on copyright law, will need to undergo a more-careful balancing test between the two fundamental rights.55

2.1.2 Copyright as a Human Right

Copyright, as a dimension of the right to property, is recognized as a human right for two reasons: firstly, because it is “property” and property in turn seen as human right,56 and, secondly, according to a René Cassin, a Nobel Peace Prize winner and principal author of the Universal Declaration of Human Rights, because “[h]uman beings can claim rights by the fact of their creation” .57

The case law of the ECHR explains that the word “possession” as used in the Convention Article 1 Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as “property rights,” and thus as “possession” for this provision.58 The issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, confer on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1.59

In conclusion, although the EU attempted to harmonise substantive law in the area of restrictions to copyright, the choice to provide to the Member States a list of non-man- datory exceptions under the umbrella of Article 5(3) InfoSoc appears to be unfortunate. This article has highlighted that ambiguities have arisen in respect, first, of the definition of the concept of “parody” itself. Since explanations on the preparatory acts of the InfoSoc, the Member States were left with a significant margin of appreciation and interpretation.60

Secondly, the CJEU when called upon to interpret Article 5(3)(k) InfoSoc, while providing guidance in defining parody, left room for debates on more issues related to the compatibility of the purpose of the parody as provided by InfoSoc. Both the CJEU and ECHR agree that neither copyright nor freedom of expression are absolute rights and remind constantly that both are human rights of equal importance. The EU Courts highlight the obligation of Member States, through national provisions as well as their interpretation and application issued by national judges, of achieving a balance between them in case of conflict. In the light of this voluntary copyright framework, parody is at this moment an exception to the rule of requesting permission from the author to use the initial work. As freedom of expression, parody can be viewed as a dimension of free speech. The EU legislation could perhaps reflect on the modern mechanisms of communication, especially through social media platforms, as well as the new forms of entertainment online and to transform Article 5(3)(k) InfoSoc in a mandatory exception. It is doubted that such a measure could have any negative impact, as long as such a provision would not disrupt the balance desired between the interests of right-holders and parodists.

3. PARODY IN NATIONAL SYSTEMS

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

Comparative research provides important insight related to the choice of the EU legislature regarding the non-mandatory character of the parody exception as allowing the Member States to adopt individual approaches developed by the particular social and political contexts. More than illustrating the equivalence and validity of different approaches and heighten an understanding and respect for them,61 the objective of this section is to identify better solutions for modernising the EU system.

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

The remarkable difference in the national regulation of copyright limitations becomes understandable in the light of the theoretical groundwork underlying common law and civil law copyright systems. The fair use approach can be traced back to the utilitarian foundation of the Anglo-Saxon copyright tradition that perceives copyright as a prerogative granted to enhance the overall welfare of society by ensuring a sufficient supply of knowledge and information.62 Professor Graeme Dinwoodie remembers that this theoretical basis only justifies rights strong enough to induce the desired production of intellectual works. Therefore, the exclusive rights of the authors deserve individual positive legal enactment. Those forms of use that need not be reserved for the right owner to provide the necessary incentive remain free. Otherwise, rights would be awarded that are unnecessary to achieve the goals of the system. In sum, exclusive rights are thus delineated precisely, while their limitation can be regulated flexibly in open-ended provisions, such as fair use. Oversimplifying the theoretical model underlying common law copyright, it might be said that freedom of use is the rule, rights are the exception.63

Dinwoodie looks back into the history of copyright law and notices that the opposite constellation where rights are the rule, follows from the natural law underpinning of continental Duitse d’al. In the natural law theory, the author occupies centre stage as his work is perceived as a personal possession by the particular social and political contexts. More than illustrating the equivalence and validity of different approaches and heighten an understanding and respect for them, the objective of this section is to identify better solutions for modernising the EU system.
3.1 The UK Approach
At the time of implementing the InfoSoc Directive into its legal system, the UK Government took the view that relevant copyright exceptions already complied with Article 5(3) – somehow reticent to the possibilities offered by the European provision, the UK, therefore, adopted a narrow list of exceptions to copyright (education, disabilities, libraries and archives, public administration).

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

However, the numerous legal disputes on the matter demonstrate that many of the British authors of parody were not discouraged by this lack of legal protection. In this context, it was worth mentioning the original poster for the movie Curry on Cleopatra, that was withdrawn from circulation after 20th Century Fox successfully brought a copyright infringement claim. The UK court found that the design was based on a painting by Howard Terpning for which Fox owned the copyright and was used to promote the 1965 Cleopatra film.

The provision seems clear about the conditions that should be respected cumulatively by a parody for it to be protected by the new national law: the use of the initial work must be fair, and the purpose of the use must be a caricature, parody or pastiche. The UK law does not provide a specific provision related to the purpose of the work in the CDPA, which could be explained by the idea that it is akin to the UK concept of fair dealing. Although using a minimalistic wording (e.g. without including references to the parodied work being published and receiving enough acknowledgement), Section 30A includes the reference to the need for a fair dealing with the original work, so to minimize the potential harm to relevant copyright owners. In spite of a lack of case-law on this matter, the Guidance released by the UK Intellectual Property Office explains that under the new provision a comedian may use a few lines from a film or song for a parody sketch, a cartoonist may represent a well-known artwork or illustration for a caricature, an artist may use small fragments from a range of films to compose a larger pastiche artwork.57

How could one assess if that dealing is fair? Fairness is primarily a British concept. Authors have placed the concept under a situation when a person has made use of someone else’s work, in the absence of a transaction between parties.58 Despite being an old concept, fairness can be an elusive one, particularly as there is no statutory criteria or definition and has not been tested about parody. The concept of fairness appears as a multifactorial test, in contrast with the 5(3).

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

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

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

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

Another factor that influences the decision as to whether a dealing is fair relates to the impact and the commercial success that the dealing is probable to have on the market for the initial work.64 In this sense, the UK case law has decided that “a dealing by a person with a commercial profit-protected work for his commercial advantage – and to the actual or potential commercial disadvantage of the copyright owner – is not to be regarded as a fair dealing, unless there is some overriding element of public advantage which justifies the subordination of the rights of the copyright owner.”65

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

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

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

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

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

3.2 The Romanian Approach
The Romanian copyright system should be understood as descending from the French intellectual property doctrine which states that: “The right to respect the work can be considered as a corollary of the right of disclosure, in the sense that the author would not have disclosed his work to the public if he knew in advance that his work would be abusively deformed.”68

The Romanian legislator embraced the views of some French authors who even believed that the respect for the authorship of the work and its author “constitutes the personality in the form of his expression in the creation and the communication to the public of the work, just as the author wanted it to be.”69

Law No. 8 of 10 March 1996 on Copyright and related rights provides the exception of parody in Chapter VI, under Article 35(b): The transformation of a work without the author’s consent and without payment of remuneration is allowed in the following situations: (...) b) if the result of the transformation is a parody or a caricature, provided that the result does not create confusion as to the original work and its author;” An analysis of this provision illustrates the need for a clear delimitation between the work and the author of the original work and the author of the derivative work must be applied, contrary to the violation of the paternity of the work. The exceptions to copyright are filtered by the Romanian legislator through the tripe-step test, as a complementary tool to the requirements of the closed list of limitations. In practice, the Romanian courts have generally used the tripe-step test as a supplementary test to confirm the application of the exceptions and limitations provided by Articles 33 and 34 of the Romanian Copyright Law. The High Court of Justice settled this matter explaining that the exceptions to copyright protection under the Romanian Law are:

“(...) subject to multiple conditions, such use being allowed in all circumstances. (...) These conditions are the following: that the work was made public before-hand, and that the use be one in accordance with good practice, does not affect the normal exploitation of the work and does not prejudice the author or the holders of the exploitation rights.”70
The Romanian copyright law recognizes freedom of expression. However, the economic justifications for the implementation of such exceptions and, even more, for properly delimiting their scope, have also been addressed in the literature.

Under Article 35(b) one can create a parody provided that the result does not cause confusion with the original work and the author thereof (emphasis intended). The works used by the Romanian legislature in this wording were, for example, the works of Strindberg and Selma Lagerlöf because they were popular abroad, which suddenly made mutual protection of translated works profitable for Swedish publishers.71

Although Sweden reacted with compliance dictated by a law to be accepted as belonging to a common European civilization, as a peripheral part of the old world,72 the national framework on copyright and particularly on parody are rather innovative and anticipate well the fast progress of culture and technology.73

As noted above, within the Swedish copyright system it is a tradition that parodies are lawful even though there is no explicit article dictating this in the law. This is the situation when it comes to the economic and moral rights of the work.74

The preparatory work for the Copyright Act stated that even though a parody is very similar to the original, maybe even containing copied fragments of it, it is still to be seen as an independent work and not an adaptation, due to the different effects of the two.75 Professor Marianne Levin of Stockholm University highlighted that it is however important not to confuse the parody with the original, because then the parody will lose its intended effect.76

3.4 Which Approach is Superior?

To conclude, the fair use approach adopted by the UK has the advantage of flexibility. The courts can broaden and restrict the scope of copyright limitations to safeguard copyrights deliberately balance between exclusive rights and the competing social, cultural and economic needs.77 The UK still has difficulties of adapting to the rapid development of the digital world and continues to have some rigidity, e.g. when it comes to increasing the efficiency of fundamental freedoms defences in national procedures. On the other hand, the Romanian case seems to support the idea that precisely defined exceptions may offer a high degree of legal certainty under the national framework. With a closed catalogue of exceptions and a detailed description of their scope, it becomes foreseeable for Internet users and/or parody authors who forms of use fall under the control of the copyright holder and can serve as a basis for the exploitation of the copyrighted material and which represent an infringement.78

The Swedish system seems to offer the most simple approach of those overlaps - compared to the UK and the Romanian systems, the claims brought in the Swedish courts are to be dealt with in a more efficient manner, with minimum risk of subjectivity manifested by the judges. The Swedish approach could influence in a positive manner the EU legislator’s future copyright reforms, as it supports the idea that the legal protection of parody needs to be adapted to the fast progress of culture and technology.79

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

4.1 The Digital Single Market Strategy

In May 2015 the EU Commission released the Digital Single Market Strategy (DSMS) for Europe that targets the steps to be taken towards reducing differences between national systems and connecting them for generating additional growth in the EU.80 The DSMS is built on three pillars: better access for consumers and businesses to online goods and services across Europe, creating the right conditions for digital networks and services to flourish, and maximizing the growth potential of the European Digital Economy.81

The Romanian copyright law recognizes freedom of expression as one of the groundings of the exceptions and limitations closed list. This is confirmed by the Romanian High Court that has held that in evaluating the exceptions to copyright in light of the purpose for their establishment, it is the immediate and direct purpose that was to be attained by the exception that is to be kept in mind. In a case concerning the reproduction, on a blog, of photographs from calendars made by a business magazine featuring their female employees, for the purpose of a satirical article, it was held by the 4th District Court of Bucharest to fall within the exception provided by Art. 33 bis a, the provision should be rephrased.

Bucharest Court of Appeals, s. IX civ., Decision no. 126/2 February 2016.82

Bucharest Court of Appeals, s. IX civ., Decision no. 126/2 February 2016.

Bucharest Tribunal, s. III civ., Decision no. 125/2 February 2016.83

Bucharest Tribunal, s. III civ., Decision no. 125/2 February 2016.

Bucharest Tribunal, s. III civ., Decision no. 125/2 February 2016.

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

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

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

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

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

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

4.2 The Impact Assessed by the Commission

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

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

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

It is true that the proposed Copyright Directive is described as being consistent with the existing EU copyright legal framework, if regarding the E-Commerce Directive as not being, strictly speaking, a pillar of the copyright legal framework. If regarding the E-Commerce Directive as not being, strictly speaking, a pillar of the copyright legal framework, it has a horizontal approach, which makes it relevant and unambiguous.

44 Idem, pg. 2.

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

4.3 Freedom of Expression Under the Value-gap Proposition

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

“[H]eving improving the bargaining position of authors and performers and the control rightsholders have on the use of their copyright protected content, the proposal will have a positive impact on copyright as a property right, protected under Article 17 of the Charter.”

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

“This impact is a limited effect on the freedom of expression and information, due to the mitigation measures put in place and a balanced approach to the obligations set by the relevant stakeholders.”

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

4.4 Public Debates or the Clash of Internet Titans?

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

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

“Any limitation on the exercise of the rights and free-
doms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and free-
doms of others.”
The Commission observed that, as far as online intermediaries and their role in the process of tracking illegal content concerned, the views of the respondents were divided. While some were generally satisfied with the current framework envisaged by the E-commerce Directive and considered that it does not need changes, other respondents shared the opinion that some measures need to be taken, particularly towards a clarification and guidance of the instrument. A majority of respondents considered that different categories of illegal content require different policy approaches, but again opinions were divided as to whether and what kind of duties should be imposed on intermediaries. “Right holders generally require different policy approaches, but again opinions considered that different categories of illegal content need to be taken, particularly towards a clarification and Directive and considered that it does not need changes.”

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

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

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

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

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

The OpenMedia Campaign was mostly supported by the Internet users, who generally found the existing laws providing a delicate balance between the freedom of expression and legal speech to “inhibit abusive behaviour, not free expression of opinion; protect free speech with largely effective checks and balances to protect individual and corporate rights while allowing a society to discuss, learn, create and expand.” The same respondents viewed sharing content online as a cornerstone of “freedom of speech” that allows users to promote a more informed and inclusive world. Secondly, the respondents of the campaign considered that monitoring actions should be a last-resort mechanism because generally, the intermediaries are not qualified as such and may have a direct impact on their platform’s systems and their inability to detect context, thus potentially unfairly censoring legal speech and expression.”

Nearly all respondents viewed online copyright infringement as a case-per-case assessment, considering that combining all types of illegal content under the same framework would lead to disproportionate measures. It is apparent that Internet users understand the new Digital Service MS measures and the online platforms’ responsibilities towards content uploaded by users are authorized or not, based on data provided by rightholders. The Commission did, however, acknowledge the identification of some types of content, such as bootleg remixes and DJ mixes, or more generally of content that has been transformed or differs significantly from the original content, may be very challenging.”

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

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Nearly all respondents viewed online copyright infringement as a case-per-case assessment, considering that combining all types of illegal content under the same framework would lead to disproportionate measures. It is apparent that Internet users understand the new Digital Service MS measures and the online platforms’ responsibilities towards content uploaded by users are authorized or not, based on data provided by rightholders. The Commission did, however, acknowledge the identification of some types of content, such as bootleg remixes and DJ mixes, or more generally of content that has been transformed or differs significantly from the original content, may be very challenging.”

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

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

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

The OpenMedia Campaign was mostly supported by the Internet users, who generally found the existing laws providing a delicate balance between the freedom of expression and legal speech to “inhibit abusive behaviour, not free expression of opinion; protect free speech with largely effective checks and balances to protect individual and corpo
At this stage of technological development, it should therefore not be accepted too quickly that content recognition technologies solve all problems, as they are not able to take into account context in order to avoid suppressing lawful uses of content. 123

The judgement issued in The Pirate Bay case appears to confirm the view of the new DSMS Copyright Directive, that “it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used thereof.” 124 Until further explanations, this can mean that even if a given platform does qualify for the safe harbour from the E-commerce Directive, it is still subject to injunctive relief. By correlating the Decision of the CJEU with Article 14 DSMS, it would not be unreasonable and incompatible with the EU law to impose to online platforms a duty to take measures even where they fall within the safe harbour.

4.6 Current Negotiations on the Value-gap Proposal

The negotiations on a final version of the proposed Copyright Directive are currently ongoing, with proposals drafted by both the EU Parliament133 and the Council of the European Union. 134 Article 14 of the E-commerce Directive provides a balance of different interests (both of rightholders and intermediaries) and, if applied correctly, already grants protection against infringements committed by ‘false’ hosting providers. As such, a revision of Article 14 of the E-commerce Directive would not serve to expose passive hosting providers to the risk of primary liability for making available copyright works provided by third-party users of their services. The situation could differ in relation to secondary liability, but intervention in this area would mean carrying out an extensive harmonisation effort that – so far – has substantially eluded EU legislation. 135

In relation to the current EU policy discussion of the so-called value gap proposal, the judgment issued in The Pirate Bay reinforces the position of the EU Commission, especially the basic idea that making available, by a hosting provider, third-party uploaded copyright content may fall within the scope of the right of communication to the public. The Court’s reasoning also prompts a reflection as to whether a hosting provider that is primarily responsible for acts of communication to the public is eligible for the safe harbour within Article 14 of Directive 2001/29/EC. 136

Although the rationale underlying the EU Commission’s proposal seems rooted within earlier CJEU case law, the Pirate Bay decision has aligned case law to policy action and might have even gone further than the latter. 137

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

To conclude, the proposed EU system fails under some circumstances to provide detailed guidance on the content of the remedies that can be sought for detecting illegal content uploaded on the Internet. Although the debates around the DSMS are far from over, it is fair to predict that the national courts and lastly the CJEU will be left with the task of filling out these gaps. It appears that there are high risks that the ISPs will track parodies through automatic filtering and find as infringing original works. Under the current legal framework, there could be anticipated an increased threat towards parody treatment online.

5. CONCLUDING REMARKS

The parody exception provided by the InfoSoc Directive has been implemented differently by the Member States, according to various political agendas and was consequently interpreted differently by the national judges. At this point of EU copyright reform, it is easy to assume that an exclusive and absolute right to control information flows constitutes an interference with the freedom of expression and would have a discouraging effect on the authors of parodies, which would contravene with the legal framework of the Member States where the parody exception was implemented. Unundoubtedly, the EU legislator must ensure future balanced measures that respect the framework of parody, where nationally implemented. With this regard, it should be possible to evolve independent monitoring bodies using the combined efforts of private, voluntary and state vehicles, if this work is done transparently, effectively and responsibly. 138

At this moment, the parody exception is implemented or partially implemented in 24 out of 28 Member States (counting the UK, for the time being a full member of the EU with the standing obligations to apply EU law in and to the UK). 139 In this situation, it could be appropriate that the EU legislator reflects on appropriate measures regarding the treatment of the parody works, for reducing and ultimately eliminating the fragmentation of the internal market, as well as ensuring that both IP rights and the freedom of expression enjoy an equivalent level of protection throughout the EU.
You gave us a Treaty. Better still you gave us a good Treaty - one that will change the lives of millions of people.

Maryanne Diamond, President, World Blind Union

ABSTRACT

While there have been numerous measures that have been taken by international institutions, led by the UN, to foster equality, one issue that has received little attention till now has been what scholars have described as the book famine. Statistics show that the number of published books available in formats accessible for the print disabled was less than 5% before 2013. However, 2013 was a landmark year for the Marrakesh Treaty. It was the culmination of this Treaty took a long time. The WIPO-UNESCO report on this issue (The Report of the Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Protected by Copyright, Paris, October 25 to 27, 1982) was discussed nearly four decades ago. Promotion of access to knowledge for the visually impaired persons in print disabilities should have been an uncontroversial issue in light of the principles of non-discrimination, equal opportunity, accessibility and full and effective participation as under the Universal Declaration of Human Rights. However, this step met with various issues related to copyright exceptions and limitations making the entire procedure long and complex.

India was the first nation to ratify the Treaty on June 24, 2014 at the twenty-eighth session of the Standing Committee on the Copyright and Related Rights Act, 2000 in Geneva. On September 30, 2014 the Treaty entered into force by formally gathering 20 nations that acceded the Treaty. The number of members joining the Treaty will increase in the coming years. To remove the barriers to accessibility this Treaty plays a vital role for the visually impaired persons and persons with print disabilities.

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

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

1. INTRODUCTION

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

Frederick Schroeder, President, World Blind Union (WBU)

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

While this Treaty is a huge step forward towards inclusivity, the culmination of this Treaty took a long time. The WIPO-UNESCO report on this issue (The Report of the Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Protected by Copyright, Paris, October 25 to 27, 1982) was discussed nearly four decades ago. Promotion of access to knowledge for the visually impaired persons and persons with print disabilities should have been an uncontroversial issue in light of the principles of non-discrimination, equal opportunity, accessibility and full and effective participation as under the Universal Declaration of Human Rights. However, this step met with various issues related to copyright exceptions and limitations making the entire procedure long and complex. India was the first nation to ratify the Treaty on June 24, 2014 at the twenty-eighth session of the Standing Committee on the Copyright and Related Rights Act, 2000 in Geneva. It took three years for twenty governments to formally join the Treaty so it could enter into force.

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

2. PRIMARY OBJECTIVES

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

The aim of the Treaty is to build a solid foundation to ensure the widespread dissemination of accessible material recognizing that many Member States have established limitations and exceptions in their national copyright laws for persons with visual impairments or with other print disabilities, yet there is a continuing shortage of available works in accessible format copies for such persons.
Article 19 of the International Covenant on Civil and Political Rights protects the freedom of expression, which also includes the freedom to seek, receive and impart information and ideas of all kinds. The Treaty has been conceived in line with this as well as the principles enshrined under the Universal Declaration of Human Rights and the United Nations Convention on the Rights of Persons with Disabilities.

The primary objective underlying this Treaty is the creation of exceptions and limitations in member states’ copyright laws for the creations and sharing of accessible work. The Treaty attempts to increase the availability of accessible works as different countries will be able to exchange such material across borders. As copyright law is territorial, the exemptions will not cover the import and export of the accessible formats. A negotiation must proceed between the right holders to exchange such material across borders.

The Treaty recognizes that though different member states have different exceptions and limitations, a uniform international framework needs to be followed to ensure cross-border exchange of books in an accessible format for the visually impaired persons and persons with print disabilities. It also needs to be ensured that the exceptions within the copyright laws comply with the Three-Step test as laid out in the Berne Convention and later provided in TRIPs Agreement, WTO, etc.

3. BENEFICIARIES

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

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

The Treaty also underlines on the need for social integration and cultural participation of the visually impaired persons. Such is only possible if everyone can avail equal access to knowledge and information.

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

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

4. THE WORKS COVERED UNDER THIS TREATY

Article 2(a) of the Marrakesh Treaty defines “works covered”.

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

The Treaty leaves the specifications of the spectrum of impairments and disabilities to be decided by the nations. It is a hope that all the nations follow a social model of disability and include all those who are in need.

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

5. BENEFICIARIES

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

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

The inclusion of the ‘print disabled’ as a beneficiary has been done to further the objective of non-discrimination and equal opportunity. A print disabled can be anyone who cannot access print due to any form of disability.

The Treaty recognizes the lack of access to the material to the visually disabled and other print handicapped persons.

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The Treaty recognizes the lack of access to the material to the visually disabled and other print handicapped persons.
7. LIMITATIONS AND EXCEPTIONS IN CROSS-BORDER EXCHANGE

Article 4(2) of the Treaty seeks to address the exceptions created by the member states in their national copyright laws. It seeks to enable “authorized entities” to make accessible format copies of works that are lawfully obtained and to disseminate them amongst legally entitled beneficiaries on a not-for-profit basis. Moreover, the Treaty mandates that such copies be shared only with beneficiaries and be made from lawfully obtained copies. Article 5(2) of the Treaty read with Article 6 gives the authorized entities access to the material from the importing country without the prior consent of the copyright owner and such material can be distributed to other authorized entities, beneficiaries in other Contracting Party territories, etc. Article 10 does order that the governments carve exceptions in their copyright laws to ensure that the interests of the authors are not unreasonably prejudiced.

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

1. The accessible works are exclusively distributed to disabled persons; and
2. The limitations and exceptions satisfy the Three-Step Test as laid down in the Berne Convention and later provided in the TRIPs Agreement, WCT, etc.

- The exception or limitation must be a special and limited provision narrowly tailored to its purpose;
- The exception or limitation does not conflict with the normal exploitation of the work; and
- The exception or limitation does not prejudice the legitimate interests of the copyright holder.

Articles 9 to 14 delegate the administrative functions to the International Bureau of the WIPO, which in turn will assist in the facilitation of cross-border exchange of accessible formats of material encouraging the voluntary sharing of information. Moreover, an assembly to manage and develop the Treaty has also been created with each member state having one representative and one vote each.

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

8. BARRIERS TO ACCESS FOR THE VISUALLY IMPAIRED

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

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

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

There are market factors that limit the creativity and distribution of accessible material. Most authors and publishers do not see an economic profit in the market for the visually impaired. The high production costs of the materials make the market for accessible formats unviable. Moreover, due to this, the market is primarily served by not-for-profit, non-governmental and charitable organizations. Such as, due to limited resources the number of accessible works produced and distributed is constrained. Furthermore, the addition of a copyright licensing fee would impose a substantial burden on the already existing constraint.

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

9. THE INTERNATIONAL POSITION

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

Stevie Wonder, Marrakesh, Geneva, June 28, 2013

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

Thus, member states can carry out their responsibilities envisaged under the other treaties without affecting any of the provisions of this Treaty; however, the member states need to comply with their international obligations as specified under the Berne Convention (1886), the WIPO Copyright Treaty (WCT 1996) and the World Trade Organisations’ Trade-Related Aspects of Intellectual Property Rights (TRIPS, 1995).

9.1. THE BRITISH POSITION

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

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

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

However, it is legal to reproduce material only if suitable accessible copies are not commercially available. Organizations that do produce copies of accessible material have a duty to keep records and provide them to the copyright owner of the material.
with the Marrakesh Treaty. This proposal allows benefi-
ciary persons and organizations to make copies of works in
accessible formats, and to disseminate them across the EU
and in third countries party to the Treaty.

A regulation will implement the Union’s obligations under the Marrakesh Treaty with respect to the exchange of accessible format copies for non-commercial purposes between the EU and third countries party to the Treaty. A directive will incorporate the obli-
gations under the Marrakesh Treaty into national domes-
tic legislation. This will ensure an improvement in the availability of accessible format copies for beneficiary persons and their circulation within the internal market.

The regulation and the directive will have to be formally adopted by the European Parliament and the Council. Afterwards, the provisions of the directive will be enacted in each national legislation within a maximum period of 12 months. Following the adoption of a Council decision authorizing the conclusion of the Marrakesh Treaty, the EU will be able to deposit the ratification instruments of the Treaty.

While the EU nations may have a uniform legislation with regards to the Marrakesh Treaty, there is an apparent lack of detail in the EU legislation, as well as some optional pro-
visions, which needs to be advocated against to bring the best possible result for the persons with print disabilities. EBLIDA, IFLA and EIFL, in cooperation with the Euro-
pean Blind Union, are supporting libraries in the EU na-
tions to make the case for a good transposition. When the legislation is fully transposed in domestic law, libraries can then perform the range of services envisaged by the Treaty: the creation and distribution of accessible format copies to people with print disabilities.

9.4. THE CANADIAN POSITION

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

To improve access, the government of Canada amended the Copyright Act in June 2016 with specific provisions on access to copyright works. Bill C-11 introduced three main changes in the copyright act.

First, the bill permits non-profit organizations acting on behalf of persons with a print disability to reproduce copyrighted works (not films or music) in accessible for-

copies to people with print disabilities.

9.3. THE EUROPEAN UNION POSITION

Following its adoption in June 2017 there was a slow start to the ratification process which caused the member sta-
tes to question the legality of ratifying the Treaty. With the Maltese presidency forming an agreement with the Euro-

With the Marrakesh Treaty being the first non-signatory country to accede to the Treaty, there has been a new exception introduced 
which will allow the import and export of accessible format copies to persons with disabilities.

The United States should support the Marrakesh Treaty as this would increase access to the accessible material and its distribution constituted an infringement of the

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

9.6. THE IRANIAN POSITION

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

9.5. THE ISRAELI POSITION

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9.7. THE CHINESE POSITION

China ratified the Convention on the Rights of Per-
sions with Disabilities and also signed the Marrakesh Treaty. China has one of the largest populations of visually impaired people in the world. With the language having several differ-
ent pronunciations and homonyms of the words in local dialects, there are pressing challenges to translations in Braille. However, China has several organizations and even the National Research Center for Sign Language and Braille which has been trying to provide accessible mate-
rial to the blind. While China’s current copyright law has an explicit provision permitting an exception for the crea-
tion of braille formats, in order to comply with the Treaty, a new exception will have to be introduced.

9.8. THE FIJIAN POSITION

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

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

9.2. THE AMERICAN POSITION

The Chafee Amendment created a copyright infringe-
ment exception to make accessible copies more efficient and to expand access to published works for the blind or other persons with disabilities. This Amendment authorized the reproduction and distribution of previously published works and did not require remuneration to be paid to the author. The American copyright law also provides the defense of fair use when the production of accessible ma-
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9.9. THE INDIAN POSITION

In June 2014, India became the first country to ratify the Marrakesh Treaty. In order to comply with the Treaty India had to proceed with an amendment to the Indian Copyright Act. Under Section 52 of the Act, which concerns fair use/fair dealing, there exists an added provision Section 52 (1) (zb) regarding ‘exception with the exceptions’ which would not amount to a copyright infringement. This provision permits the conversion of a work into an accessible format exclusively for the benefit of differently abled people. Although this amendment was introduced much before the Marrakesh Treaty coming into picture, it may have been upheld to be a beacon for other countries during the Marrakesh Conference.

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

The Accessible India Campaign is a benchmark for universal access of accessible material for the visually impaired persons. India has also begun implementation of the Marrakesh Treaty into its domestic laws through a multi-stakeholder approach: collaboration with key players i.e. governmental bodies, authorized entities, etc. This has led to the launch of Sugamya Pustakalya, India’s largest collection of online accessible books with over 200,000 volumes of material. It is hoped that Sugamya Pustakalya will soon become a member of the ABC Book Service, thereby joining an international library-to-library service managed by WIPO in Geneva. Today, as the Marrakesh Treaty sits as a benchmark for social inclusion, India’s multi-stakeholder approach should also be seen as a model for other nations to follow. 69

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

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

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

10. CONCLUSION

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

David Hammerstein, World Blind Union (WBU)

This Treaty may be the first international legal instrument that seeks to address a specific impediment i.e. the issue of book famine for the visually impaired persons. As Professor Justin Hughes notes, this Treaty provides an alternative narrative of how a compromise can be sought between the social purposes of copyright law vis-à-vis safeguarding the interests of the author. Such a balance reaffirms the proposition that the competing interests can be reconciled to ensure that copyright law remains an engine of expression, wealth creation, and cultural renewal. As opposed to the other multilateral intellectual property treaties this is the only Treaty which seeks to limit the scope of copyright protection.

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

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