



universität
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MASTER THESIS

Titel der Master Thesis / Title of the Master's Thesis

**„Comparative Research on the Desirability of Introducing the American Fair Use
Doctrine in European Copyright Law“**

verfasst von / submitted by

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angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of
Master of Laws (LL.M.)

Wien, 2018 / Vienna 2018

Studienkennzahl lt. Studienblatt /
Postgraduate programme code as it appears on
the student record sheet:

A 992 548

Universitätslehrgang lt. Studienblatt /
Postgraduate programme as it appears on
the student record sheet:

Europäisches und Internationales Wirtschaftsrecht /
European and International Business Law

Betreut von / Supervisor:

Prof. Dr. M. Walter

Abstract

Technology and digitization have taken a prominent place in various aspects of our lives: we read books and newspapers online, stream movies and search everything we need to know on the internet with the help from online search engines. It is one of the most significant evolutions of our modern society, and this does not remain without any consequences. This evolution holds, among others, important effects on the legal framework within which these activities are located, of which one of them is copyright law.

Recent legal doctrine and jurisprudence express a cry for more flexibility in the area of copyright law, more specifically with regard to the exceptions and limitations on the exclusive rights of copyright owners, in combination with the Three-Step test. There have been multiple requests for more flexibility in order to adapt the law to this current situation of an information society of highly dynamic and unpredictable change, but a concrete proposal is still left out until today. The purpose of this master thesis is to search for options how to address this problem.

The main source of information for the research of this master thesis forms an extensive review of books, articles and relevant websites regarding current copyright law policy. It thereby takes on a comparative method with the United States, to gain inspiration across the borders of Europe. Furthermore, an extensive research of case law in both Europe and the United States has been conducted, in order to reveal the differences in application by courts of both copyright systems.

The research conducted demonstrates important differences between the United States and Europe when it comes to addressing the issue of copyright law facing new evolutions. Even within Europe the courts of the Member States have striking divergent outcomes when addressing a similar issue. But those differences are not a bad thing per se; there are certainly elements to be found in all those different jurisdictions then can be useful for a common European copyright law development.

Abstract

Technologie und Digitalisierung haben einen prominenten Platz in verschiedenen Bereichen unseres Lebens eingenommen: Wir lesen Bücher und Zeitungen online, streamen Filme und suchen alles, was wir brauchen oder wissen wollen im Internet, mit Hilfe von Online-Suchmaschinen. Es ist eine der bedeutendsten Entwicklungen unserer modernen Gesellschaft, und das bleibt nicht ohne Folgen. Diese Entwicklung hat unter anderem wichtige Auswirkungen auf den rechtlichen Rahmen, in dem diese Aktivitäten angesiedelt sind, darunter auch das Urheberrecht.

Neuere Rechtslehre und Jurisprudenz sprechen sich für mehr Flexibilität im Bereich des Urheberrechts aus, insbesondere im Hinblick auf die Ausnahmen und Beschränkungen der ausschließlichen Rechte der Urheberrechtinhaber in Verbindung mit dem Dreistufentest. Es gab mehrere Anfragen nach erhöhter Flexibilität, um das Recht an die gegenwärtige Situation einer Informationsgesellschaft, die unvorhersehbare Veränderungen unterworfen ist, anzupassen. Aber ein konkreter Vorschlag bleibt bis heute aus. Somit ist das Ziel dieser Masterarbeit Möglichkeiten zu finden um dieses Problem anzugehen.

Die wichtigste Informationsquelle für die Forschung dieser Masterarbeit besteht aus einer umfangreichen Prüfung von Büchern, Artikeln und relevanten Websites zur aktuellen Urheberrechtspolitik. Dabei wird eine vergleichende Methode mit den Vereinigten Staaten angewendet, um sich über die Grenzen Europas hinaus inspirieren zu lassen. Außerdem wurde eine umfassende Forschung der Jurisprudenz sowohl in Europa als auch in den Vereinigten Staaten durchgeführt, um die Unterschiede in der Anwendung beider Urheberrechtssysteme durch die Gerichte aufzudecken.

Die Forschung zeigt wichtige Unterschiede zwischen der Art und Weise, in der die Vereinigten Staaten und Europa Urheberrechtsfragen bei neuen Entwicklungen angehen. Sogar innerhalb Europas haben die Gerichte der Mitgliedstaaten auffallend unterschiedliche Ergebnisse, wenn es um ein ähnliches Thema geht. Aber diese Unterschiede sind an sich nicht prohibitiv. Es gibt sicherlich Elemente in den verschiedenen Rechtsordnungen, die für die gemeinsame Entwicklung des europäischen Urheberrechts nützlich sein können.

Acknowledgements

I would first like to thank my thesis promotor Prof. Dr. Michel WALTER, of the Department of Commercial and Business Law of the University of Vienna. The door to his office was always open whenever I ran into a trouble spot or had a question about my research or writing. She consistently allowed this paper to be my own work, but steered me in the right the direction whenever he thought I needed it.

I would also like to thank Jur. Dr. Maria STURM, research assistant and program manager at the Department of Commercial and Business Law of the University of Vienna. Her seminars formed an essential guidance during the writing of this master thesis. Besides, she was always available to answer all my questions whether thesis-related or not.

Finally, I must express my very profound gratitude to my parents for providing me with unfailing support and continuous encouragement throughout my years of study and through the process of researching and writing this thesis. This accomplishment would not have been possible without them. Thank you.

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List of Abbreviations

CJEU	Court of Justice of the European Union
InfoSoc Directive	Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property Rights
WIPO	World Intellectual Property Organization
WCT	WIPO Copyright Treaty
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

Introduction

1. **DELIMITATION OF THE SUBJECT MATTER** – For reasons of clarity, efficiency and interpretation purposes, it is necessary to define the subject matter of this master thesis more precisely. This master thesis situates within the area of copyright law. The starting point are the privileges granted to copyright owners: exclusive exploitation rights, such as the right of reproduction. But these exploitation rights are not absolute, as the law provides for exemptions. These exemptions are carried out differently in Europe and in the U.S. Whereas Europe knows a rather strict approach with closed lists of exceptions and limitations, accompanied by the Three-Step test, the U.S. know a broad open-ended system with the fair use doctrine. A comparative assessment of these two systems of copyright exemptions forms the main subject matter of this master thesis.
2. **RESEARCH PURPOSES AND METHODS** – Recent case law and studies in Europe agree that the current restrictive system is not maintainable, considering the current situation of an information society of highly dynamic and unpredictable change. There have been multiple requests for more flexibility, but a concrete proposal is still left out until today. As the U.S. system stands for flexibility and adaptability to change, it seems useful to me to compare the European system of copyright exemptions with the U.S. system. The purpose of this master thesis is to weigh these two views against each other, and to find out if it might be possible to transfer the American fair use principle to Europe in some form. Based on a thorough study of legal doctrine and a comparative case study, this thesis aims to formulate a proposal for a more flexible and contemporaneous European approach of copyright exemptions.
3. **CHOICE OF THE COMPARABLE SYSTEMS** – The choice for the comparable system to the European one was not difficult. Both the European system as the U.S. system of copyright exemptions arise from the same basis, but have been carried out differently. It is interesting to examine how a common ground can lead to such different interpretations. Because both systems undoubtedly share some similarities, one can learn from the other in problem areas.
4. **STRUCTURE** – The *first* chapter outlines the general context and forms the starting point for the further chapters of this master thesis. It focuses on the Berne Convention and the rights contained therein, and the concept of exceptions and limitations. The *second and third* chapters describe the two main systems regarding copyright exemptions: the European

system with the Three-Step test and the U.S. system with the fair use doctrine. In these two chapters, attention is given to the statutory bases of both systems, their content, how they emerged and how they are interpreted. The *fourth* chapter then compares, on a theoretical basis, both systems and weighs some of the (in my opinion) most important advantages and disadvantages. The *fifth* chapter carries out a more practical comparison, in the form of a case study. The subject of the case study is based on the specific issue of search engines, such as Google. This chapter demonstrates the striking differences in approach and interpretation by the courts in the two systems, based on the same subject. The *sixth* chapter formulates my personal proposal, based on the conducted study of legal doctrine and cases, as to how to revise and improve the current European system of copyright exemptions. The thesis then closes with a general conclusion.

1. Context of the topic

6. **EUROPEAN APPROACH** – Before focusing deeper on the actual subject of this master thesis, it is necessary to outline briefly the broader context wherein the subject is situated. In the first place this master thesis is written from a European point of view and then compared to American law.

1.1 Starting point: the Berne Convention

7. **THE BASIS OF EUROPEAN COPYRIGHT LAW** –When addressing copyright protection, the Berne Convention immediately comes to mind. Even though it is an international treaty with both European countries and the USA as acceded parties, within the context of this master thesis it is closer to European law as it is to American law. The Berne Convention is the most relevant treaty regarding the topic of this master thesis because of numerous reasons, that will become clear in the following paragraphs.
8. **CONTENT OF THE CONVENTION** – The Berne Convention covers copyright in a strict sense, namely the right of authors to their literary or artistic creations.¹ When it comes to copyright protection, the Convention provides for certain minimum rights that Member States are obliged to grant to the beneficiaries.² Those minimum rights are drawn up in a rather comprehensive range and in a rather detailed kind of way, as can be read in the Convention itself.³ Together with these minimum rights, the Convention also sets forth the conditions under which these rights may or must be limited.⁴ The most prominent example for such limitations and exceptions is the Three-Step-Test, which forms the main subject of this master thesis.⁵
9. **CONTINUATION WITHIN OTHER TREATIES** – As the Berne Convention originates from 1886, it had to be adapted several times to the economic and technical developments, in

¹ A. KUR and T. DREIER, *European Intellectual Property Law: Text, Cases & Materials*, Cheltenham, Edward Elgar Publishing, 2013, 19.

² A. KUR and T. DREIER, *European Intellectual Property Law: Text, Cases & Materials*, Cheltenham, Edward Elgar Publishing, 2013, 19.

³ A. KUR and T. DREIER, *European Intellectual Property Law: Text, Cases & Materials*, Cheltenham, Edward Elgar Publishing, 2013, 20-21.

⁴ A. KUR and T. DREIER, *European Intellectual Property Law: Text, Cases & Materials*, Cheltenham, Edward Elgar Publishing, 2013, 21.

⁵ A. KUR and T. DREIER, *European Intellectual Property Law: Text, Cases & Materials*, Cheltenham, Edward Elgar Publishing, 2013, 21.

order to remain compatible with the relevant legal challenges.⁶ Most international copyright agreements since then have incorporated versions of the original text, and the core content continued to exist, with or without variations (*infra* sector no. 19).⁷

1.2 Exclusive rights

10. **EXCLUSIVE ECONOMIC RIGHTS** – With copyright protection comes a variety of rights to be protected. The most relevant rights within the topic of this master thesis are the so-called economic rights. Exceptions and limitations, who form the main topic of this master thesis, concern mostly economic rights.⁸ The owner of a copyright-protected work may decide how to use the work, and may prevent others from using it without his authorization.⁹ The rights granted under national laws to the owner of copyright in a protected work are normally exclusive rights to authorize a third party to use the work.¹⁰ However, as will become clear hereunder, this does not mean the owner has *carte blanche* to do whatever he wants. He has to respect the legally recognized rights and interests of others.¹¹
11. **TYPES OF ECONOMIC RIGHTS** – All the different types of economic rights are certain acts the author can authorize or prevent in relation to his work.¹² Among the Berne Convention, the author can authorize or prohibit the following acts:
 - Reproduction of the work in various forms;
 - Distribution of copies of the work;
 - Public performance of the work;
 - Broadcasting or other communication of the work to the public;
 - Translation of the work into other languages;

⁶ A. KUR and T. DREIER, *European Intellectual Property Law: Text, Cases & Materials*, Cheltenham, Edward Elgar Publishing, 2013, 24.

⁷ Electronic Frontier Foundation, *The Three-Step Test*, 27 November 2012, 2.

⁸ World Intellectual Property Organization, “Understanding copyright and Related Rights”, *WIPO Publications No. 909(E)* 2016, 15.

⁹ World Intellectual Property Organization, “Understanding copyright and Related Rights”, *WIPO Publications No. 909(E)* 2016, 7; B. FITZGERALD, D. O’BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 3.

¹⁰ World Intellectual Property Organization, “Understanding copyright and Related Rights”, *WIPO Publications No. 909(E)* 2016, 7; B. FITZGERALD, D. O’BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 3.

¹¹ World Intellectual Property Organization, “Understanding copyright and Related Rights”, *WIPO Publications No. 909(E)* 2016, 7.

¹² World Intellectual Property Organization, “Understanding copyright and Related Rights”, *WIPO Publications No. 909(E)* 2016, 10.

- Adaptation of the work.¹³

12. **MORAL RIGHTS** – Besides economic rights, authors are also granted moral rights. Notably 1) the right to claim authorship of a work (sometimes called the right of paternity or the right of attribution), and 2) the right to object to any distortion or modification of a work, or other derogatory action in relation to a work, which would be prejudicial to the author's honour or reputation (sometimes called the right of integrity).¹⁴ Moral rights are independent of the economic rights of the author.¹⁵ These rights are only accorded to individual authors and in many national laws they remain with the authors even after the authors have transferred their economic rights.¹⁶ The significance of moral rights for the subject of this master thesis will be discussed later (*infra* section no. 57).
13. **POINT OF VIEW OF THE RIGHT HOLDER** – Copyright can be commercialised through various means, for example by a license agreement. With this type of agreement, the owner of the copyright grants permission to another person for the use of its intellectual property to another person, within the limits set by the provisions of the contract.¹⁷ This means that in that case, it is not the actual owner (the licensor) who exercises the copyright, but someone else (the licensee).¹⁸ In this master thesis, all the upcoming topics will be addressed from the point of view of any of the right holders of the copyright protection unless indicated otherwise. This means either the original author or another derived right holder.

1.3 Exceptions and limitations

14. **NO ABSOLUTE RIGHTS** – For as long as the economic rights have existed, they have been restricted as well. Already with the creation of the Berne Convention, exceptions and

¹³ World Intellectual Property Organization, "Understanding copyright and Related Rights", *WIPO Publications No. 909(E)* 2016, 10.

¹⁴ World Intellectual Property Organization, "Understanding copyright and Related Rights", *WIPO Publications No. 909(E)* 2016, 14; J. GRIFFITS, "Moral Rights from a Copyright Perspective" in F. BRISON, S. DUSOLLIER, M.-C. JANSSENS and H. VANHEES (eds.), *Moral Rights in the 21st Century*, Brussels, Larcier, 2015, 1-2.

¹⁵ World Intellectual Property Organization, "Understanding copyright and Related Rights", *WIPO Publications No. 909(E)* 2016, 14.

¹⁶ World Intellectual Property Organization, "Understanding copyright and Related Rights", *WIPO Publications No. 909(E)* 2016, 14; J. GRIFFITS, "Moral Rights from a Copyright Perspective" in F. BRISON, S. DUSOLLIER, M.-C. JANSSENS and H. VANHEES (eds.), *Moral Rights in the 21st Century*, Brussels, Larcier, 2015, 1.

¹⁷ European IPR Helpdesk, "Commercialising Intellectual Property: Licence Agreements", *Commercialising IP Fact Sheets* 2015, 2.

¹⁸ European IPR Helpdesk, "Commercialising Intellectual Property: Licence Agreements", *Commercialising IP Fact Sheets* 2015, 2.

limitations from the protection of literary and artistic works have been permitted.¹⁹ From the beginning this was seen as a normal and natural thing.²⁰ Equally the CJEU has already made clear in a number of cases that protecting the right of intellectual property (to be found in article 17(2) of the EU Charter) is not absolute, and a maximalist reading of this provision is to be rejected.²¹

15. **LIMITATIONS VS. EXCEPTIONS** – Some instruments make a distinction between limitations and exceptions. A limitation would then be seen as an exclusion from the rights granted, such as the possibility of quoting in accordance with good practice or making a single copy for private study or research.²² An exception, on the other hand, would be an exclusion from the protected subject matter, such as the possibility of abstaining from protecting statutes, court decisions and other official texts.²³
16. **TYPES OF LIMITATIONS AND EXCEPTIONS** – Different types of limitations and exceptions restrict the copyright protection of the author. First, certain categories of works are excluded from copyright protection, for example if they are not fixed in a tangible form.²⁴ Second, certain particular acts of exploitation that usually require the author's permission may, under circumstances specified in the law be carried out without the owner's permission.²⁵ The two basic types of limitations and exceptions in this second category are 1) exempted use, which carries no obligation to compensate the right owner for the use of the work without permission, and 2) non-voluntary or compulsory licenses, which require compensation to be paid to the right owner for non-authorized exploitation.²⁶ In this within

¹⁹ J. BLOMQVIST, *Primer on International Copyright and Related Rights*, Cheltenham, Edward Elgar Publishing, 2014, 157.

²⁰ J. BLOMQVIST, *Primer on International Copyright and Related Rights*, Cheltenham, Edward Elgar Publishing, 2014, 157.

²¹ CJEU 27 March 2014, *UPC Telekabel Wien*, C-314/12, ECLI:EU:C:2014:192; CJEU 16 February 2012, *SABAM/Netlog*, C-360/10, ECLI:EU:C:2012:85; CJEU 24 November 2011, *Scarlet Extended*, C-70/10, ECLI:EU:C:2011:771; A. METZGER (ed.) on behalf of the European Copyright Society, *Limitations and exceptions as key elements of the legal framework for copyright in the European Union. Opinion on the Judgement of the CJEU in Case C-201/13 Deckmyn*, 1 November 2014, 6.

²² J. BLOMQVIST, *Primer on International Copyright and Related Rights*, Cheltenham, Edward Elgar Publishing, 2014, 157.

²³ J. BLOMQVIST, *Primer on International Copyright and Related Rights*, Cheltenham, Edward Elgar Publishing, 2014, 157.

²⁴ World Intellectual Property Organization, "Understanding copyright and Related Rights", *WIPO Publications No. 909(E)* 2016, 15.

²⁵ World Intellectual Property Organization, "Understanding copyright and Related Rights", *WIPO Publications No. 909(E)* 2016, 15.

²⁶ World Intellectual Property Organization, "Understanding copyright and Related Rights", *WIPO Publications No. 909(E)* 2016, 15.

the context of the free use of copyright protected materials that the Three Step Test comes up.

2. The European Three-Step Test

2.1 Statutory basis

17. **ARTICLE 9(1)** – When the three-step test was mentioned for the first time, it was linked to the right of reproduction. This right of reproduction can be found in article 9(1) of the Berne convention and reads as follows:

“Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.”

18. **ARTICLE 9(2)** – Together with the recognition of a general right of reproduction, the need for a general clause regulating exceptions and limitations came up.²⁷ The countries agreed to the Three-Step test as the compromise solution instead of a finite list of specific, named exceptions.²⁸ This test can be found in article 9(2) of the Berne Convention and reads as follows:

“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

2.2 Emergence of the Three-Step test

19. **INITIAL FUNCTIONS** – The Three-Step test was anchored in the Berne Convention at the 1967 Stockholm Conference.²⁹ As noted in the paragraph above, back then it served as a counterbalance to the formal recognition of a general right of reproduction. When in 1967 an “omnibus” right of reproduction was added, the need for a general clause became

²⁷ C. GEIGER, D.J. GERVAIS and M. SENFTLEBEN, “Understanding the “Three-Step Test” in D.J. GERVAIS, International Intellectual Property: A Handbook of Contemporary Research, Cheltenham, Edward Elgar, 2015, 169-170.

²⁸ C. GEIGER, D.J. GERVAIS and M. SENFTLEBEN, “Understanding the “Three-Step Test” in D.J. GERVAIS, International Intellectual Property: A Handbook of Contemporary Research, Cheltenham, Edward Elgar, 2015, 170.

²⁹ C. GEIGER, D.J. GERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 1.

apparent.³⁰ Many options were considered before countries agreed on the Three-Step test.³¹ Civil law countries were more in favour of named exceptions, as they are found in the law of countries like France, Germany or the Netherlands. For instance, France proposed an exception for “individual or family use”.³² However, in the end the more open Three-Step test emerged as the compromise solution.³³ Another important aspect in relation to the initial function of the Three-Step test is that, when the Test emerged in 1967, it was clearly meant as a guide to national legislators.³⁴ This initial purpose of the Three-Step test is essential to its interpretation.³⁵ It was meant to judge the exception as a rule, not its application in a specific case to a given author, work and user.³⁶ But transposing the Test into national law radically transforms its purpose and meaning (*infra* section no. 21).³⁷

20. **THE TEST IN OTHER LEGAL INSTRUMENTS** – A lot of international copyright agreements have incorporated versions of the Test in their text.³⁸ It was adopted in article 13 of the TRIPS agreement and it has furthermore been adopted in articles of the InfoSoc Directive, the WCT, the WPPT, the Beijing Treaty on Audiovisual Performances and of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled.³⁹ It has also been used in several EU directives, a number of trade agreements and also incorporated in a number of national law.⁴⁰ A

³⁰ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 3.

³¹ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 3.

³² C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 3.

³³ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 3.

³⁴ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 5.

³⁵ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 5.

³⁶ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 5.

³⁷ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 5.

³⁸ Electronic Frontier Foundation, *The Three-Step Test*, 27 November 2012, 2; B. FITZGERALD, D. O’BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 2.

³⁹ C. GEIGER, D. GERSAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to use the Test’s Flexibility in National Copyright Law, *PIJIP Research Papers*, no. 2013-04, 2013, 7; B. FITZGERALD, D. O’BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 2.

⁴⁰ C. GEIGER, D. GERSAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to use the Test’s Flexibility in National Copyright Law, *PIJIP Research Papers*, no. 2013-04, 2013, 7; B. FITZGERALD, D. O’BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M.

significant concern, however, follows from the fact that the coverage and the language of the test changes each time it appears somewhere new.⁴¹

21. **TRIPS** – The most important incorporation of the Three-Step test concerns the TRIPS agreement. The test is present in article 13 of the TRIPS Agreement, but this article contains significant adjustments to the original version of the text. First, whereas the Test of the Berne Convention *only* applies to exceptions and limitations to the right of reproduction, the Test contained in article 13 of the TRIPS Agreement applies to exceptions and limitations to *any* of the exclusive rights associated with copyright.⁴² This represents a major expansion of the application of the Three-Step test. The current article 13 on exceptions and limitations reads as follows:

“Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

Second, the incorporation of the test into the TRIPS agreement was accompanied by some significant changes of the wording of the test. For instance, within the Berne Convention, the test requires that an exception or limitation “not unreasonably prejudice the legitimate interests of the *author*”; the TRIPS’ test requires that an exception or limitation “not unreasonably prejudice the legitimate interests of the *right holder*”.⁴³ This is a change that shifts attention away from the interests of creators, towards the economic interests of companies that acquire copyrights from the original creators.⁴⁴

ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 1.

⁴¹ C. GEIGER, D.J. GERVAIS and M. SENFTLEBEN, *Understanding the “three-step test”*, 2015, 6 C. GEIGER, D. GERVAIS and M. SENFTLEBEN, *The Three-Step Test Revisited: How to use the Test’s Flexibility in National Copyright Law*, *PIJIP Research Papers*, no. 2013-04, 2013, 8.

⁴² ELECTRONIC FRONTIER FOUNDATION, *The Three-Step Test*, 27 November 2012, 2; C. GEIGER, D. GERVAIS and M. SENFTLEBEN, *The Three-Step Test Revisited: How to use the Test’s Flexibility in National Copyright Law*, *PIJIP Research Papers*, no. 2013-04, 2013, 8.

⁴³ C. GEIGER, D.J. GERVAIS and M. SENFTLEBEN, *Understanding the “three-step test”*, 2015, 6, ELECTRONIC FRONTIER FOUNDATION, *The Three-Step Test*, 27 November 2012, 2; C. GEIGER, D. GERVAIS and M. SENFTLEBEN, *The Three-Step Test Revisited: How to use the Test’s Flexibility in National Copyright Law*, *PIJIP Research Papers*, no. 2013-04, 2013, 5.

⁴⁴ C. GEIGER, D.J. GERVAIS and M. SENFTLEBEN, *Understanding the “three-step test”*, 2015, 6; C. GEIGER, D. GERVAIS and M. SENFTLEBEN, *The Three-Step Test Revisited: How to use the Test’s Flexibility in National Copyright Law*, *PIJIP Research Papers*, no. 2013-04, 2013, 8.

Third, in two provisions of the TRIPS the legitimate interests of third parties were added to the third step, also a significant change.⁴⁵ This changes the content of the third step because the interests of *users* may not be of the same nature as those of *right holders*.⁴⁶ This last change was of course established for the benefit of users in the first place, but other essential changes are still unexplained and are something that policy makers, dispute settlement entities and legislators must bear in mind.⁴⁷ However, in the view of the authors of the TRIPS agreement, the system of exceptions and limitations as it exists in the Berne Convention was not modified by TRIPS.⁴⁸ In their view, the TRIPS version of the test applies to new rights, and to rights for which no specific exceptions and limitations are provided in the Berne Convention.⁴⁹

2.3 Content and interpretation of the Three-Step test

2.3.1 A broad list of exceptions

22. **COMMISSION APPROACH** – As will be discussed further (*infra* section no. 39), one of the main commitments of the European Commission regarding the field of copyright, is to ensure a high level of protection for authors and other right holders, which is “fairly balanced” against protection of third party rights and interests.⁵⁰ At the legislative level, this commitment has been translated into strong statutory rights for right holders, compensated by a large number of detailed exceptions and limitations.⁵¹ Although in Europe the nature and scope of the rights conferred by copyright are a matter to be governed by the domestic laws of the individual Member States, these domestic laws have been extensively

⁴⁵ C. GEIGER, D.J. GERVAIS and M. SENFTLEBEN, “Understanding the ‘three-step test’”, in D.J. GERVAIS (ed.), *International Intellectual Property. A Handbook of Contemporary Research*, Cheltenham, Edward Elgar Publishing, 2015, 6; C. GEIGER, D. GERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to use the Test’s Flexibility in National Copyright Law, *PIJIP Research Papers*, no. 2013-04, 2013, 8.

⁴⁶ C. GEIGER, D.J. GERVAIS and M. SENFTLEBEN, “Understanding the ‘three-step test’”, in D.J. GERVAIS (ed.), *International Intellectual Property. A Handbook of Contemporary Research*, Cheltenham, Edward Elgar Publishing, 2015, 6-7; C. GEIGER, D. GERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to use the Test’s Flexibility in National Copyright Law, *PIJIP Research Papers*, no. 2013-04, 2013, 8.

⁴⁷ C. GEIGER, D.J. GERVAIS and M. SENFTLEBEN, “Understanding the ‘three-step test’”, in D.J. GERVAIS (ed.), *International Intellectual Property. A Handbook of Contemporary Research*, Cheltenham, Edward Elgar Publishing, 2015, 7; C. GEIGER, D. GERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to use the Test’s Flexibility in National Copyright Law, *PIJIP Research Papers*, no. 2013-04, 2013, 8.

⁴⁸ C. GEIGER, D. GERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to use the Test’s Flexibility in National Copyright Law, *PIJIP Research Papers*, no. 2013-04, 2013, 8.

⁴⁹ C. GEIGER, D. GERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to use the Test’s Flexibility in National Copyright Law, *PIJIP Research Papers*, no. 2013-04, 2013, 8-9.

⁵⁰ J. PILA and P. TORREMANS, *European Intellectual Property Law*, Oxford, Oxford University Press, 2016, 256.

⁵¹ J. PILA and P. TORREMANS, *European Intellectual Property Law*, Oxford, Oxford University Press, 2016, 256.

harmonized at the European level.⁵² In this regard, article 5 of the InfoSoc Directive is of major importance as it contains most of the exceptions Member States may recognize.⁵³

23. **INFOSOC DIRECTIVE** – The InfoSoc Directive starts with the recognition of the rights to be granted to the owners of works that may be protected under copyright (article 2-4). In article 5 the Directive sums up twenty possible exceptions and limitations to these rights. Starting with the exceptions regarding the right of reproduction in article 5(1), article 5(2) to (4) continues with an exhaustive list of the additional exceptions that Member States may, in their discretion, recognize to the reproduction, communication and/or making available and distribution rights.⁵⁴ The article includes several exceptions permitting the use of a copyright protected work without the need of prior authorization of the original author.⁵⁵ The exceptions that will be considered within the subject matter of this master thesis are temporary acts of reproduction (article 5(1)), reproduction for the purpose of news reporting (article 5(3)(c)), quotations for purposes such as criticism or review (article 5(3)(d)) and use for the purpose of parody (article 5(3)(k)). Out of these articles, article 5(1) forms a mandatory exception for the Member States to provide in their national laws, whereas the other articles form voluntary exceptions that the Member States can choose to provide or not.

2.3.2 *WTO Panel Report*

24. **THE ONLY INTERPRETATION** – It would be reasonable to think that after all those consecutive incorporations the meaning of the Three-Step test would be clear by now, but nothing could be further from the truth. In fact, the content of the Three-Step test has only been interpreted once. This was the case in a World Trade Organization Panel Report in 2000, where article 13 of the TRIPS agreement has been interpreted in a case against the United States brought before the WTO by the European Union.⁵⁶ In this Report the WTO

⁵² J. PILA and P. TORREMAN, *European Intellectual Property Law*, Oxford, Oxford University Press, 2016, 330.

⁵³ J. PILA and P. TORREMAN, *European Intellectual Property Law*, Oxford, Oxford University Press, 2016, 330.

⁵⁴ J. PILA and P. TORREMAN, *European Intellectual Property Law*, Oxford, Oxford University Press, 2016, 330.

⁵⁵ J. PILA and P. TORREMAN, *European Intellectual Property Law*, Oxford, Oxford University Press, 2016, 330; P.B. HUGENHOLTZ, “Law and Technology. Fair Use in Europe. Examining the mismatch between copyright law and technology-influenced evolving social media norms in the European Union”, *Communications of the ACM* 2013, Vol. 56, No. 5, 28.

⁵⁶ World Trade Organization, “United States – Section 110(5) of the US Copyright. Report of the Panel”, *WTO Panel Reports* 2000, No. WT/DS160/R; C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 11;

Panel ruled that article 13 of TRIPS “cannot have more than a narrow or limited operation. (...) It was not intended to provide for exceptions or limitations except for those of a limited nature”.⁵⁷ It also ruled that “the three conditions apply on a cumulative basis, each being a separate and independent requirement that must be satisfied.”⁵⁸ Failure to comply with any one of the three conditions results in the article 13 exception being disallowed.”⁵⁹ So according to the Panel the exceptions and limitations should be interpreted restrictively, and all the three steps of the test should be fulfilled for the exemption to be granted. Subsequently the Panel proceeded to an interpretation of each of the three steps of article 13 TRIPS.

25. **THE FIRST STEP** – The first step contains the requirement that exceptions or limitations shall be confined to “certain special cases”. According to the Panel, the term “certain” here implies that as a matter of legal certainty, a limitation must be well defined.⁶⁰ However, there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised.⁶¹ This guarantees a sufficient degree of legal certainty.⁶² The term “special”

P. GOLDSTEIN and B. HUGENHOLTZ, *International Copyright. Principles, Law, and Practice*, III, Oxford, Oxford University Press, 2012, 365.

⁵⁷ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 11; P. GOLDSTEIN and B. HUGENHOLTZ, *International Copyright. Principles, Law, and Practice*, III, Oxford, Oxford University Press, 2012, 365; World Trade Organization, “United States – Section 110(5) of the US Copyright. Report of the Panel”, *WTO Panel Reports* 2000, No. WT/DS160/R, 31.

⁵⁸ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 11; World Trade Organization, “United States – Section 110(5) of the US Copyright. Report of the Panel”, *WTO Panel Reports* 2000, No. WT/DS160/R, 31.

⁵⁹ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 11; World Trade Organization, “United States – Section 110(5) of the US Copyright. Report of the Panel”, *WTO Panel Reports* 2000, No. WT/DS160/R, 31.

⁶⁰ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 11; P. GOLDSTEIN and B. HUGENHOLTZ, *International Copyright. Principles, Law, and Practice*, III, Oxford, Oxford University Press, 2012, 365; World Trade Organization, “United States – Section 110(5) of the US Copyright. Report of the Panel”, *WTO Panel Reports* 2000, No. WT/DS160/R, 33.

⁶¹ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 11; P. GOLDSTEIN and B. HUGENHOLTZ, *International Copyright. Principles, Law, and Practice*, III, Oxford, Oxford University Press, 2012, 365; World Trade Organization, “United States – Section 110(5) of the US Copyright. Report of the Panel”, *WTO Panel Reports* 2000, No. WT/DS160/R, 33.

⁶² C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 11; P. GOLDSTEIN and B. HUGENHOLTZ, *International Copyright. Principles, Law, and Practice*, III, Oxford, Oxford University Press, 2012, 365; World Trade Organization, “United States – Section 110(5) of the US Copyright. Report of the Panel”, *WTO Panel Reports* 2000, No. WT/DS160/R, 33;

means, according to the Panel, something that comes down to exceptional.⁶³ An exception or limitation should be narrow in quantitative as well as a qualitative sense.⁶⁴ It should be the opposite of a non-special, i.e., a normal case.⁶⁵

26. **THE SECOND STEP** –The second step says that an exception or limitation should “not conflict with a normal exploitation of the work”. The Panel read this second step in an economic way.⁶⁶ According to the Panel an exemption would constitute a conflict with a normal exploitation of the work on two conditions: 1) If such a use enters into economic competition with the ways right holders usually extract economic value from the copyright and 2) thereby deprive them of significant or tangible commercial gains.⁶⁷ Another interesting statement here is that the Panel also ruled that the criterion of a normal exploitation should not only involve consideration of the means of exploitation that *currently* generate an income for the author but also those which are *likely* to be of considerable importance in the *future*.⁶⁸
27. **THE THIRD STEP** – Finally, the third step says that an exception or limitation should “not unreasonably prejudice the legitimate interests of the right holder”. According to the Panel, these “legitimate interests” is the economic value of the exclusive rights conferred by

⁶³ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 12; P. GOLDSTEIN and B. HUGENHOLTZ, *International Copyright. Principles, Law, and Practice*, III, Oxford, Oxford University Press, 2012, 365; World Trade Organization, “United States – Section 110(5) of the US Copyright. Report of the Panel”, *WTO Panel Reports* 2000, No. WT/DS160/R, 33;

⁶⁴ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 12; P. GOLDSTEIN and B. HUGENHOLTZ, *International Copyright. Principles, Law, and Practice*, III, Oxford, Oxford University Press, 2012, 365; World Trade Organization, “United States – Section 110(5) of the US Copyright. Report of the Panel”, *WTO Panel Reports* 2000, No. WT/DS160/R, 33.

⁶⁵ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 12; World Trade Organization, “United States – Section 110(5) of the US Copyright. Report of the Panel”, *WTO Panel Reports* 2000, No. WT/DS160/R, 33;

⁶⁶ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 13; P. GOLDSTEIN and B. HUGENHOLTZ, *International Copyright. Principles, Law, and Practice*, III, Oxford, Oxford University Press, 2012, 365.

⁶⁷ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 13; P. GOLDSTEIN and B. HUGENHOLTZ, *International Copyright. Principles, Law, and Practice*, III, Oxford, Oxford University Press, 2012, 366; World Trade Organization, “United States – Section 110(5) of the US Copyright. Report of the Panel”, *WTO Panel Reports* 2000, No. WT/DS160/R, 48.

⁶⁸ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 13; World Trade Organization, “United States – Section 110(5) of the US Copyright. Report of the Panel”, *WTO Panel Reports* 2000, No. WT/DS160/R, 48.

copyright to their holders.⁶⁹ With regard to “unreasonably prejudice” the Panel opined that a certain amount of “prejudice” has to be presumed justified as “not unreasonable”.⁷⁰ In their view, prejudice reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.⁷¹

3. The U.S. Fair Use Principle

3.1 Statutory basis

28. **SECTION 107 COPYRIGHT ACT** - Fair use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances.⁷² It functions as an escape clause from the copyright’s exclusive use protection.⁷³ Section 107 of the 1976 Copyright Act defines Fair Use and sets forth what is commonly known as the four-factor test.⁷⁴ The text of Section 107 reads as follows:

“§ 107. Limitations on exclusive rights: fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an

⁶⁹ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 16; World Trade Organization, “United States – Section 110(5) of the US Copyright. Report of the Panel”, *WTO Panel Reports* 2000, No. WT/DS160/R, 59;

⁷⁰ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 16; P. GOLDSTEIN and B. HUGENHOLTZ, *International Copyright. Principles, Law, and Practice*, III, Oxford, Oxford University Press, 2012, 366; World Trade Organization, “United States – Section 110(5) of the US Copyright. Report of the Panel”, *WTO Panel Reports* 2000, No. WT/DS160/R, 59;

⁷¹ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 16; P. GOLDSTEIN and B. HUGENHOLTZ, *International Copyright. Principles, Law, and Practice*, III, Oxford, Oxford University Press, 2012, 366; World Trade Organization, “United States – Section 110(5) of the US Copyright. Report of the Panel”, *WTO Panel Reports* 2000, No. WT/DS160/R, 59.

⁷² M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 158; P.N. LEVAL, “Towards a Fair Use Standard”, *Harvard Law Review* 1990, Vol. 103, 1105.

⁷³ M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 158; P.N. LEVAL, “Towards a Fair Use Standard”, *Harvard Law Review* 1990, Vol. 103, 1105.

⁷⁴ M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 158; P.N. LEVAL, “Towards a Fair Use Standard”, *Harvard Law Review* 1990, Vol. 103, 1105.

infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”

3.2 Emergence of the fair use principle

29. **RISE OF THE PRINCIPLE** – Contrary to European law, its American counterpart does not originate from a legal basis, but from case law. The term “fair use” arose for the first time within the American judicial system in the case of *Lawrence v. Dana*⁷⁵ in 1869, where the Court ruled that the contested materials did not constitute a fair use but were really a reprint.⁷⁶ In early English cases, the fair use concept was known as “fair abridgment” and appeared already in cases since the 18th century.⁷⁷
30. **FOLSOM V. MARSH** – A very important case in the emergence of the fair use principle is *Folsom v. Marsh*.⁷⁸ In this case, what is now the third factor of the four-factor test (amount and substantiality of the portion used) was at the heart of the Court’s decision.⁷⁹ In this case the defendant used 353 pages of the plaintiff’s work to write a biography.⁸⁰ Although it contained not more than 6% of the plaintiff’s work, the Court decided in favour of the

⁷⁵ *Lawrence v. Dana*, 15 F. Cas. 26 (D. Mass. 1869).

⁷⁶ M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 164.

⁷⁷ *Gyles v. Wilcox* (1740), 3 Atk 143; 26 ER 489; *Doddsely v. Kinnersly* (1761), 1 Amb. 403; *Cary v. Kearsley* (1802), 4 Esp. 168; *Roworth v. Wilkes* (1807), M. & R. 94; M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 165.

⁷⁸ *Folsom v. Marsh*, 9 F. Cas. 342, (D. Mass. 1841).

⁷⁹ *Folsom v. Marsh*, 9 F. Cas. 342, (D. Mass. 1841); M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 165; P.N. LEVAL, “Towards a Fair Use Standard”, *Harvard Law Review* 1990, Vol. 103, 1105.

⁸⁰ *Folsom v. Marsh*, 9 F. Cas. 342, (D. Mass. 1841); M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 165.

latter.⁸¹ The Court held that the defendant had copied the most important part of the copyright protected material (i.e. substantiality).⁸² The *Folsom* case is viewed as having influenced the reach of the current fair use statute.⁸³

31. **OTHER CASE LAW FOUNDATIONS** – The *Folsom* case was followed by other cases that also laid the foundation for the drafting of Section 107 of the Copyright Act.⁸⁴ The actual foundation came after the federal Copyright Office had drew up a list with examples which constitute fair use.⁸⁵ After the existing discourse of fair use had been folded into the law by way of the four-factor test, the courts began to apply the factors.⁸⁶ The first one of interest being *Sony Corp v. Universal City Studios, Inc.* of 1984.⁸⁷ In this case the Supreme Court held that, while applying the four-factor test, the sale of VCRs did not equal contributory infringement of Universal Studio’s copyrights.⁸⁸

3.3 Content and interpretation of the fair use principle

3.3.1 The four factors explained

32. **AN OPEN CONCEPT** – The four factors enumerated in the paragraphs above are of great importance. Section 107 sets forth four elements to determine if a certain use of copyright protected material is “fair” or not. However, no sharp lines exist that tell for certain that a use is fair or not.⁸⁹ As will be described further (*infra* section no. 38) this causes both problems and advantages with the interpretation of the principle. Copyright infringement occurs if a new work is *substantially similar* to a copyrighted work and the author of the

⁸¹ *Folsom v. Marsh*, 9 F. Cas. 342, (D. Mass. 1841); M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 165.

⁸² *Folsom v. Marsh*, 9 F. Cas. 342, (D. Mass. 1841); M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 165.

⁸³ M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 165.

⁸⁴ M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 166.

⁸⁵ M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 166.

⁸⁶ M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 166; P.N. LEVAL, “Towards a Fair Use Standard”, *Harvard Law Review* 1990, Vol. 103, 1105.

⁸⁷ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, (U.S. 1984); M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 166.

⁸⁸ M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 166.

⁸⁹ M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 164.

new work had access to the copyrighted work.⁹⁰ Under Section 107 it is irrelevant if credit was given to the author to determine fair use.⁹¹ Even if attribution is given, copyright infringement can still occur, unless the use is “fair”.⁹² The determination of fair use in any particular case depends on the application of these four factors.⁹³ Courts use these four factors, among other things, when making determinations on issues of infringement.⁹⁴ Not one factor is decisive, courts always have to consider all of them and sometimes add additional questions.⁹⁵

33. **THE FIRST FACTOR** – The first factor concerns the purpose and character of the use. First of all, this first factor examines if the use is commercial or not.⁹⁶ Purposes that generally favour fair use include non-profit, education, personal uses, research and criticism, while commercial uses are less likely to be deemed fair use.⁹⁷ This does not mean that for instance an educational use will in and of itself assure that a use is fair, and by the same token not every commercial use will fail as a fair use.⁹⁸ A second aspect to take into account within this first factor is if the use is “transformative”.⁹⁹ Transformative uses are uses that result in

⁹⁰ M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 159.

⁹¹ M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 159.

⁹² M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 159.

⁹³ M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 159; P.N. LEVAL, “Towards a Fair Use Standard”, *Harvard Law Review* 1990, Vol. 103, 1111.

⁹⁴ A.M. OBISSI and A.A. AMER, “Fair Enough – How far does the fair use defence protect “reaction” videos on video-hosting platforms like YouTube?”, *Jd Supra* 2017, 2; M.C. RIFE, “The fair use doctrine: History, application, and implications for (new media) writing teachers”, *Computers and Composition* 2007, ep. 24, 159.

⁹⁵ A.M. OBISSI and A.A. AMER, “Fair Enough – How far does the fair use defence protect “reaction” videos on video-hosting platforms like YouTube?”, *Jd Supra* 2017, 2; P.N. LEVAL, “Towards a Fair Use Standard”, *Harvard Law Review* 1990, Vol. 103, 1111; University of Minnesota, “Understanding Fair Use”, *Copyright Services*, <https://www.lib.umn.edu/copyright/fairuse>.

⁹⁶ A.M. OBISSI and A.A. AMER, “Fair Enough – How far does the fair use defence protect “reaction” videos on video-hosting platforms like YouTube?”, *Jd Supra* 2017, 1; C. POSTEL “Let’s Play: YouTube and Twitch’s Video Game Footage and a New Approach to Fair Use”, *Hastings Law Journal* 2017, Vol. 68, No. 5, 1175; University of Minnesota, “Understanding Fair Use”, *Copyright Services*, <https://www.lib.umn.edu/copyright/fairuse>; University of Louisville, “Fair Use Four Factor Analysis”, *Copyright Guidelines and Resources*, <http://louisville.edu/copyright/resources/four-factor-analysis>.

⁹⁷ C. POSTEL “Let’s Play: YouTube and Twitch’s Video Game Footage and a New Approach to Fair Use”, *Hastings Law Journal* 2017, Vol. 68, No. 5, 1175; University of Minnesota, “Understanding Fair Use”, *Copyright Services*, <https://www.lib.umn.edu/copyright/fairuse>; University of Louisville, “Fair Use Four Factor Analysis”, *Copyright Guidelines and Resources*, <http://louisville.edu/copyright/resources/four-factor-analysis>.

⁹⁸ P.N. LEVAL, “Towards a Fair Use Standard”, *Harvard Law Review* 1990, Vol. 103, 1111-1112; University of Louisville, “Fair Use Four Factor Analysis”, *Copyright Guidelines and Resources*, <http://louisville.edu/copyright/resources/four-factor-analysis>.

⁹⁹ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PIJIP Research Paper Series* 2017, No. 2017-01, 4; C. POSTEL “Let’s Play: YouTube and Twitch’s Video Game Footage and a New Approach to Fair Use”, *Hastings Law Journal* 2017, Vol. 68, No. 5, 1175; P.N. LEVAL, “Towards a Fair Use Standard”, *Harvard Law Review* 1990, Vol. 103, 1111. University of Minnesota, “Understanding Fair Use”, *Copyright Services*,

the creation of a new work, with a new purpose and different character.¹⁰⁰ This type of uses are favoured as fair uses over uses that merely reproduce an original work.¹⁰¹

34. **THE SECOND FACTOR** – The second factor concerns the nature of the copyrighted work. One element of this factor is whether the original work is published or not.¹⁰² It is less likely to be fair to use elements of an unpublished work, as it contains making someone else's work public when such person chooses not to.¹⁰³ But it is nonetheless possible for use of unpublished materials to be legally fair.¹⁰⁴ Another element is whether the work is more factual or more creative.¹⁰⁵ A use borrowed from a factual work is more likely to be fair than a use borrowed from a work that is creative, imaginative or artistic.¹⁰⁶ This is related to the fact that copyright does not protect facts and data.¹⁰⁷
35. **THE THIRD FACTOR** – The third factor concerns the amount and substantiality of the portion used. With regard to the amount, this element forms the quantitative aspect of the third factor.¹⁰⁸ The statute gives no bright indication on how much of a work may be used to be

<https://www.lib.umn.edu/copyright/fairuse>; University of Louisville, "Fair Use Four Factor Analysis", *Copyright Guidelines and Resources*, <http://louisville.edu/copyright/resources/four-factor-analysis>.

¹⁰⁰ A.M. OBISSI and A.A. AMER, "Fair Enough – How far does the fair use defence protect "reaction" videos on video-hosting platforms like YouTube?", *Jd Supra* 2017, 1; B. PATRY, "Fair Use Is Good for Creativity and Innovation", *PIJIP Research Paper Series* 2017, No. 2017-01, 4; C. POSTEL "Let's Play: YouTube and Twitch's Video Game Footage and a New Approach to Fair Use", *Hastings Law Journal* 2017, Vol. 68, No. 5, 1175; P.N. LEVAL, "Towards a Fair Use Standard", *Harvard Law Review* 1990, Vol. 103, 1111; University of Minnesota, "Understanding Fair Use", *Copyright Services*, <https://www.lib.umn.edu/copyright/fairuse>; University of Louisville, "Fair Use Four Factor Analysis", *Copyright Guidelines and Resources*, <http://louisville.edu/copyright/resources/four-factor-analysis>.

¹⁰¹ A.M. OBISSI and A.A. AMER, "Fair Enough – How far does the fair use defence protect "reaction" videos on video-hosting platforms like YouTube?", *Jd Supra* 2017, 1; C. POSTEL "Let's Play: YouTube and Twitch's Video Game Footage and a New Approach to Fair Use", *Hastings Law Journal* 2017, Vol. 68, No. 5, 1175; University of Louisville, "Fair Use Four Factor Analysis", *Copyright Guidelines and Resources*, <http://louisville.edu/copyright/resources/four-factor-analysis>.

¹⁰² A.M. OBISSI and A.A. AMER, "Fair Enough – How far does the fair use defence protect "reaction" videos on video-hosting platforms like YouTube?", *Jd Supra* 2017, 2; C. POSTEL "Let's Play: YouTube and Twitch's Video Game Footage and a New Approach to Fair Use", *Hastings Law Journal* 2017, Vol. 68, No. 5, 1179; P.N. LEVAL, "Towards a Fair Use Standard", *Harvard Law Review* 1990, Vol. 103, 1116; University of Minnesota, "Understanding Fair Use", *Copyright Services*, <https://www.lib.umn.edu/copyright/fairuse>.

¹⁰³ P.N. LEVAL, "Towards a Fair Use Standard", *Harvard Law Review* 1990, Vol. 103, 1117; University of Minnesota, "Understanding Fair Use", *Copyright Services*, <https://www.lib.umn.edu/copyright/fairuse>.

¹⁰⁴ University of Minnesota, "Understanding Fair Use", *Copyright Services*, <https://www.lib.umn.edu/copyright/fairuse>.

¹⁰⁵ P.N. LEVAL, "Towards a Fair Use Standard", *Harvard Law Review* 1990, Vol. 103, 1118; University of Minnesota, "Understanding Fair Use", *Copyright Services*, <https://www.lib.umn.edu/copyright/fairuse>.

¹⁰⁶ P.N. LEVAL, "Towards a Fair Use Standard", *Harvard Law Review* 1990, Vol. 103, 1118; University of Minnesota, "Understanding Fair Use", *Copyright Services*, <https://www.lib.umn.edu/copyright/fairuse>; University of Louisville, "Fair Use Four Factor Analysis", *Copyright Guidelines and Resources*, <http://louisville.edu/copyright/resources/four-factor-analysis>.

¹⁰⁷ P.N. LEVAL, "Towards a Fair Use Standard", *Harvard Law Review* 1990, Vol. 103, 1109; University of Minnesota, "Understanding Fair Use", *Copyright Services*, <https://www.lib.umn.edu/copyright/fairuse>.

¹⁰⁸ P.N. LEVAL, "Towards a Fair Use Standard", *Harvard Law Review* 1990, Vol. 103, 1123.

considered fair use.¹⁰⁹ A use is usually more in favour of fair use if it uses a smaller amount of the source work, and usually more likely to weigh against fair use if it uses a larger amount.¹¹⁰ However in some circumstances that already weigh in favour of fair use, for instance for uses like education or research, one may use more of a work.¹¹¹ With regard to the substantiality, this element forms the qualitative aspect of the third factor.¹¹² It is matter of whether the use concerns something from the “heart” of the work, or something more peripheral.¹¹³

36. **THE FOURTH FACTOR** – The fourth and last factor concerns the effect on the potential market for or value of the work. It is basically a matter of whether or not there is some economic harm to the owner of the copyright as a result of the use.¹¹⁴ The initial concept underlying copyright promises authors the opportunity to realize rewards in compensation of their creative efforts.¹¹⁵ Thus, a secondary use that interferes excessively with an author’s incentives undermines this initial aim of copyright.¹¹⁶

¹⁰⁹ A.M. OBISSI and A.A. AMER, “Fair Enough – How far does the fair use defence protect “reaction” videos on video-hosting platforms like YouTube?”, *Jd Supra* 2017, 2; University of Louisville, “Fair Use Four Factor Analysis”, *Copyright Guidelines and Resources*, <http://louisville.edu/copyright/resources/four-factor-analysis>.

¹¹⁰ C. POSTEL “Let’s Play: YouTube and Twitch’s Video Game Footage and a New Approach to Fair Use”, *Hastings Law Journal* 2017, Vol. 68, No. 5, 1180; P.N. LEVAL, “Towards a Fair Use Standard”, *Harvard Law Review* 1990, Vol. 103, 1122; University of Minnesota, “Understanding Fair Use”, *Copyright Services*, <https://www.lib.umn.edu/copyright/fairuse>.

¹¹¹ C. POSTEL “Let’s Play: YouTube and Twitch’s Video Game Footage and a New Approach to Fair Use”, *Hastings Law Journal* 2017, Vol. 68, No. 5, 1180; University of Louisville, “Fair Use Four Factor Analysis”, *Copyright Guidelines and Resources*, <http://louisville.edu/copyright/resources/four-factor-analysis>.

¹¹² C. POSTEL “Let’s Play: YouTube and Twitch’s Video Game Footage and a New Approach to Fair Use”, *Hastings Law Journal* 2017, Vol. 68, No. 5, 1180; P.N. LEVAL, “Towards a Fair Use Standard”, *Harvard Law Review* 1990, Vol. 103, 1123.

¹¹³ C. POSTEL “Let’s Play: YouTube and Twitch’s Video Game Footage and a New Approach to Fair Use”, *Hastings Law Journal* 2017, Vol. 68, No. 5, 1180; P.N. LEVAL, “Towards a Fair Use Standard”, *Harvard Law Review* 1990, Vol. 103, 1123; University of Minnesota, “Understanding Fair Use”, *Copyright Services*, <https://www.lib.umn.edu/copyright/fairuse>; University of Louisville, “Fair Use Four Factor Analysis”, *Copyright Guidelines and Resources*, <http://louisville.edu/copyright/resources/four-factor-analysis>.

¹¹⁴ A.M. OBISSI and A.A. AMER, “Fair Enough – How far does the fair use defence protect “reaction” videos on video-hosting platforms like YouTube?”, *Jd Supra* 2017, 2; C. POSTEL “Let’s Play: YouTube and Twitch’s Video Game Footage and a New Approach to Fair Use”, *Hastings Law Journal* 2017, Vol. 68, No. 5, 1183; P.N. LEVAL, “Towards a Fair Use Standard”, *Harvard Law Review* 1990, Vol. 103, 1124; University of Minnesota, “Understanding Fair Use”, *Copyright Services*, <https://www.lib.umn.edu/copyright/fairuse>; University of Louisville, “Fair Use Four Factor Analysis”, *Copyright Guidelines and Resources*, <http://louisville.edu/copyright/resources/four-factor-analysis>.

¹¹⁵ P.N. LEVAL, “Towards a Fair Use Standard”, *Harvard Law Review* 1990, Vol. 103, 1124; A.B. COHEN, “When Does a Work Infringe the Derivate Works Rights of a Copyright Owner?”, *Cardozo Arts & Ent. L.J.* 1999, Vol. 17, 655.

¹¹⁶ P.N. LEVAL, “Towards a Fair Use Standard”, *Harvard Law Review* 1990, Vol. 103, 1124.

3.3.2 Fair use guidelines

- 4 **PURPOSE** – An important element to mention here is the existence of fair use guidelines in the U.S. But as they are not relevant for the further discussion of this master thesis, this paragraph limit itself to only a brief explanation of the subject. Only four factors to determine whether a use of copyright protected material is fair or not, has since long time been deemed insufficient.¹¹⁷ This limited fair use law is subject to many different and divergent outcomes.¹¹⁸ In 1976, Congress was not prepared to include further details in the law, but it urged stakeholders to negotiate their concerns and to reach agreement about the meaning of the law.¹¹⁹ The result was a first series of guidelines.¹²⁰ These guidelines intend to define or at least explain the practical scope of the law regarding fair use.¹²¹ Sometimes the guidelines have been identified as “merely advisory”, and at other times they have been declared as the true meaning of the law.¹²² The limited importance of the guidelines for this thesis (and I dare to say also in general) results from the fact that the literature of the law has largely neglected them and left them without a clear and meaningful conceptualization.¹²³ Also Congress usually gave them a gesture of acceptance after they had been developed, but only little substantive scrutiny.¹²⁴
- 5 **EXAMPLE GUIDELINES** – The enumeration hereafter gives an impression on what sort of issues guidelines have been developed, this enumeration gives an idea. The majority of the guidelines are situated within the context of education.¹²⁵ Guidelines exist on photocopying for classroom handouts, on making copies for musical works for education, on sending

¹¹⁷ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PIJIP Research Paper Series* 2017, No. 2017-01, 31; K.D. CREWS, “The Law of Fair Use and the Illusion of Fair-Use Guidelines”, *Ohio State Journal* 2001, Vol. 62, No. 2, 605.

¹¹⁸ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PIJIP Research Paper Series* 2017, No. 2017-01, 31; K.D. CREWS, “The Law of Fair Use and the Illusion of Fair-Use Guidelines”, *Ohio State Journal* 2001, Vol. 62, No. 2, 604.

¹¹⁹ M.W. CARROLL, “Fixing Fair Use”, *North Carolina Law Review* 2007, Vol. 85, No. 4, 1115; K.D. CREWS, “The Law of Fair Use and the Illusion of Fair-Use Guidelines”, *Ohio State Journal* 2001, Vol. 62, No. 2, 604.

¹²⁰ M.W. CARROLL, “Fixing Fair Use”, *North Carolina Law Review* 2007, Vol. 85, No. 4, 1115; K.D. CREWS, “The Law of Fair Use and the Illusion of Fair-Use Guidelines”, *Ohio State Journal* 2001, Vol. 62, No. 2, 604.

¹²¹ M.W. CARROLL, “Fixing Fair Use”, *North Carolina Law Review* 2007, Vol. 85, No. 4, 1115; K.D. CREWS, “The Law of Fair Use and the Illusion of Fair-Use Guidelines”, *Ohio State Journal* 2001, Vol. 62, No. 2, 604.

¹²² M.W. CARROLL, “Fixing Fair Use”, *North Carolina Law Review* 2007, Vol. 85, No. 4, 1115; K.D. CREWS, “The Law of Fair Use and the Illusion of Fair-Use Guidelines”, *Ohio State Journal* 2001, Vol. 62, No. 2, 604.

¹²³ M.W. CARROLL, “Fixing Fair Use”, *North Carolina Law Review* 2007, Vol. 85, No. 4, 1115; K.D. CREWS, “The Law of Fair Use and the Illusion of Fair-Use Guidelines”, *Ohio State Journal* 2001, Vol. 62, No. 2, 604.

¹²⁴ K.D. CREWS, “The Law of Fair Use and the Illusion of Fair-Use Guidelines”, *Ohio State Journal* 2001, Vol. 62, No. 2, 604.

¹²⁵ K.D. CREWS, “The Law of Fair Use and the Illusion of Fair-Use Guidelines”, *Ohio State Journal* 2001, Vol. 62, No. 2, 604; Utah Valley University, “Fair Use Guidelines”, *UVU Distance Education* 2012, 3.

copies of journal articles for interlibrary loans, on recording television broadcasts off-air for classroom use,...¹²⁶ Later on the Conference on Fair use also developed guidelines outside of the educational scope but with regard to, among other topics, multimedia development and the digitizing of visual images.¹²⁷ Today a lot of American universities and research institutions provide for check lists and other guidelines to help determine if a certain use could be considered fair or not.

4. Comparison between the European and the U.S. systems

37. **RATIO** – The purpose of this master thesis is to find out if it would be useful to introduce the American fair use principle within European copyright law. Therefore, it is crucial to weigh the advantages and disadvantages of both systems against each other.

4.1 Serving the same legal purpose

38. **FAIR BALANCE** – Both the American and the European system of copyright exemptions are intended to fulfil the same purpose: safeguarding a fair balance of rights and interests between the different categories of right holders, as well as between right holders and right users.¹²⁸ This is not surprising, as both systems descend from the same legal basis (*supra* section no. 7).
39. **RIGHTS AND INTERESTS OF OTHERS** – To pursue this fair balance, both systems allow copyright protected works to be used under certain circumstances by individuals who are not the original authors of the work.¹²⁹ Both systems of copyright exceptions fulfil the function of ensuring that the rights of the copyright holders take account of the rights and interests of third parties and of the society to freedom of expression and education.¹³⁰

¹²⁶ K.D. CREWS, “The Law of Fair Use and the Illusion of Fair-Use Guidelines”, *Ohio State Journal* 2001, Vol. 62, No. 2, 604.

¹²⁷ M.S. SRIDHAR, “Fair Use, CONTU Guidelines, CONFU Guidelines and the DMCA”, *SRELS Journal of Information Management* 2011, Vol. 47, No. 3, 242; B.A. LEHMAN, “Final Report to the Commissioner on the Conclusion of the Conference on Fair Use”, *The Conference on Fair Use* 1998, 4.

¹²⁸ A.B. COHEN, “When Does a Work Infringe the Derivate Works Rights of a Copyright Owner?”, *Cardozo Arts & Ent. L.J.* 1999, Vol. 17, 657; P.N. LEVAL, “Towards a Fair Use Standard”, *Harvard Law Review* 1990, Vol. 103, 1109.

¹²⁹ J. PILA and P. TORREMANS, *European Intellectual Property Law*, Oxford, Oxford University Press, 2016, 330.

¹³⁰ J. PILA and P. TORREMANS, *European Intellectual Property Law*, Oxford, Oxford University Press, 2016, 330-331.

4.2 Legal certainty vs flexibility

40. **SHIFT IN APPROACH** – At first sight, the approach to copyright limitations strongly differs between Europe and the US. Whereas Europe provides for a closed catalogue of carefully defined exceptions, the US allow an open-ended fair use system that leaves the task of identifying individual cases of exempted unauthorized use to the courts.¹³¹ In my opinion, both approaches to copyright limitations have their specific merits and defects.

4.2.1 *The legal certainty of the European system*

4.2.1.1 *A closed list of exceptions and limitations ...*

41. **THE ADVANTAGE OF FORESEEABILITY** – As mentioned above, the European system provides for a closed catalogue of permissible exceptions. The biggest advantage of this closed list of permissible exceptions is the foreseeability.¹³² Users and investors can foresee which means of use fall under the control of the copyright holder and can serve as a basis for the exploitation of copyrighted material, and which means of unauthorised use remain outside this controlled area and can be carried out without infringing copyright.¹³³

4.2.1.2 *... But without overall harmonization*

42. **LACK OF HARMONIZATION** – However, this above-mentioned foreseeability may not be overestimated. While the exclusive rights of the right holders have been largely harmonized across the member states of the European Union¹³⁴, this is not the case for the exceptions and limitations.¹³⁵ The final legislative compromise fell short in the initial ambition of harmonizing the limitations.¹³⁶ If the EU wants to satisfy the need of an internal market¹³⁷,

¹³¹ M. SENFTLEBEN, “The international Three-Step Test: A Model Provision for EC Fair Use Legislation”, *JIPITEC* 2010, no. 67, 68.

¹³² M. SENFTLEBEN, “The international Three-Step Test: A Model Provision for EC Fair Use Legislation”, *JIPITEC* 2010, no. 67, 69.

¹³³ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PLJIP Research Paper Series* 2017, No. 2017-01, 22; M. SENFTLEBEN, “The international Three-Step Test: A Model Provision for EC Fair Use Legislation”, *JIPITEC* 2010, no. 67, 69.

¹³⁴ This has been done by the Berne Convention and its successors.

¹³⁵ A. METZGER (ed.) on behalf of the European Copyright Society, *Opinion on the Judgement of the CJEU in Case C-201/13 Deckmyn*, 1 November 2014, 2; S. VON LEWINSKI, “Introduction: Analysis: Sections 1-5”, in M. WALTER and S. VON LEWINSKI (eds.), *European Copyright Law: A Commentary*, New York, Oxford University Press, 2010, 12.

¹³⁶ R. XALABARDER, “The Role of the CJEU in Harmonizing EU Copyright Law”, *IIC* 2016, no. 47, 638-639.

¹³⁷ Recital 31, “existing differences in the exceptions and limitations ... have direct negative effects on the functioning of the internal market”.

further harmonization of the limitations and exceptions is required and shall not be limited to the harmonization of the rights.¹³⁸ Currently, those exceptions and limitations are still far from harmonised and fall mostly within the jurisdiction of national laws of the member states. This has created a situation where the rights of copyright right holders are patchwork. But the goal of full harmonization of copyright in the EU in the form of a single copyright code appears to be a long-term target, so other possibilities to meet the need for harmonisation are welcomed.¹³⁹

43. **ATTEMPT TO HARMONIZATION BY THE CJEU** – In response to this need for harmonisation, the CJEU has in recent years issued some interesting and controversial rulings interpreting and further harmonizing EU copyright law.¹⁴⁰ Based on the subsidiary principle, the CJEU has found an express route to further strengthen and harmonize the fragmented and sometimes inconsistent EU copyright acquis.¹⁴¹ For instance with regard to exceptions and limitations, the CJEU has expressly rejected a restrictive reading and has even turned to other criteria to interpret the scope and application of limitations.¹⁴² In a number of cases the CJEU has made use of the principle of proportionality in the enforcement of copyright, balanced against other fundamental rights and public interests such as the need to safeguard the “effectiveness and the purpose” of the limitation.¹⁴³ These criteria correspond to general principles which had not traditionally been favoured within copyright law to interpret the scope and application of limitations.¹⁴⁴
44. **DECKMYN CASE** – An important case in this regard is the *Deckmyn* case, ruled by the European Court of Justice.¹⁴⁵ In Belgium, Book XI of the Code of Economic Law (“CEL”)¹⁴⁶ provides a closed list of exceptions.¹⁴⁷ Only the exceptions that are explicitly provided by the law can be invoked by the users without having to ask the permission of

¹³⁸ R. XALABARDER, “The Role of the CJEU in Harmonizing EU Copyright Law”, *IIC* 2016, no. 47, 638-639.

¹³⁹ R. XALABARDER, “The Role of the CJEU in Harmonizing EU Copyright Law”, *IIC* 2016, no. 47, 639.

¹⁴⁰ R. XALABARDER, “The Role of the CJEU in Harmonizing EU Copyright Law”, *IIC* 2016, no. 47, 635.

¹⁴¹ R. XALABARDER, “The Role of the CJEU in Harmonizing EU Copyright Law”, *IIC* 2016, no. 47, 635.

¹⁴² R. XALABARDER, “The Role of the CJEU in Harmonizing EU Copyright Law”, *IIC* 2016, no. 47, 638.

¹⁴³ CJEU 11 September 2014, No. C-117/13, *Darmstadt v. Eugen Ulmer*, ECLI:EU:C:2014:2196; CJEU 3 September 2014, No. C-201/13, *Deckmyn*, ECLI:EU:C:2014:2132; CJEU 7 March 2013, No. C-145/10, *Painer*, ECLI:EU:C:2013:138; CJEU 29 January 2008, No. C-275/06, *Promusicae*, ECLI:EU:C:2008:54; R. XALABARDER, “The Role of the CJEU in Harmonizing EU Copyright Law”, *IIC* 2016, no. 47, 638.

¹⁴⁴ R. XALABARDER, “The Role of the CJEU in Harmonizing EU Copyright Law”, *IIC* 2016, no. 47, 638.

¹⁴⁵ CJEU 3 September 2014, *Deckmyn*, C-201/13, ECLI:EU:C:2014:2132.

¹⁴⁶ Boek XI Wetboek van economisch recht 28 February 2013, *BS* 31 May 2014.

¹⁴⁷ M.-C. JANSSENS, H. VANHEES and V. VANOVERMEIRE, “De intellectuele eigendomsrechten verankerd in het Wetboek economisch recht: een eerste analyse”, *IRDI* 2014, no. 2, 42.

the author.¹⁴⁸ One of these exception is the parody-exception of article XI.190, 10° CEL. This exception was the subject of a case at the CJEU in 2014, which involved a cover of the comic book “Suske en Wiske”.

First, the Court decides that the concept of “parody”, which appears in a provision of a directive (article 5(3)(k) InfoSoc) does not contain any reference to national laws, and therefore must be regarded as an autonomous concept of EU law and interpreted uniformly throughout the European Union. Then, the court provides for specific criteria to define a parody. The essential characteristics of parody are:

- To evoke an existing work, while being noticeably different from it, and;
- To constitute an expression of humour or mockery.¹⁴⁹

On the other hand, it is not required for the parody:

- To mock the copyrighted work (the copyrighted work may be “appropriated” to mock something else);
- That it would itself be an original work of art;
- That it could reasonably be attributed to someone else than the author of the copyrighted work;
- That it mentions the source of the parodied work.¹⁵⁰

Finally, a fair balance must be struck between, on the one hand, the right of the author of the copyrighted work used, and on the other hand the freedom of expression of the person who makes the parody.¹⁵¹

45. **OPINION BY THE EUROPEAN COPYRIGHT SOCIETY (“ECS”)** – Shortly after the outcome of the *Deckmyn* case, the European Copyright Society wrote an opinion on the issues raised by the CJEU in this case.¹⁵² In this opinion, they support the decision of the CJEU at different levels. When it comes to the harmonization issue, the ECS welcomes the CJEU’s commitment to a uniform application of EU law, by considering parody an autonomous

¹⁴⁸ M.-C. JANSSENS, H. VANHEES and V. VANOVERMEIRE, “De intellectuele eigendomsrechten verankerd in het Wetboek economisch recht: een eerste analyse”, *IRDI* 2014, no. 2, 42.

¹⁴⁹ CJEU 3 September 2014, *Deckmyn*, C-201/13, ECLI:EU:C:2014:2132.

¹⁵⁰ CJEU 3 September 2014, *Deckmyn*, C-201/13, ECLI:EU:C:2014:2132.

¹⁵¹ CJEU 3 September 2014, *Deckmyn*, C-201/13, ECLI:EU:C:2014:2132.

¹⁵² A. METZGER (ed.) on behalf of the European Copyright Society, *Opinion on the Judgement of the CJEU in Case C-201/13 Deckmyn*, 1 November 2014.

concept across the EU.¹⁵³ They also emphasize the desirability of further legislative harmonization of exceptions and limitations across the EU.¹⁵⁴

4.2.2 *The flexibility of the American system*

46. **THE CASE FOR FLEXIBILITY** – The alleged flexibility that comes with the fair use doctrine is probably its biggest and most important characteristic. The comprehensive term “flexibility” includes more specific advantages and consequences, which are explained in the subtitles below. Australia is currently reviewing their copyright law system and considers to reform towards a fair use system. Within this process, several factors are considered and advantages and disadvantages of the fair use doctrine are weighted against the current Australian regime, which consists of a “fair dealing” doctrine. The documentation on this reform is of major interest for the topic of this master thesis, which is why some of the arguments below are based on that documentation.

The fair dealing doctrine is, like the fair use doctrine, an exception to copyright infringement but nevertheless has some divergent underpinnings. For instance, fair dealing statutes provide for a finite list of uses that might constitute fair dealing instead of an open-ended list like the fair use doctrine.¹⁵⁵ Another point of divergence is the availability of statutory guidance on how the fairness of a use should be evaluated, whereas the fair use provision in U.S. copyright law prescribes four factors that must be included in a fairness determination (*supra* section no. 32).¹⁵⁶ Because of the limited importance of the fair dealing doctrine in relation with the topic of this master thesis, I will not get into this subject any further.

4.2.2.1 *Fair use is a standard*

47. **RULES VS STANDARDS** – In this context, it is important to emphasize the difference between a rule and a standard. First, rules are more specific and prescribed, where standards allow

¹⁵³ A. METZGER (ed.) on behalf of the European Copyright Society, *Opinion on the Judgement of the CJEU in Case C-201/13 Deckmyn*, 1 November 2014, 3.

¹⁵⁴ A. METZGER (ed.) on behalf of the European Copyright Society, *Opinion on the Judgement of the CJEU in Case C-201/13 Deckmyn*, 1 November 2014, 3.

¹⁵⁵ Australian Copyright Council, “Fair Dealing: What Can I Use Without Permission?”, *Information Sheet* 2017, No. GO79v08, 1; G. D'AGOSTINO, “Healing fair dealing? A comparative copyright analysis of Canada's fair dealing to U.K. fair dealing and U.S. fair use” *McGill Law Journal* 2008, Vol. 53, 318.

¹⁵⁶ Australian Copyright Council, “Fair Dealing: What Can I Use Without Permission?”, *Information Sheet* 2017, No. GO79v08, 1; G. D'AGOSTINO, “Healing fair dealing? A comparative copyright analysis of Canada's fair dealing to U.K. fair dealing and U.S. fair use” *McGill Law Journal* 2008, Vol. 53, 318.

decisions to be made at the time of application, and with respect to a concrete set of facts.¹⁵⁷ This is what makes them more flexible. Second, such standards are sometimes accompanied by factors a court may or must take into account in applying the standard, or examples of when the standard may have been breached or complied with.¹⁵⁸ Within the fair use doctrine, this takes the form of the non-exhaustive list of examples. Finally, standards are often based on concepts that are readily accessible to non-experts.¹⁵⁹

48. **THE ADVANTAGE OF THE USE OF STANDARDS** – The flexibility of fair use largely comes from the fact that it is a standard, rather than a rule. A fair use application requires the consideration of four fairness factors, rather than an application of precise circumstances in which the exception will apply.¹⁶⁰ In my opinion, the use of standards within case law leaves a freedom to the judges to make a deliberate and thought out decision, rather than a scripted solution that can be found in the law. But it doesn't mean they can decide without taking any rules into account; the standards form a guidance to help the judge to come to his decision.

4.2.2.2 *Fair use is fact-specific*

49. **CASE-BY-CASE CONSIDERATION** – There is a big difference between the use of exemptions, as in the European system, and fair use. Exemptions function as a gateway to non-liability: if a use is within the class of works or behaviour covered by the exemption, there is no liability.¹⁶¹ Opponents of this approach argue that there is no weighing of different factors.¹⁶² Fair use is focused on individual uses and the individual who asserts fair use as a defence.¹⁶³ The result in a fair use case is based only on the facts of that case, and in

¹⁵⁷ Australian Law Reform Commission, *The Case for Fair Use*, 2013, 98; F. SCHAUER, “The Convergence of Rules and Standards”, *New Zealand Law Review* 2003, no. 3, 303.

¹⁵⁸ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 99.

¹⁵⁹ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 98; E. HUDSON, “Implementing Fair Use in Copyright Law”, *Intellectual Property Law Journal* 2013, no. 25, 220.

¹⁶⁰ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 95.

¹⁶¹ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PIJIP Research Paper Series* 2017, No. 2017-01, 22; M. SENFTLEBEN, “The International Three-Step Test. A Model Provision for EC Fair Use Legislation”, *JIPITEC* 2010, Vol. 1, No. 2, 69.

¹⁶² B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PIJIP Research Paper Series* 2017, No. 2017-01, 22.

¹⁶³ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PIJIP Research Paper Series* 2017, No. 2017-01, 22; M. SENFTLEBEN, “The International Three-Step Test. A Model Provision for EC Fair Use Legislation”, *JIPITEC* 2010, Vol. 1, No. 2, 68.

reaching the result of that case the judge must weigh various factors.¹⁶⁴ Proponents of this approach think that is a good thing. According to them, by being fact-specific courts are able to hear all relevant evidence and make a considered judgement, but are not “legislating” the outcome for future cases.¹⁶⁵

4.2.2.3 Fair use is technology-neutral

50. **THE PROBLEM WITH TECHNOLOGY** – New technologies, services and uses emerge over time, and this happens rapidly in the digital environment.¹⁶⁶ This collides with the inherent nature of law-making, which is a slow process.¹⁶⁷ This distance between the development of new technologies and the law-making process may affect legal certainty and cause individuals to act in an ambiguous environment where rights and responsibilities cannot be clearly acknowledged or predicted.¹⁶⁸ Moreover, the development and diffusion of (unregulated) technology influences the behaviour of its users, generates needs, triggers a market demand, and ends up imposing itself with the force of the fact.¹⁶⁹
51. **A TECHNOLOGY-OPEN STANDARD** – The standard-like characteristics which the fair use principle carries with it, make it suitable to function in an environment with innovative technology.¹⁷⁰ Many submissions in the Australian Copyright Law Reform suggested that the fair use system would be more responsive to rapid technological change and other associated developments than the current specific, closed-list approach to exceptions.¹⁷¹ This because fair use is a broad principles-based exception, which employs technology-

¹⁶⁴ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PIJIP Research Paper Series* 2017, No. 2017-01, 22; M. SENFTLEBEN, “The International Three-Step Test. A Model Provision for EC Fair Use Legislation”, *JIPITEC* 2010, Vol. 1, No. 2, 68.

¹⁶⁵ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PIJIP Research Paper Series* 2017, No. 2017-01, 22.

¹⁶⁶ Australian Law Reform Commission, *The Case for Fair Use*, 2013, 95.

¹⁶⁷ E. PALMERINI, “The interplay between law and technology, or the RoboLaw project in context” in E. PALMERINI and E. STRADELLA (eds.), *Law and Technology. The Challenge of Regulating Technological Development*, Pisa, Pisa University Press, 2013, 16.

¹⁶⁸ E. PALMERINI, “The interplay between law and technology, or the RoboLaw project in context” in E. PALMERINI and E. STRADELLA (eds.), *Law and Technology. The Challenge of Regulating Technological Development*, Pisa, Pisa University Press, 2013, 16.

¹⁶⁹ E. PALMERINI, “The interplay between law and technology, or the RoboLaw project in context” in E. PALMERINI and E. STRADELLA (eds.), *Law and Technology. The Challenge of Regulating Technological Development*, Pisa, Pisa University Press, 2013, 16; T. DREIER, “Law and Information Technology – An Uneasy Marriage, or Getting Along with Each Other?”, *Information & Communications Technology Law* 2005, Vol. 14, No. 3, 209.

¹⁷⁰ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PIJIP Research Paper Series* 2017, No. 2017-01, 12.

¹⁷¹ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 95.

neutral drafting.¹⁷² Thanks to this technology-neutral drafting, fair use does not only have the agility to keep up with the current technological developments, but it can even respond to future technologies that don't yet exist or haven't yet been foreseen.¹⁷³

4.2.2.4 Fair use as an alternative to law-making

52. **THE PROBLEM OF THE SLOW LAW-MAKING PROCESS** – As mentioned above, the slow law-making process can struggle with the innovative dimension of technology. Also in the Australian Copyright Law Reform, stakeholders expressed their concern about the lengthy delay between on the one hand the emergence of a new use, and on the other hand the legislature's consideration of the need for a specific exception.¹⁷⁴ At present, each new situation needs to be considered and dealt with in separate amending legislation which usually occurs after the need is identified.¹⁷⁵ Because of this delay, the law now lags years behind the current state of innovation in technology and service delivery.¹⁷⁶ Many stakeholders agreed with this statement in their submissions. Yahoo! for instance stated that “the existing exceptions under the Act are no longer sufficient by themselves to protect and support the new services introduced by internet and technology companies”.¹⁷⁷

Another submission added the concern that policy makers simply cannot be expected to identify and define *ex ante* all of the precise circumstances in which an exception should be available.¹⁷⁸ No legislature can anticipate or predict the future: it is not possible to legislate detailed rules to regulate dynamic situations, it is only possible to set forth guiding principles.¹⁷⁹

Furthermore it is not only difficult to adjust the law when a *new* technology is emerging and regulators have to face the challenge of “getting connected”, but also when the technology is in some way *already* established and widespread and it simply keeps moving

¹⁷² Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 95.

¹⁷³ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PLJIP Research Paper Series* 2017, No. 2017-01, 12; Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 95.

¹⁷⁴ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 96.

¹⁷⁵ R. LIIVOJA, “Technical change and the evolution of the law of war”, *International Review of the Red Cross* 2015, nr. 97, 1169; Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 96.

¹⁷⁶ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 96; T. DREIER, “Law and Information Technology – An Uneasy Marriage, or Getting Along with Each Other?”, *Information & Communications Technology Law* 2005, Vol. 14, No. 3, 209.

¹⁷⁷ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 96.

¹⁷⁸ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 96.

¹⁷⁹ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PLJIP Research Paper Series* 2017, No. 2017-01, 12; Australian Law Reform Commission, *The Case for Fair Use*, 2013, 96.

and being transformed.¹⁸⁰ “Staying connected” to established technologies that evolve again has also a bearing on the law, as it has to be adapted because of its reduced quality.¹⁸¹

53. **AN ALTERNATIVE TO LAW-MAKING** – On the other hand, within this context the law’s slow pace is not necessarily a weakness to warn against.¹⁸² With a fair use standard, innovation and other new expressive purposes don’t need to wait for the parliament to reconsider the appropriate scope of copyright exceptions.¹⁸³ Fair use will save the legislature from constant law reform to catch up with new technologies and uses, although of course the legislature could still act if needed to respond to particular developments.¹⁸⁴ In this regard, a flexible fair use provision can enable the law to adapt to changing technologies and uses without the need for legislative intervention.¹⁸⁵ Many stakeholders agreed with this in their submissions. eBay for instance, submitted that “a principles-based approach is likely to lessen the need to make ongoing statutory amendments in order to accommodate changing user expectations”.¹⁸⁶ Other stakeholders suggested that specific exceptions will inevitably reflect the circumstances that prevailed at the time of their enactment, while a general exception can respond to a changing environment.¹⁸⁷

4.2.3 Arguments against this far-reaching flexibility

54. **SEPARATION OF POWERS** – Despite the facilitating role the fair use principle can have for the legislator, other stakeholders argued against this broad function of fair use. Some stakeholders argued that it’s the task of the legislator and not of the judiciary to determine the scope of the exceptions.¹⁸⁸ The parliamentary process allows public consideration of community priorities, and create an opportunity for public scrutiny and debate.¹⁸⁹ In a

¹⁸⁰ E. PALMERINI, “The interplay between law and technology, or the RoboLaw project in context” in E. PALMERINI and E. STRADELLA (eds.), *Law and Technology. The Challenge of Regulating Technological Development*, Pisa, Pisa University Press, 2013, 17.

¹⁸¹ E. PALMERINI, “The interplay between law and technology, or the RoboLaw project in context” in E. PALMERINI and E. STRADELLA (eds.), *Law and Technology. The Challenge of Regulating Technological Development*, Pisa, Pisa University Press, 2013, 17.

¹⁸² E. PALMERINI, “The interplay between law and technology, or the RoboLaw project in context” in E. PALMERINI and E. STRADELLA (eds.), *Law and Technology. The Challenge of Regulating Technological Development*, Pisa, Pisa University Press, 2013, 17.

¹⁸³ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 97.

¹⁸⁴ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 97.

¹⁸⁵ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PIJIP Research Paper Series* 2017, No. 2017-01, 12; Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 95.

¹⁸⁶ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 96.

¹⁸⁷ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 96.

¹⁸⁸ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 97.

¹⁸⁹ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 97.

judicial decision-making process only the views of the parties are presented to the court, and therefore this process was seen as less democratic.¹⁹⁰ It is thus the task of the parliament to set out the principles upon which decisions should be made; the application of these principles to specific fact situations is the role of the courts.¹⁹¹

55. **NO NEED FOR MORE FLEXIBILITY** – Another refuting argument questioned the need of the fair use principle to respond to changing technological changes. Those stakeholders state that there is no need for greater flexibility, and that more flexibility comes at too high a cost.¹⁹² Or that the existing system is sufficiently flexible to respond to technological change.¹⁹³ In this context it is to be said that fair dealing exceptions are generally more flexible than specific prescribed exceptions.¹⁹⁴ Like fair use, they don't need to be confined to particular technologies and they require a consideration of fairness, in light of a set of principles.¹⁹⁵ But for most stakeholders, the current closed-ended fair dealing exceptions are too confined and inflexible.¹⁹⁶
56. **THE RISK OF UNPREDICTABILITY** – Because of the fact that a fair use examination always depends on a case-by-case decision, makes it, according to some, an unpredictable standard.¹⁹⁷ However, the argument that fair use is so fact-specific that it is unpredictable can easily be refuted as well. The fair use standard is equally applicable to the “reasonable person” in tort and negligence law, and the “rule of reason” in antitrust law.¹⁹⁸ These standards do not exist independently of the facts of the particular case either and they seem to work well.¹⁹⁹ But then again I am sure that this argument can be refuted again by developing a thorough comparison between the specific characteristics of copyright law and for instance tort law, concluding that the fair use standard and the reasonable person standard may not be tarred with the same brush.

¹⁹⁰ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 97.

¹⁹¹ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 97.

¹⁹² Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 97.

¹⁹³ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 97.

¹⁹⁴ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PIJIP Research Paper Series* 2017, No. 2017-01, 29; Australian Law Reform Commission, *The Case for Fair Use*, 2013, 98.

¹⁹⁵ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PIJIP Research Paper Series* 2017, No. 2017-01, 29; Australian Law Reform Commission, *The Case for Fair Use*, 2013, 98.

¹⁹⁶ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PIJIP Research Paper Series* 2017, No. 2017-01, 29; Australian Law Reform Commission, *The Case for Fair Use*, 2013, 98.

¹⁹⁷ J.C. GINSBURG, “Fair Use for Free, or Permitted-but-Paid?”, *Berkeley Tech. L.J.* 2015, 1383-1388.

¹⁹⁸ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PIJIP Research Paper Series* 2017, No. 2017-01, 22.

¹⁹⁹ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PIJIP Research Paper Series* 2017, No. 2017-01, 22.

4.2.4 *Crucial elements missing in the fair use doctrine*

4.2.4.1 *Moral rights*

57. **MORAL RIGHTS IN THE U.S.** – Article 6bis of the Berne Convention provides for moral rights. The meaning of moral rights was explained above (*supra* section no. 12). Moral rights reflect the initial ratio of the Berne Convention. They have been developed in nineteenth-century France as an element of the artist's right of personality and were meant to protect the artist's work, "his spiritual child", as an outgrowth of his soul.²⁰⁰ But despite the sentimental appeal of the doctrine, moral rights have faced strong resistance in the U.S., and American courts initially refused to recognize any moral rights of authors.²⁰¹ Since then, the situation has changed and the Congress recognized moral rights, but those rights are still significantly more limited than their European counterparts.²⁰² However, moral rights are not to be neglected, as they form an important part of the author's possibility to control the use of his work.
58. **MORAL RIGHTS AND FAIR USE** – Nevertheless, the fair use doctrine and moral rights seem to be incompatible, and this for a number of reasons. First, fair use is a doctrine born of intellectual property law for the purpose of permitting certain non-rivalrous uses of *intangible* copyrighted works, whereas moral rights govern the relationship of artists with *tangible* property.²⁰³ Second, fair use is a doctrine that permits certain uses of a work in preference to a copyright owner's otherwise valid copyright exclusive rights, whereas moral rights are rights of a different nature as they are "personal" rights or "personal property", and thus of an entirely different nature than ordinary exclusive copyrights.²⁰⁴ Third, the underlying goal of the fair use is to promote the creation of new works of authorship, whereas moral rights exist for opposite reasons, notably to promote artistic respect and

²⁰⁰ J. GRIFFITS, "Moral Rights from a Copyright Perspective" in F. BRISON, S. DUSOLLIER, M.-C. JANSSENS and H. VANHEES (eds.), *Moral Rights in the 21st Century*, Brussels, Larcier, 2015, 1; D.S. CIOLINO, "Rethinking the Compatibility of Moral Rights and Fair Use", *Washington and Lee Law Review* 1997, Vol. 54, No. 1, 35; S. RICKETSON, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, London, Centre for Commercial Law Studies, Queen Mary College, Kluwer, 1987, 486.

²⁰¹ D.S. CIOLINO, "Rethinking the Compatibility of Moral Rights and Fair Use", *Washington and Lee Law Review* 1997, Vol. 54, No. 1, 35.

²⁰² D.S. CIOLINO, "Rethinking the Compatibility of Moral Rights and Fair Use", *Washington and Lee Law Review* 1997, Vol. 54, No. 1, 36.

²⁰³ D.S. CIOLINO, "Rethinking the Compatibility of Moral Rights and Fair Use", *Washington and Lee Law Review* 1997, Vol. 54, No. 1, 37.

²⁰⁴ D.S. CIOLINO, "Rethinking the Compatibility of Moral Rights and Fair Use", *Washington and Lee Law Review* 1997, Vol. 54, No. 1, 37.

artefact preservation.²⁰⁵ Finally, the four fair use factors simply do not work when they are applied to a “use” of tangible property protected by moral rights.²⁰⁶

4.2.4.2 Fair compensation

59. **ABSOLUTIST POSITION** – Another important aspect that, in my opinion, seems to be missing in the fair use doctrine is the possibility for the original author to obtain compensation for the use of his work. The U.S. have a rather absolute position when it comes to the application of the fair use doctrine: it is all or nothing.²⁰⁷ Either a certain use contains an infringement of copyright, or it is fair use.²⁰⁸ If it contains fair use, Section 107 declares it “is not an infringement of copyright”.²⁰⁹ As a result, the user is not only dispensed from obtaining permission, but he also owes no compensation for the use.²¹⁰ It may seem unfair that much of the fruit of the compiler’s labour may be used by others without compensation, but this is the consequence of what forms the essence of copyright in the U.S.²¹¹ The primary objective of copyright is not to reward the labour of authors, but to promote the progress of science and useful arts.²¹²

In Europe, on the contrary, the author can still be remunerated even though the use of his work by others is permitted without his prior authorization (what would constitute a fair use in the U.S.). For instance, article 5(2) of the InfoSoc Directive provides for a fair compensation for private uses. In this regard, the European copyright approach differs from the U.S. as they pursue different objectives. The InfoSoc Directive acknowledges in Recital 10, among others, that if authors are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work.²¹³ Adequate legal protection of

²⁰⁵ D.S. CIOLINO, “Rethinking the Compatibility of Moral Rights and Fair Use”, *Washington and Lee Law Review* 1997, Vol. 54, No. 1, 37.

²⁰⁶ D.S. CIOLINO, “Rethinking the Compatibility of Moral Rights and Fair Use”, *Washington and Lee Law Review* 1997, Vol. 54, No. 1, 37.

²⁰⁷ J.C. GINSBURG, “Fair Use for Free, or Permitted-but-Paid?”, *Berkeley Tech. L.J.* 2015, 1384; R. PATTERSON, “Understanding Fair Use”, *Law and Contemporary Problems* 1992, Vol. 55, No. 2, 265.

²⁰⁸ J.C. GINSBURG, “Fair Use for Free, or Permitted-but-Paid?”, *Berkeley Tech. L.J.* 2015, 1384.

²⁰⁹ J.C. GINSBURG, “Fair Use for Free, or Permitted-but-Paid?”, *Berkeley Tech. L.J.* 2015, 1384.

²¹⁰ J.C. GINSBURG, “Fair Use for Free, or Permitted-but-Paid?”, *Berkeley Tech. L.J.* 2015, 1384; R. PATTERSON, “Understanding Fair Use”, *Law and Contemporary Problems* 1992, Vol. 55, No. 2, 265.

²¹¹ R. PATTERSON, “Understanding Fair Use”, *Law and Contemporary Problems* 1992, Vol. 55, No. 2, 265.

²¹² R. PATTERSON, “Understanding Fair Use”, *Law and Contemporary Problems* 1992, Vol. 55, No. 2, 265.

²¹³ A. RENDA, F. SIMONELLI, G. MAZZIOTTI, A. BOLOGNINI and G. LUCHETTA, “The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society”, *CEPS Special Report* 2015, No. 120, 108.

intellectual property rights is necessary in order to guarantee the availability of such a reward.²¹⁴

4.3 Parallelism between the criteria of the Three-Step test and the fair use factors

60. **A MATTER OF INTERPRETATION** – In the end, the whole discussion about which system is the best, might in my opinion lead to a dead end. As argued in the paragraphs above, both systems have their strengths and flaws. But I believe you can interpret both systems in such way that the actual differences between them become more or less insignificant. The paragraphs below further demonstrate the parallelism between the two systems.
61. **PARALLELISM IN THE WORDING** – The most important asset of the fair use principle, as argued above, is its flexible wording. But the wording of the Three-Step test carries inherent flexibility in itself as well. The initial purpose of the Test was to be able to strike an appropriate balance in copyright law between right holders and right users.²¹⁵ This is why the test is formulated in such an open-ended way, so that it leaves room for flexible approaches seeking to find this balance.²¹⁶ Like the fair use doctrine, the Three-Step test establishes a set of abstract criteria.²¹⁷ Furthermore, some of the criteria of the Three-Step test and the factors of the fair use doctrine seem to be very similar. For instance, the second step of the Three-Step test (prohibition of a conflict with a normal exploitation) recalls the fourth factor of the fair use doctrine, which is about the effect of the use upon the potential market for or value of the copyrighted work.²¹⁸
62. **PARALLELISM IN THE PHILOSOPHY** – In the WTO Panel Report of 2000 on the Three-Step test, the Panel stated the following: *“There is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a sufficient degree of legal*

²¹⁴ A. RENDA, F. SIMONELLI, G. MAZZIOTTI, A. BOLOGNINI and G. LUCHETTA, “The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society”, *CEPS Special Report* 2015, No. 120, 108.

²¹⁵ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 23.

²¹⁶ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 23.

²¹⁷ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 23.

²¹⁸ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, The Three-Step Test Revisited: How to Use the Test’s Flexibility in National Copyright Law, *PIJIP Research Paper Series* 2013, 23-24.

*certainty.*²¹⁹ With this statement, the Panel has left room for the national copyright laws to provide for open-ended exceptions and limitations when interpreting the Three-Step test.²²⁰ Secondly, it also means that legal certainty is not necessarily the exclusive task of the legislator but also of the national courts.²²¹ This is an important parallelism when it comes to the legal philosophy behind both systems, as in the U.S. system this role is also divided between law makers and judges.²²²

63. **PARALLELISM IN THE APPLICABILITY** – Following the previous paragraph about the roles of the legislators and the courts, one of the most important arguments why fair use wouldn't be compatible with the Three-Step test can be refuted. The argument contains the problem that fair use, by definition, would be incompatible with the requirement of “certain special cases” of the Three-Step test. But the open fair use factors allow courts to determine “certain special cases” of permissible unauthorized use in the light of the individual circumstances of a given case.²²³ With every new court decision, a new “special case” becomes known and thus “certain” in the sense of the Three-Step test.²²⁴ The degree of legal certainty, as was argued to be the most important asset of the Three-Step test, follows in the fair use doctrine from established case law instead of detailed legislation.²²⁵
64. **FAIR USE IS SUFFICIENTLY CERTAIN AND PREDICTABLE** – It is important for individuals, institutions and businesses to know what uses they can make of copyright material, and it is important for right holders to know when their rights are exclusive.²²⁶ The most significant concern raised by opponents of the fair use system is that the lack of clear and precise rules would result in uncertainty about what uses are fair.²²⁷ The uncertainty would create a need for both rights holders and users to obtain legal advice, and thus increasing

²¹⁹ World Trade Organization, “United States – Section 110(5) of the US Copyright Act. Report of the Panel”, *WTO Panel Reports* 2000, No. WT/DS160/R, 33.

²²⁰ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, *PIJIP Research Paper Series* 2013, 24.

²²¹ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, *PIJIP Research Paper Series* 2013, 24.

²²² C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, *PIJIP Research Paper Series* 2013, 24.

²²³ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, *PIJIP Research Paper Series* 2013, 24.

²²⁴ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, *PIJIP Research Paper Series* 2013, 25.

²²⁵ C. GEIGER, D.J. SERVAIS and M. SENFTLEBEN, *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, *PIJIP Research Paper Series* 2013, 25.

²²⁶ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 114.

²²⁷ Australian Law Reform Commission, “The Case for Fair Use”, *ALRC Publications* 2013, 112.

transaction costs.²²⁸ In the materials of the Australian Copyright Law Reform, the Committee concluded that fair use is sufficiently certain and predictable.²²⁹ Owners and users of copyright material are guided by the fairness factors, the list of illustrative purposes, existing case law, case law of other relevant jurisdictions, and any industry guidelines and codes of practice that are developed.²³⁰ Uncertainty is most likely to arise when a new use emerges, and such a use is more likely to be subject to litigation.²³¹ It is exactly in these newer areas of copyright use that flexibility is most necessary.²³²

5. Comparative case studies

65. **PURPOSE** – To illustrate the differences and similarities in the practical application of both copyright use systems, this chapter discusses some similar cases that have been ruled in the U.S. and in continental Europe.
66. **SEARCH ENGINES** – A relevant issue to illustrate those differences and similarities are Search engines, such as Google. The evolution and development of search engines over the past ten years to their current level of sophistication, poses several challenging legal issues to the area of copyright law.²³³ These legal issues particularly arise in regard to the reproduction and communication to the public of text or images.²³⁴ It is important to note that search engines don't own any content, but instead organise and provide access to the material that is posted on websites and the internet general.²³⁵
67. Google has been attacked in various countries for alleged violations of copyright law resulting from several features offered by its internet search engines.²³⁶ As such, almost all the cases discussed below involve Google as one of the disputing parties, except for the first American copyright case *Kelly v. Arriba Soft Corporation*, where the search engine is not

²²⁸ Australian Law Reform Commission, "The Case for Fair Use", *ALRC Publications* 2013, 112.

²²⁹ Australian Law Reform Commission, "The Case for Fair Use", *ALRC Publications* 2013, 113.

²³⁰ Australian Law Reform Commission, "The Case for Fair Use", *ALRC Publications* 2013, 113.

²³¹ Australian Law Reform Commission, "The Case for Fair Use", *ALRC Publications* 2013, 115.

²³² Australian Law Reform Commission, "The Case for Fair Use", *ALRC Publications* 2013, 115.

²³³ B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, "Search Engine Liability for Copyright Infringement", in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 1.

²³⁴ B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, "Search Engine Liability for Copyright Infringement", in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 4.

²³⁵ B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, "Search Engine Liability for Copyright Infringement", in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 4.

²³⁶ E. KIRSCH and A. KLETT, "US and European courts split over fair use", *Managing IP* 2009, 32.

Google but Arriba Soft. The (search) services of Google have been proved susceptible for copyright infringement, mostly because of the technology Google uses. The matters concern the use by Google of text, photographs or other graphic elements (such as thumbnails), on their services such as Google News and Google Images.²³⁷ Therefore, with regard to the subject matter of this master thesis, the content of these Google cases seemed very appropriate for a more detailed examination and commentary. While operating a search engine in the U.S. would generally be considered fair use, the courts in Europe have different opinions.²³⁸ In analysing these cases, the focus will lay principally on those aspects of the cases which are relevant to the subject matter analysed under the current master thesis and not the entire case as such.

5.1 American fair use cases

68. **OVERVIEW** – This first section focuses on the American interpretation of fair use cases related to search engines. Five cases will be discussed chronologically, as the succeeding cases generally build upon the reasoning of the previous cases. Each case discussion is built up among the same structure, namely 1) a brief explanation of the dispute matter, 2) the claims of the plaintiff and 3) how the four factors of the fair use doctrine are applied in the particular case. Before proceeding with the section on European cases, a short interim evaluation on the American aspect is presented.

5.1.1 *Kelly v. Arriba Soft Corporation*

69. **DISPUTE MATTER** – In this first American case of 2003 the dispute matter concerns a service which is similar to what most people know as Google Images.²³⁹ Google Images will also be discussed in later cases. The search engine Arriba Soft enabled users to search for images on the internet.²⁴⁰ The results retrieved by the search engine were then displayed in the form of thumbnail images of lower resolution and quality than the original images from which

²³⁷ E. KIRSCH and A. KLETT, “US and European courts split over fair use”, *Managing IP* 2009, 32.

²³⁸ E. KIRSCH and A. KLETT, “US and European courts split over fair use”, *Managing IP* 2009, 33.

²³⁹ *Kelly v. Arriba Soft Corp*, 336 F.3d 811, (9th Cir. 2003).

²⁴⁰ *Kelly v. Arriba Soft Corp*, 336 F.3d 811, (9th Cir. 2003), 9064; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 7.

they were made.²⁴¹ The thumbnail images contained inline links to the full-size images.²⁴² So by clicking on a thumbnail a full-size version of the image was displayed as it appeared on the original copyright owner's website, as well as the webpage from which the image originated.²⁴³ This use of "inline linking" meant that the image displayed when a user clicked on the thumbnail, was the actual image that appeared on the copyright owner's website.²⁴⁴

70. **CLAIMS OF THE PLAINTIFF** – The plaintiff (Mr. Kelly) was a professional photographer. He owned photographic images that he had posted on his website on which he sold advertising space as well as books and travel packages.²⁴⁵ He claimed copyright infringement for the fact that Arriba Soft had reproduced thirty-five of his photographs and displayed them as thumbnails in response to search requests.²⁴⁶

71. **APPLICATION OF THE FAIR USE FACTORS** – After the application of the four factors, the Court held that defendant's reproduction of the photos as thumbnail images was fair use.²⁴⁷ The most important fair use factors in this were the first one (purpose and character of the use) and the fourth one (effect of the use upon the potential market for or value of the copyrighted work). As will be seen in the following cases, the fair use consideration is

²⁴¹ *Kelly v. Arriba Soft Corp*, 336 F.3d 811, (9th Cir. 2003), 9064; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, "Search Engine Liability for Copyright Infringement", in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 7.

²⁴² *Kelly v. Arriba Soft Corp*, 336 F.3d 811, (9th Cir. 2003), 9064; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, "Search Engine Liability for Copyright Infringement", in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 7.

²⁴³ *Kelly v. Arriba Soft Corp*, 336 F.3d 811, (9th Cir. 2003), 9064; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, "Search Engine Liability for Copyright Infringement", in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 7.

²⁴⁴ *Kelly v. Arriba Soft Corp*, 336 F.3d 811, (9th Cir. 2003), 9064; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, "Search Engine Liability for Copyright Infringement", in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 7.

²⁴⁵ *Kelly v. Arriba Soft Corp*, 336 F.3d 811, (9th Cir. 2003), 9064; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, "Search Engine Liability for Copyright Infringement", in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 7; U.S. Copyright Office, "Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003)", *Fair Use Index*, <https://www.copyright.gov/fair-use/summaries/kelly-arriba-9thcir2003.pdf>.

²⁴⁶ *Kelly v. Arriba Soft Corp*, 336 F.3d 811, (9th Cir. 2003), 9064; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, "Search Engine Liability for Copyright Infringement", in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 7; U.S. Copyright Office, "Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003)", *Fair Use Index*, <https://www.copyright.gov/fair-use/summaries/kelly-arriba-9thcir2003.pdf>.

²⁴⁷ U.S. Copyright Office, "Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003)", *Fair Use Index*, <https://www.copyright.gov/fair-use/summaries/kelly-arriba-9thcir2003.pdf>.

usually focused on these two factors. As to the first factor, the Court deemed the use transformative because the thumbnails served an entirely different function than the original images.²⁴⁸ While the images of the plaintiff were artistic works, the use of them by the defendant was unrelated to any aesthetic purpose.²⁴⁹ The search engine merely functioned as a tool to help index and improve access to images on the internet and their related websites.²⁵⁰ As to the fourth factor, the Court found that the lower-resolution thumbnail images did not harm the market for or value of plaintiff's images.²⁵¹ By showing the thumbnails on its results page when users entered terms related to plaintiff's images, the search engine would guide users to the website of the plaintiff rather than away from it.²⁵²

5.1.2 *Field v. Google Inc. and follow-up case Parker v. Google Inc.*

72. **DISPUTE MATTER** – This second American case of 2006 concerns Google Cache.²⁵³ An internet search engine like Google allows internet users to sift through the massive amount of information available on the internet to find specific information that is of particular interest to them.²⁵⁴ To index and catalogue all this information, Google uses an automated program (the “Googlebot”), to continuously crawl across the internet to locate and analyse available web pages, and to catalogue them into Google’s searchable web index.²⁵⁵ As part

²⁴⁸ *Kelly v. Arriba Soft Corp*, 336 F.3d 811, (9th Cir. 2003), 9070; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 7; U.S. Copyright Office, “Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003)”, *Fair Use Index*, <https://www.copyright.gov/fair-use/summaries/kelly-arriba-9thcir2003.pdf>.

²⁴⁹ *Kelly v. Arriba Soft Corp*, 336 F.3d 811, (9th Cir. 2003), 9070; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 7; U.S. Copyright Office, “Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003)”, *Fair Use Index*, <https://www.copyright.gov/fair-use/summaries/kelly-arriba-9thcir2003.pdf>.

²⁵⁰ *Kelly v. Arriba Soft Corp*, 336 F.3d 811, (9th Cir. 2003), 9071.

²⁵¹ *Kelly v. Arriba Soft Corp*, 336 F.3d 811, (9th Cir. 2003), 9075; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 7; U.S. Copyright Office, “Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003)”, *Fair Use Index*, <https://www.copyright.gov/fair-use/summaries/kelly-arriba-9thcir2003.pdf>.

²⁵² *Kelly v. Arriba Soft Corp*, 336 F.3d 811, (9th Cir. 2003), 9075-9076.

²⁵³ *Field v. Google, Inc.*, 412 F Supp 2d 1106 (D. Nev. 2006).

²⁵⁴ *Field v. Google, Inc.*, 412 F Supp 2d 1106 (D. Nev. 2006), 2; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 5; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 372.

²⁵⁵ *Field v. Google, Inc.*, 412 F Supp 2d 1106 (D. Nev. 2006), 2; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 372.

of this process, Google makes and analyses a copy of each web page that it finds, and stores the HTML code from those pages in a temporary repository, called a cache.²⁵⁶

73. **CLAIMS OF THE PLAINTIFF** – The plaintiff (Mr. Field) was an author. He claimed copyright infringement against Google because it automatically cached and copied his website, which included numerous works authored by himself.²⁵⁷ He alleged that Google directly infringed his exclusive rights to reproduce and distribute copies of his works, when it served cached copies of his works to its users.²⁵⁸
74. **IMPLIED LICENSE** – Before proceeding to the application of the fair use factors on to the concrete circumstances of the case, the Court focussed on Google’s defence argument of having acquired an implied license from the plaintiff. A license is a defence to a claim of copyright infringement.²⁵⁹ The Court found that the plaintiff had granted Google an implied, non-exclusive license to display the work.²⁶⁰ The plaintiff was aware of the technical methods to instruct a search engine *not* to cache his website by using a “no-archive” meta-tag.²⁶¹ Despite this knowledge, the plaintiff chose not to include the no-archive meta-tag on the pages of his site.²⁶² He did so, knowing that Google would interpret the absence of the

²⁵⁶ *Field v. Google, Inc.*, 412 F Supp 2d 1106 (D. Nev. 2006), 3; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 372.

²⁵⁷ *Field v. Google, Inc.*, 412 F Supp 2d 1106 (D. Nev. 2006), 2; B. FITZGERALD, D. O’BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 5; *Berkeley Technology Law Journal*, “Field v. Google Inc.”, *Berkeley Tech. L.J.* 2006, Vol. 21, No. 1, 2; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 374.

²⁵⁸ *Field v. Google, Inc.*, 412 F Supp 2d 1106 (D. Nev. 2006), 2; B. FITZGERALD, D. O’BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 5; *Berkeley Technology Law Journal*, “Field v. Google Inc.”, *Berkeley Tech. L.J.* 2006, Vol. 21, No. 1, 2; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 374.

²⁵⁹ *Field v. Google, Inc.*, 412 F Supp 2d 1106 (D. Nev. 2006), 10.

²⁶⁰ *Field v. Google, Inc.*, 412 F Supp 2d 1106 (D. Nev. 2006), 11; *Berkeley Technology Law Journal*, “Field v. Google Inc.”, *Berkeley Tech. L.J.* 2006, Vol. 21, No. 1, 2.

²⁶¹ *Field v. Google, Inc.*, 412 F Supp 2d 1106 (D. Nev. 2006), 11; B. FITZGERALD, D. O’BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 5; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 374.

²⁶² *Field v. Google, Inc.*, 412 F Supp 2d 1106 (D. Nev. 2006), 11; B. FITZGERALD, D. O’BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 5; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 374.

meta-tag as permission to allow access to the pages via cached links.²⁶³ Thus, with knowledge of how Google would use the copyrighted works he placed on those pages, and with knowledge that he could prevent such use, the Court concluded that the plaintiff instead made a conscious decision to permit it.²⁶⁴

75. **APPLICATION OF THE FAIR USE FACTORS** – After having considered other arguments of the defendant (such as the doctrine of estoppel and the fact that there was no volitional act from Google), the Court proceeded to the examination of the four fair use factors.²⁶⁵ As conclusion, the Court found that the plaintiff’s copyright had not been infringed.²⁶⁶ In this case the Court has given the most weight to the first factor.²⁶⁷ It concluded that Google’s use of the protected material is transformative.²⁶⁸ Rather than serving an artistic function, its display of the images served an archival function allowing users to access content when the original page is inaccessible.²⁶⁹
76. **PARKER V. GOOGLE** – Soon after the decision in *Field v. Google* in 2006, the same year another district court followed this decision in the *Parker v. Google* case involving caching and indexing copyrighted material from the internet.²⁷⁰ The circumstances of this case are

²⁶³ *Field v. Google, Inc.*, 412 F Supp 2d 1106 (D. Nev. 2006), 11.

²⁶⁴ *Field v. Google, Inc.*, 412 F Supp 2d 1106 (D. Nev. 2006), 11; B. FITZGERALD, D. O’BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 5.

²⁶⁵ B. FITZGERALD, D. O’BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 5; Berkeley Technology Law Journal, “Field v. Google Inc.”, *Berkeley Tech. L.J.* 2006, Vol. 21, No. 1, 2; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 374.

²⁶⁶ *Field v. Google, Inc.*, 412 F Supp 2d 1106 (D. Nev. 2006), 2; Berkeley Technology Law Journal, “Field v. Google Inc.”, *Berkeley Tech. L.J.* 2006, Vol. 21, No. 1, 2.

²⁶⁷ *Field v. Google, Inc.*, 412 F Supp 2d 1106 (D. Nev. 2006), 13.

²⁶⁸ *Field v. Google, Inc.*, 412 F Supp 2d 1106 (D. Nev. 2006), 14; B. FITZGERALD, D. O’BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 5; Berkeley Technology Law Journal, “Field v. Google Inc.”, *Berkeley Tech. L.J.* 2006, Vol. 21, No. 1, 2; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 375.

²⁶⁹ *Field v. Google, Inc., Inc.*, 412 F Supp 2d 1106 (D. Nev. 2006), 14; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 375.

²⁷⁰ *Parker v. Google Inc.*, 422 Supp 2d 492 (D. Penn. 2006), 2; B. FITZGERALD, D. O’BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 6; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 384.

very similar to the ones in *Field v. Google*. An author (Mr. Parker) claimed that Google had directly infringed his copyrights by automatically archiving a copy of a chapter of his book that he put on an online bulletin board.²⁷¹ He also claimed direct infringement for the fact that Google provides users of the search engine with a list of links in response to a search query, with excerpts of his website contained within the list of links.²⁷² The Court rejected the claims of the plaintiff on similar grounds as the Court in *Field v. Google*.²⁷³

5.1.3 *Perfect 10 v. Google Inc.*

77. **DISPUTE MATTER** – The facts of this case from 2007 are similar to the *Kelly v. Arriba Soft Corp* case of 2003.²⁷⁴ It concerned the Google Images service.²⁷⁵ Because Google stores webpage content in its own cache servers (as explained above, *supra* nr. 72), an image infringing the copyrights of the original owner can be viewed even if the webpage owner removed the HTML instructions.²⁷⁶ The webpage owner would have to change the web address of the image or render it unavailable in order for it to be inaccessible through the cache.²⁷⁷ The users of Perfect 10 have to pay a fee to view the images in the “members area” of the site.²⁷⁸ Google does not have these images in its index or database.²⁷⁹ However, some website publishers republish the images without authorization.²⁸⁰ And when this happens,

²⁷¹ *Parker v. Google Inc.*, 422 Supp 2d 492 (D. Penn. 2006), 2; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 6.

²⁷² *Parker v. Google Inc.*, 422 Supp 2d 492 (D. Penn. 2006), 2; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 6.

²⁷³ *Parker v. Google Inc.*, 422 Supp 2d 492 (D. Penn. 2006); B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 6.

²⁷⁴ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007).

²⁷⁵ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5759.

²⁷⁶ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5762.

²⁷⁷ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5762.

²⁷⁸ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5764; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – *Field v. Google, Inc.* and *Perfect 10 v. Google, Inc.*”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 278.

²⁷⁹ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5764; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – *Field v. Google, Inc.* and *Perfect 10 v. Google, Inc.*”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 278.

²⁸⁰ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5764; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – *Field v. Google, Inc.* and *Perfect 10 v. Google, Inc.*”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 278.

Google may index the webpages containing the images and provide thumbnail versions of images in response to searches.²⁸¹

78. **CLAIMS OF THE PLAINTIFF** – The plaintiff was the owner of copyrighted photographs from which he derived revenue in various ways, such as publications in magazines, displays on a subscription website and the licensing to a third party to sell thumbnails of the images for downloading to mobile phones.²⁸² He claimed copyright infringement by Google because its search engine showed thumbnail versions of the plaintiff’s original images in its results.²⁸³
79. **APPLICATION OF THE FAIR USE FACTORS** – In its analyse of the four factors, the Court regularly refers to the *Kelly v. Arriba Soft Corp* case, but also distinguished some elements.²⁸⁴ As to the first factor, the Court noted that this case was very similar to the *Kelly v. Arriba Soft Corp* case and concluded that Google’s use in this case was highly transformative too.²⁸⁵ Although an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information.²⁸⁶ In other words, a search engine puts images in a different context so that they are transformed into a new creation.²⁸⁷ The fact that Google incorporates the entire Perfect 10 image into the search engine results does not diminish the transformative nature of Google's use.²⁸⁸

²⁸¹ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5764; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 278.

²⁸² *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5768; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 278.

²⁸³ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5768; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 278.

²⁸⁴ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5777; A. FALZONE, “The two faces of Perfect 10 v. Google”, *Blog of The Center for Internet and Society* 2007; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 281.

²⁸⁵ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5778; M. SENFTLEBEN, “The international Three-Step Test: A Model Provision for EC Fair Use Legislation”, *JIPITEC* 2010, no. 67, 73; A. FALZONE, “The two faces of Perfect 10 v. Google”, *Blog of The Center for Internet and Society* 2007; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 281.

²⁸⁶ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5780.

²⁸⁷ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5780; M. SENFTLEBEN, “The international Three-Step Test: A Model Provision for EC Fair Use Legislation”, *JIPITEC* 2010, no. 67, 73.

²⁸⁸ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5780; M. SENFTLEBEN, “The international Three-Step Test: A Model Provision for EC Fair Use Legislation”, *JIPITEC* 2010, no. 67, 73.

As to a first issue relating to the fourth factor, the Court also followed the reasoning in *Kelly* and held that market harm could not be presumed, given the highly transformative nature of the use.²⁸⁹ A second issue relating to this fourth factor that has not been considered in the *Kelly* case, is that in this case Perfect 10 also has a market for reduced-size images, like Google has.²⁹⁰ This has to do with the possibility to download reduced-size images onto cell phones.²⁹¹ Perfect 10 argued that persons who can obtain Perfect 10 images free of charge from Google, are less likely to pay for a download, and that the availability of Google's thumbnail images would harm Perfect 10's market for cell phone downloads.²⁹² But the Court reasoned that there was no finding that Google users have downloaded thumbnail images for cell phone use.²⁹³ Therefore, this potential harm to Perfect 10's market remains hypothetical.²⁹⁴

5.1.4 *Author's Guild, Inc. v. Google, Inc.*

80. **DISPUTE MATTER** – The last case relating to the issue of search engines that is relevant to the subject matter of this master thesis dates from 2015.²⁹⁵ This case concerns another feature of Google, namely Google Books.²⁹⁶ In this case, Google scanned more than twenty-million books without permission or payment of license fees and subsequently made the digital copies available to its library partners.²⁹⁷ It also maintained copies on Google servers

²⁸⁹ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5784; M. SENFTLEBEN, “The international Three-Step Test: A Model Provision for EC Fair Use Legislation”, *JIPITEC* 2010, no. 67, 74; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 282.

²⁹⁰ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5785; A. FALZONE, “The two faces of Perfect 10 v. Google”, *Blog of The Center for Internet and Society* 2007; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 282.

²⁹¹ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5785; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 282.

²⁹² *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5785; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 282.

²⁹³ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5786; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 282.

²⁹⁴ *Perfect 10 Inc. v. Google Inc.*, 508 F.3d 1146 (9th Cir. 2007), 5786; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 282.

²⁹⁵ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (2nd Cir. 2015).

²⁹⁶ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (2nd Cir. 2015); S. VAIDHYANATHAN, “The Googlization of Everything and the Future of Copyright”, *University of California Davis Law Review* 2007, Vol. 40, 1212.

²⁹⁷ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (2nd Cir. 2015), 2; C. POSTEL “Let’s Play: YouTube and Twitch’s Video Game Footage and a New Approach to Fair Use”, *Hastings Law Journal* 2017, Vol. 68, No. 5, 1182; C. COHN and K. HASHIMOTO, “The Case for Book Privacy Parity: Google Books and the Shift from

and on backup tapes, created an electronic index, and displayed “snippets” of text in search engine results.²⁹⁸

81. **CLAIMS OF THE PLAINTIFF** – The plaintiffs alleged that Google infringed their copyright protected works by using the books without permission.²⁹⁹ Despite the fact that Google takes measures to provide full text of only works in public domain, and providing only a searchable summary online for books still under copyright protection, plaintiffs maintain that Google has no right to copy full text of their books with copyrights and save them in large amounts into its own database.³⁰⁰
82. **APPLICATION OF THE FAIR USE FACTORS** – The consideration of the fair use factors follows substantially a similar structure and reasoning as in the previous cases. For instance, the Court equally commenced in this case with the consideration that the use by Google was transformative (first factor), and came to a similar conclusion as in previous cases.³⁰¹ It stated that Google’s making of a digital copy to provide a search function augments public knowledge, because by doing so Google makes information available *about* the plaintiffs’ books without providing the public with a substantial quantity of the books.³⁰² Related to this, the Court also found that Google’s provision of digital copies to participating libraries, authorizing them to make non-infringing uses, is non- infringing, and that the mere

Offline to Online Reading”, *Law&Policy Review* 2010; S. VAIDHYANATHAN, “The Googlization of Everything and the Future of Copyright”, *University of California Davis Law Review* 2007, Vol. 40, 1212; U.S. Copyright Office, “Authors Guild, Inc. v. Google, Inc., 13-4829-cv (2d Cir. Oct. 16, 2015)”, *Fair Use Index*, <https://www.copyright.gov/fair-use/summaries/authorsguild-google-2dcir2015.pdf>.

²⁹⁸ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (2nd Cir. 2015), 2-3; C. POSTEL “Let’s Play: YouTube and Twitch’s Video Game Footage and a New Approach to Fair Use”, *Hastings Law Journal* 2017, Vol. 68, No. 5, 1182; C. COHN and K. HASHIMOTO, “The Case for Book Privacy Parity: Google Books and the Shift from Offline to Online Reading”, *Law&Policy Review* 2010; S. VAIDHYANATHAN, “The Googlization of Everything and the Future of Copyright”, *University of California Davis Law Review* 2007, Vol. 40, 1212; U.S. Copyright Office, “Authors Guild, Inc. v. Google, Inc., 13-4829-cv (2d Cir. Oct. 16, 2015)”, *Fair Use Index*, <https://www.copyright.gov/fair-use/summaries/authorsguild-google-2dcir2015.pdf>.

²⁹⁹ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (2nd Cir. 2015), 3; S. VAIDHYANATHAN, “The Googlization of Everything and the Future of Copyright”, *University of California Davis Law Review* 2007, Vol. 40, 1212.

³⁰⁰ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (2nd Cir. 2015), 3.

³⁰¹ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (2nd Cir. 2015), 17; W. CRAWFORD, “Google Books”, *Cites & Insights* 2016, Vol. 16, No. 4, 7; CRS Reports & Analysis, “Still Fair Use for Google Books: Second Circuit Ruling in Authors Guild v. Google”, *CRS Legal Sidebar* 2015, 1.

³⁰² *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (2nd Cir. 2015), 18; C. POSTEL “Let’s Play: YouTube and Twitch’s Video Game Footage and a New Approach to Fair Use”, *Hastings Law Journal* 2017, Vol. 68, No. 5, 1182; CRS Reports & Analysis, “Still Fair Use for Google Books: Second Circuit Ruling in Authors Guild v. Google”, *CRS Legal Sidebar* 2015, 1.

speculative possibility that the libraries might allow use of their copies in an infringing manner does not make Google a contributory infringer.³⁰³

In this case the court also devoted attention to the third fair use factor: the amount and substantiality of the portion taken.³⁰⁴ Regarding this factor the Court considered Google's copying of entire texts to enable the Google Books search function not to be an obstacle for fair use, because Google restricted the amount of text it displayed to users in search engine results.³⁰⁵

The Court concluded with considering the fourth factor. It ruled that even if the snippet reveals some authorial expression, it is too short and incomplete to satisfy the searcher's interest in the author's work.³⁰⁶ In the Court's opinion the use by Google does not provide a significant substitute for the purchase of the author's book.³⁰⁷

5.1.5 Interim evaluation

83. **REPEATED STRUCTURE** – One of the main arguments of the opponents to the fair use doctrine, is that the outcome of the cases is unpredictable. One could have the impression that a slightly different interpretation of one or two of the four factors in the fair use test is capable of already leading to a different conclusion between for instance a district court and a court of appeals. But after having read this number of American fair use cases, I recognize a certain pattern in the courts' reasoning. Not only are the cases all built up among a similar

³⁰³ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (2nd Cir. 2015), 18; CRS Reports & Analysis, "Still Fair Use for Google Books: Second Circuit Ruling in Authors Guild v. Google", *CRS Legal Sidebar* 2015, 1; U.S. Copyright Office, "Authors Guild, Inc. v. Google, Inc., 13-4829-cv (2d Cir. Oct. 16, 2015)", *Fair Use Index*, <https://www.copyright.gov/fair-use/summaries/authorsguild-google-2dcir2015.pdf>.

³⁰⁴ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (2nd Cir. 2015), 29; W. CRAWFORD, "Google Books", *Cites & Insights* 2016, Vol. 16, No. 4, 7; CRS Reports & Analysis, "Still Fair Use for Google Books: Second Circuit Ruling in Authors Guild v. Google", *CRS Legal Sidebar* 2015, 2.

³⁰⁵ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (2nd Cir. 2015), 33; W. CRAWFORD, "Google Books", *Cites & Insights* 2016, Vol. 16, No. 4, 7; CRS Reports & Analysis, "Still Fair Use for Google Books: Second Circuit Ruling in Authors Guild v. Google", *CRS Legal Sidebar* 2015, 2; U.S. Copyright Office, "Authors Guild, Inc. v. Google, Inc., 13-4829-cv (2d Cir. Oct. 16, 2015)", *Fair Use Index*, <https://www.copyright.gov/fair-use/summaries/authorsguild-google-2dcir2015.pdf>.

³⁰⁶ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (2nd Cir. 2015), 36; W. CRAWFORD, "Google Books", *Cites & Insights* 2016, Vol. 16, No. 4, 7; CRS Reports & Analysis, "Still Fair Use for Google Books: Second Circuit Ruling in Authors Guild v. Google", *CRS Legal Sidebar* 2015, 2; U.S. Copyright Office, "Authors Guild, Inc. v. Google, Inc., 13-4829-cv (2d Cir. Oct. 16, 2015)", *Fair Use Index*, <https://www.copyright.gov/fair-use/summaries/authorsguild-google-2dcir2015.pdf>.

³⁰⁷ *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (2nd Cir. 2015), 36; W. CRAWFORD, "Google Books", *Cites & Insights* 2016, Vol. 16, No. 4, 7; CRS Reports & Analysis, "Still Fair Use for Google Books: Second Circuit Ruling in Authors Guild v. Google", *CRS Legal Sidebar* 2015, 2; U.S. Copyright Office, "Authors Guild, Inc. v. Google, Inc., 13-4829-cv (2d Cir. Oct. 16, 2015)", *Fair Use Index*, <https://www.copyright.gov/fair-use/summaries/authorsguild-google-2dcir2015.pdf>.

structure, also the reasonings are very similar. Indeed, a Court being sought to rule on a case, refers to and uses arguments that other courts made in previous cases, to build up its decision. Because of this way of building up a case, I cannot agree with the statement that the outcome of fair use cases is uncertain. The more precedents there will be developed on a certain issue, the harder it becomes to differ from the established general opinion. The lack of predetermined and detailed copyright exemptions as in the European system, is in my opinion solved in the American system by the functioning of precedents. Difficulties may arise, however, when a situation comes before a court on which there is no precedent yet. In such event, case law will evolve, and while in an initially stage, interested parties may face uncertainly, over time, precedents will be established.

84. **GREAT SUPPORT OF SEARCH ENGINES** – In a lot of cases I read, and in all the cases I discussed in the section above, the Courts ruled in favour of the search engines. This seems very striking to me as usually in this kind of disputes, one would expect that courts would sympathize with the small entrepreneur facing a large international company having strong economic power and deep pockets. For instance in the last case I discussed about Google Books, it would have seemed a more logic outcome to me to let Google compensate the original authors for the use of their books, like other search databases do such as LexisNexis or Westlaw. It seems to me that in those cases on search engines the courts might be blinded by the arguments in favour of the public benefit, when considering the balance that has to be found in copyright law between the interests of the author and of the general public. If courts fail to comprehend the potential harm search engines can cause to authors, this might lead to a decrease in America's literary culture: American authors may not be incentivised any more to write, as their work becomes accessible to the public without proper compensation.
85. **GLANCE AT THE FUTURE** – I am convinced that the last word on copyright fair use has not yet been said with these cases, given the current expansion of the fair use doctrine in the digital age. It remains to be seen how this doctrine will develop further. But it is my strong opinion that this digital revolution should not be effected without due consideration of the rights of authors. Copyright has been one of the main reasons for the development of a cultural literary heritage and this should be preserved. Authors protected under copyright should stay enabled to earn a fair return for their investments in their work.

5.2 European Three-Step test cases

86. **OVERVIEW** – This second section focuses on the European interpretation of copyright exemptions and Three-Step test cases related to search engines. Three cases (or groups of cases) originating from three different European jurisdictions almost with a same time frame will be discussed. With my choice of jurisdiction (Belgium, Spain, Germany) I will try to illustrate the various interpretation possibilities that are circulating within Europe. As in the previous section, each case discussion is built up among a similar structure: 1) a brief explanation of the dispute matter, 2) the claims of the plaintiff and 3) how the Three-Step test is applied in this particular case. After this section a comprehensive evaluation of these case law studies follows.

5.2.1 CJEU: *Infopaq*

87. **TRIGGER-CASE** – Before proceeding to the case law of the European Member States, I would like to briefly mention the CJEU decision that triggered this discussion. It concerns the *Infopaq* case, in which a media monitoring and analysis business (Infopaq), was engaged in sending customers selected summarized articles from Danish daily newspapers and other periodicals by email.³⁰⁸ The articles were selected on the basis of certain subject criteria agreed with by customers and made available by means of a data capture process.³⁰⁹ Danske Dagblades Forening (DDF), a professional association of Danish daily newspaper publishers, assists its members with copyright issues.³¹⁰ DDF became aware that Infopaq was scanning newspaper articles for commercial purposes without authorization and complained to Infopaq about this procedure.³¹¹

³⁰⁸ CJEU 11 July 2009, *Infopaq International A/S v. Danske Dagblades Forening*, C-5/08, ECLI:EU:C:2009:465; M. FREDENSLUND, “Denmark: Infopaq-case finally decided after eight years”, *Kluwer Copyright Blog* 2013, 1; S. VOUSDEN, “Infopaq and the Europeanisation of Copyright Law”, *The WIPO Journal: Analysis of Intellectual Property Issues* 2010, Vol. 1, No. 2, 197.

³⁰⁹ CJEU 11 July 2009, *Infopaq International A/S v. Danske Dagblades Forening*, C-5/08, ECLI:EU:C:2009:465; M. FREDENSLUND, “Denmark: Infopaq-case finally decided after eight years”, *Kluwer Copyright Blog* 2013, 1; S. VOUSDEN, “Infopaq and the Europeanisation of Copyright Law”, *The WIPO Journal: Analysis of Intellectual Property Issues* 2010, Vol. 1, No. 2, 197.

³¹⁰ CJEU 11 July 2009, *Infopaq International A/S v. Danske Dagblades Forening*, C-5/08, ECLI:EU:C:2009:465; M. FREDENSLUND, “Denmark: Infopaq-case finally decided after eight years”, *Kluwer Copyright Blog* 2013, 1; S. VOUSDEN, “Infopaq and the Europeanisation of Copyright Law”, *The WIPO Journal: Analysis of Intellectual Property Issues* 2010, Vol. 1, No. 2, 197.

³¹¹ CJEU 11 July 2009, *Infopaq International A/S v. Danske Dagblades Forening*, C-5/08, ECLI:EU:C:2009:465; M. FREDENSLUND, “Denmark: Infopaq-case finally decided after eight years”, *Kluwer Copyright Blog* 2013, 1; S. VOUSDEN, “Infopaq and the Europeanisation of Copyright Law”, *The WIPO Journal: Analysis of Intellectual Property Issues* 2010, Vol. 1, No. 2, 197.

The CJEU decided that, firstly, an 11-word extract of a protected work is a reproduction in part within the meaning of Article 2 of the InfoSoc Directive, if the words reproduced are the expression of the intellectual creation of the author.³¹² The court stated that it was for the national courts of the Member States to decide when such a reproduction is the author's expression of intellectual creation.³¹³ Secondly, the act of printing out an 11-word extract during a data capture process does not fulfil the condition of being transient in nature as required by Article 5(1) of the InfoSoc Directive and, therefore, that process cannot be carried out without the consent of the relevant right holders.³¹⁴

This case highlights the problems of copyright infringement and new technology in new business models, especially those involving content aggregation. This decision is considered to have had a high impact on fundamental principles of copyright law, and it lies at the base of the discussion regarding the case law of European Member States outlined below.

5.2.2 *Belgium: Google Inc v. Copiepresse*

88. **DISPUTE MATTER** – The disputed Google services in this case³¹⁵ are twofold: one the hand “Google News”, and on the other hand “cached links”. Google News is a service that Google offers besides its classical Google search engine.³¹⁶ The Google News website is a computer-generated daily press overview, sorted between different main topics such as business, sports, technology and entertainment.³¹⁷ The service consists of an index composed by means of specific software, which lists press articles that have been published

³¹² CJEU 11 July 2009, *Infopaq International A/S v. Danske Dagblades Forening*, C-5/08, ECLI:EU:C:2009:465; M. FREDENSLUND, “Denmark: Infopaq-case finally decided after eight years”, *Kluwer Copyright Blog* 2013, 2; S. VOUSDEN, “Infopaq and the Europeanisation of Copyright Law”, *The WIPO Journal: Analysis of Intellectual Property Issues* 2010, Vol. 1, No. 2, 198.

³¹³ CJEU 11 July 2009, *Infopaq International A/S v. Danske Dagblades Forening*, C-5/08, ECLI:EU:C:2009:465; M. FREDENSLUND, “Denmark: Infopaq-case finally decided after eight years”, *Kluwer Copyright Blog* 2013, 2; S. VOUSDEN, “Infopaq and the Europeanisation of Copyright Law”, *The WIPO Journal: Analysis of Intellectual Property Issues* 2010, Vol. 1, No. 2, 198.

³¹⁴ CJEU 11 July 2009, *Infopaq International A/S v. Danske Dagblades Forening*, C-5/08, ECLI:EU:C:2009:465; M. FREDENSLUND, “Denmark: Infopaq-case finally decided after eight years”, *Kluwer Copyright Blog* 2013, 2; S. VOUSDEN, “Infopaq and the Europeanisation of Copyright Law”, *The WIPO Journal: Analysis of Intellectual Property Issues* 2010, Vol. 1, No. 2, 198.

³¹⁵ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*

³¹⁶ P. LAURENT, “Case note article. Brussels High Court confirms Google News’ ban”, *Computer law & security report* 2007, No. 23, 290.

³¹⁷ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 3; J. GRIFFITS, “The ‘Three-Step Test’ in European Copyright Law – Problems and Solutions”, *Queen Mary University of London Legal Studies Research Papers* 2009, No. 31/2009, 6; P. LAURENT, “Case note article. Brussels High Court confirms Google News’ ban”, *Computer law & security report* 2007, No. 23, 290.

on the internet.³¹⁸ Internet users can consult this index by entering keywords in the search bar of Google News. Every press article is then announced by its title, a thumbnail of its illustrating picture if applicable, a brief summary or the first lines of the article and an underlying hyperlink redirecting to the original page where the article is posted.³¹⁹ Cached links, on the other hand, enable users to call in the HTML text copy of an article that has been stored in Google's own caching servers.³²⁰ Cached links are not provided in Google News but only in the general search results of Google.³²¹

89. **CLAIMS OF THE PLAINTIFF** – The plaintiffs consisted of Belgian press publishers, their Belgian authors and journalists who had published press articles on sites operating in Belgium.³²² They objected (and thus claimed copyright infringement) on the one hand to the display on Google News of the titles and first few lines of the newspaper articles without having obtained the prior authorisation of the publishers and authors, and on the other hand to the cached links of the articles stored in Google's caching servers.³²³
90. **GOOGLE NEWS** – Google tried to refute the copyright infringement as to Google News based on several arguments. In a first argument, they said the titles and the displayed first sentences of the articles in Google News were not original elements that benefit from the

³¹⁸ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 3; J. GRIFFITS, "The 'Three-Step Test' in European Copyright Law – Problems and Solutions", *Queen Mary University of London Legal Studies Research Papers* 2009, No. 31/2009, 6; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, "Search Engine Liability for Copyright Infringement", in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 13; P. LAURENT, "Case note article. Brussels High Court confirms Google News' ban", *Computer law & security report* 2007, No. 23, 291.

³¹⁹ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 3; J. GRIFFITS, "The 'Three-Step Test' in European Copyright Law – Problems and Solutions", *Queen Mary University of London Legal Studies Research Papers* 2009, No. 31/2009, 6; P. LAURENT, "Case note article. Brussels High Court confirms Google News' ban", *Computer law & security report* 2007, No. 23, 291.

³²⁰ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 3; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, "Search Engine Liability for Copyright Infringement", in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 13; P. LAURENT, "Case note article. Brussels High Court confirms Google News' ban", *Computer law & security report* 2007, No. 23, 290.

³²¹ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 3.

³²² Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 1; P.B. HUGENHOLTZ, "De Auteursrechtelijke groeipijnen van Google", *Ars Aequi* 2011, 92; E. KIRSCH and A. KLETT, "US and European courts split over fair use", *Managing IP* 2009, 33; P. LAURENT, "Case note article. Brussels High Court confirms Google News' ban", *Computer law & security report* 2007, No. 23, 290.

³²³ P.B. HUGENHOLTZ, "De Auteursrechtelijke groeipijnen van Google", *Ars Aequi* 2011, 92; J. GRIFFITS, "The 'Three-Step Test' in European Copyright Law – Problems and Solutions", *Queen Mary University of London Legal Studies Research Papers* 2009, No. 31/2009, 6; E. KIRSCH and A. KLETT, "US and European courts split over fair use", *Managing IP* 2009, 33; P. LAURENT, "Case note article. Brussels High Court confirms Google News' ban", *Computer law & security report* 2007, No. 23, 290.

protection of copyright law.³²⁴ It is beyond dispute that the articles themselves were copyright works, so the question was whether reproducing the opening lines could amount to substantial reproduction. The Court found that some (not all) of the titles were sufficiently original to qualify for copyright protection.³²⁵ Therefore, Google reproduced and communicated to the public works protected by copyright in violation of the law.³²⁶

Secondly, Google argued that they could rely on the exceptions to copyright infringements for citation and news reporting under Belgian copyright law.³²⁷ The Court rejected both exceptions.³²⁸ As to the citation exception it found that Google limited itself to listing and classifying the articles in an automatic way, without any analysis or critique on their part.³²⁹ As to the news reporting it found that Google's call on this argument was contradictory to their position that it is only a search engine and not an information portal.³³⁰ So this exception did not apply as the reproduction of the copyright protected works was the principal object, rather than the news reporting in subordinate order.³³¹

³²⁴ P. LAURENT, "Case note article. Brussels High Court confirms Google News' ban", *Computer law & security report* 2007, No. 23, 291.

³²⁵ P. LAURENT, "Case note article. Brussels High Court confirms Google News' ban", *Computer law & security report* 2007, No. 23, 291.

³²⁶ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 16; P.B. HUGENHOLTZ, "De Auteursrechtelijke groeipijnen van Google", *Ars Aequi* 2011, 92; P. LAURENT, "Case note article. Brussels High Court confirms Google News' ban", *Computer law & security report* 2007, No. 23, 291; B. VAN ASBROECK and M. COCK, "Belgian Newspapers v Google News: 2-0", *Journal of Intellectual Property Law & Practice* 2007, Vol. 2, No. 7, 463.

³²⁷ Wet van 30 juni 1994 betreffende het auteursrecht en de naburige rechten, *BS* 27 juli 1994, abolished 1 January 2015; J. GRIFFITS, "The 'Three-Step Test' in European Copyright Law – Problems and Solutions", *Queen Mary University of London Legal Studies Research Papers* 2009, No. 31/2009, 6; E. KIRSCH and A. KLETT, "US and European courts split over fair use", *Managing IP* 2009, 33; P. LAURENT, "Case note article. Brussels High Court confirms Google News' ban", *Computer law & security report* 2007, No. 23, 290.

³²⁸ E. KIRSCH and A. KLETT, "US and European courts split over fair use", *Managing IP* 2009, 33; J. GRIFFITS, "The 'Three-Step Test' in European Copyright Law – Problems and Solutions", *Queen Mary University of London Legal Studies Research Papers* 2009, No. 31/2009, 6; P. LAURENT, "Case note article. Brussels High Court confirms Google News' ban", *Computer law & security report* 2007, No. 23, 290; B. VAN ASBROECK and M. COCK, "Belgian Newspapers v Google News: 2-0", *Journal of Intellectual Property Law & Practice* 2007, Vol. 2, No. 7, 463.

³²⁹ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 24; E. KIRSCH and A. KLETT, "US and European courts split over fair use", *Managing IP* 2009, 33; P. LAURENT, "Case note article. Brussels High Court confirms Google News' ban", *Computer law & security report* 2007, No. 23, 292; B. VAN ASBROECK and M. COCK, "Belgian Newspapers v Google News: 2-0", *Journal of Intellectual Property Law & Practice* 2007, Vol. 2, No. 7, 463.

³³⁰ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 25; E. KIRSCH and A. KLETT, "US and European courts split over fair use", *Managing IP* 2009, 33; P. LAURENT, "Case note article. Brussels High Court confirms Google News' ban", *Computer law & security report* 2007, No. 23, 292; B. VAN ASBROECK and M. COCK, "Belgian Newspapers v Google News: 2-0", *Journal of Intellectual Property Law & Practice* 2007, Vol. 2, No. 7, 463.

³³¹ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 25; P. LAURENT, "Case note article. Brussels High Court confirms Google News' ban", *Computer law & security report* 2007, No. 23, 292; B. VAN ASBROECK and M. COCK, "Belgian Newspapers v Google News: 2-0", *Journal of Intellectual Property Law & Practice* 2007, Vol. 2, No. 7, 463.

91. **APPLICATION OF THE THREE-STEP TEST** – This second argument is connected with the Three-Step test. In the case under consideration, the Court interpreted the Three-Step test in a restrictive way.³³² With regard to this second argument, the Court ruled that the exceptions invoked by Google had to be read in compliance with the Three-Step test.³³³ It found that these exceptions were not met. In support of its decision, the court stated that *“the exceptions and limitations provided for 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 (three-stage test), which seems to confirm the restrictive nature of the exceptions...”*³³⁴ The reproductions in Google’s cache interfered with the normal exploitation of the works, as internet users were able to gain access to articles that had either been removed from the original publisher’s websites or were only available from the sites for a fee.³³⁵ Google could not reproduce the titles and excerpts from the articles without having first obtained the authorisation of the original authors.³³⁶ The fact that the Three-Step test had not been explicitly transposed into Belgian law was not considered to be relevant because, even where not directly implemented, it served as an interpretative guideline for courts and tribunals.³³⁷
92. **GOOGLE CACHE** – As to the Google Cache-issue, it is interesting to compare this Belgian case with the U.S. *Field v. Google Inc.* case. The issue in this Belgian case was that Google copies and stores the content of web pages in its memory without the explicit authorisation of the right holders.³³⁸ One of the interesting comparison elements here, is the argument that Google raised about having acquired legitimacy by virtue of an implied license.³³⁹

³³² Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*; J. GRIFFITS, “The ‘Three-Step Test’ in European Copyright Law – Problems and Solutions”, *Queen Mary University of London Legal Studies Research Papers* 2009, No. 31/2009, 5; P. LAURENT, “Case note article. Brussels High Court confirms Google News’ ban”, *Computer law & security report* 2007, No. 23, 292.

³³³ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 26.

³³⁴ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 26; J. GRIFFITS, “The ‘Three-Step Test’ in European Copyright Law – Problems and Solutions”, *Queen Mary University of London Legal Studies Research Papers* 2009, No. 31/2009, 6.

³³⁵ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 26.

³³⁶ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 27.

³³⁷ J. GRIFFITS, “The ‘Three-Step Test’ in European Copyright Law – Problems and Solutions”, *Queen Mary University of London Legal Studies Research Papers* 2009, No. 31/2009, 6.

³³⁸ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 27; P.B. HUGENHOLTZ, “De Auteursrechtelijke groeipijnen van Google”, *Ars Aequi* 2011, 92; B. FITZGERALD, D. O’BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 5; B. KOCIUBINSKI, “Legal Update. Copyright and the evolving law of internet search – *Field v. Google, Inc.* and *Perfect 10 v. Google, Inc.*”, *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 3.

³³⁹ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 27.

Google argued that it was open to the publishers to use technical means to exclude their publications from being indexed by search engines, and that these were standard methods known worldwide.³⁴⁰ Insofar publishers did not use those technical means, according to Google, they explicitly or implicitly agreed to have their pages indexed and accessible via the cached links.³⁴¹ The Belgian court ruled that the publishers' failure to use these technical means did not amount to an implied license.³⁴² This contrasts with the U.S. case *Field v. Google Inc.*, in which the court held the opposite (*supra* section no. 72).³⁴³

Also interesting in comparison with this *Field v. Google Inc.* case are the cached links. Whereas in the Belgian case the court found those cached links a copyright infringement (*supra* section no. 72). In the U.S. case, the court considered that those cached links were not copyright infringing.³⁴⁴ Google's delivery of cached content to users when they click on the cached link, was non-volitional and therefore not an act of direct infringement.³⁴⁵ Additionally, the court found these cached links to be fair use after consideration of the four factors.³⁴⁶

³⁴⁰ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 27.

³⁴¹ Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 27; B. VAN ASBROECK and M. COCK, "Belgian Newspapers v Google News: 2-0", *Journal of Intellectual Property Law & Practice* 2007, Vol. 2, No. 7, 463.

³⁴² Court of Appeal Brussels, 5 May 2011, 2007/AR/1730, *Google, Inc. v. Copiepresse et al.*, 30; P.B. HUGENHOLTZ, "De Auteursrechtelijke groeipijnen van Google", *Ars Aequi* 2011, 92; B. Van ASBROECK and M. COCK, "Belgian Newspapers v Google News: 2-0", *Journal of Intellectual Property Law & Practice* 2007, Vol. 2, No. 7, 463.

³⁴³ *Field v. Google*, 412 F Supp 2d 1106 (D. Nev. 2006), 12; P.B. HUGENHOLTZ, "De Auteursrechtelijke groeipijnen van Google", *Ars Aequi* 2011, 92; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, "Search Engine Liability for Copyright Infringement", in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 5; B. KOCIUBINSKI, "Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.", *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 3.

³⁴⁴ *Field v. Google*, 412 F Supp 2d 1106 (D. Nev. 2006), 12; P.B. HUGENHOLTZ, "De Auteursrechtelijke groeipijnen van Google", *Ars Aequi* 2011, 92; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, "Search Engine Liability for Copyright Infringement", in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 5; B. KOCIUBINSKI, "Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.", *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 3.

³⁴⁵ *Field v. Google*, 412 F Supp 2d 1106 (D. Nev. 2006), 12; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, "Search Engine Liability for Copyright Infringement", in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 5; B. KOCIUBINSKI, "Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.", *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 3.

³⁴⁶ *Field v. Google*, 412 F Supp 2d 1106 (D. Nev. 2006), 13; P.B. HUGENHOLTZ, "De Auteursrechtelijke groeipijnen van Google", *Ars Aequi* 2011, 92; B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, "Search Engine Liability for Copyright Infringement", in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 6; B. KOCIUBINSKI, "Legal Update. Copyright and the evolving law of internet search – Field v. Google, Inc. and Perfect 10 v. Google, Inc.", *Boston University Journal of Science & Technology Law* 2006, Vol. 12, No. 2, 4.

93. **EVALUATION** – The essence of this case that I would like to emphasize is that this case is the first example as to how the Three-Step test can be applied by the courts of European member states. The Brussels Court of Appeal held that Google squarely infringes the rights of copyright owners by the working of their services. As will become clear after the disquisition of other European case law, this case is an example of a restrictive application of the Three-Step test.

5.2.3 Spain: *Megakini.com v. Google Spain*

94. **DISPUTE MATTER** – This Spanish case forms the complete opposite of the Belgian case discussed above. Whereas the Brussels Court of Appeal ruled on all points against Google, the Spanish Supreme Court ruled in favour of the Google Search Engine. The comparison between these two cases becomes even more interesting because the disputed Google services in this case³⁴⁷ are very similar, if not the same. It also concerned the Google Search service and its accompanying Google Cache service.³⁴⁸
95. **CLAIMS OF THE PLAINTIFF** – The owner of a web page sued Google (Spain) for the unauthorized reproduction and making available of its contents by means of the Google Search engine and the Google Cache service.³⁴⁹ The court had to decide whether one or both of these unauthorized uses qualified as an infringement: the reproduction and display of some fragments of the web page contents under the links resulting from the operation of the search engine by the users, and/or the reproduction and making available of the whole web page contents under the Google Cache service.³⁵⁰ There was even a third unauthorized copyright use, namely the reproduction of the web pages HTML code in order for the search

³⁴⁷ Spanish Supreme Court, 3 April 2012, 172/2012, *Megakini.com v. Google Spain*.

³⁴⁸ Spanish Supreme Court, 3 April 2012, 172/2012, *Megakini.com v. Google Spain*, 1; R. XALABARDER, “Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?”, *JIPITEC* 2012, Vol. 3, No.2, 162.

³⁴⁹ Spanish Supreme Court, 3 April 2012, 172/2012, *Megakini.com v. Google Spain*, 1; C. GEIGER and M. SENFTLEBEN, “Understanding the ‘three-step test’” in D.J. GERVAIS (ed.), *International Intellectual Property: A Handbook of Contemporary Research*, Cheltenham, Edward Elgar Publishing, 2015, 186; R. XALABARDER, “Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?”, *JIPITEC* 2012, Vol. 3, No.2, 162;

³⁵⁰ C. GEIGER and M. SENFTLEBEN, “Understanding the ‘three-step test’” in D.J. GERVAIS (ed.), *International Intellectual Property: A Handbook of Contemporary Research*, Cheltenham, Edward Elgar Publishing, 2015, 186; R. XALABARDER, “Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?”, *JIPITEC* 2012, Vol. 3, No.2, 162-163.

engine to operate.³⁵¹ But both parties agreed that the latter one was exempted under the copyright limitation of “temporary copies” of the Spanish copyright law.³⁵²

96. **GOOGLE SEARCH** – A first major difference in comparison with the Belgian case can be found in the Court’s ruling on the Google Search service. The Court considered that the search engine uses, that consisted of the reproduction and making available of fragments of the webpage contents as displayed under the resulting links, were “*so temporary, incidental and minimal*” that they lacked any infringing character.³⁵³
97. **GOOGLE CACHE** – Another notable difference can be found in the Court’s ruling on the Google Cache service. On the one hand, the Court rejected Google’s argument of the temporary copies limitation, since this kind of reproduction was neither technically necessary for the functioning of the search engine, nor actually temporary as the cache service offers access to old web pages which are no longer available online.³⁵⁴ On the other hand, the Court refused to qualify the unauthorized use by Google under its cache service as infringing, because it was not substantial enough to amount to an infringement.³⁵⁵
98. **APPLICATION OF THE THREE-STEP TEST** – It is in connection with this Google Cache service that the Court called on the Three-Step test. In this regard, the Court made a striking statement. It explained that the Three-Step test should not only be used as a negative interpretation criterion, but also in positive terms, incorporating the specificities of the general principles of the law into the copyright statute.³⁵⁶ With these general principles of

³⁵¹ R. XALABARDER, “Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?”, *JIPITEC* 2012, Vol. 3, No.2, 163.

³⁵² Real Decreto Legislativo 1/1996 de 12 de abril 1996, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia, *BOE* 22 abril 1996; R. XALABARDER, “Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?”, *JIPITEC* 2012, Vol. 3, 163.

³⁵³ Spanish Supreme Court, 3 April 2012, 172/2012, *Megakini.com v. Google Spain*, 3; P.B. HUGENHOLTZ, “Law and Technology. Fair Use in Europe. Examining the mismatch between copyright law and technology-influenced evolving social media norms in the European Union”, *Communications of the ACM* 2013, Vol. 56, No. 5, 27; R. XALABARDER, “Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?”, *JIPITEC* 2012, Vol. 3, No. 2, 163.

³⁵⁴ Spanish Supreme Court, 3 April 2012, 172/2012, *Megakini.com v. Google Spain*, 3; R. XALABARDER, “Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?”, *JIPITEC* 2012, Vol. 3, No. 2, 163.

³⁵⁵ Spanish Supreme Court, 3 April 2012, 172/2012, *Megakini.com v. Google Spain*, 4; P.B. HUGENHOLTZ, “Law and Technology. Fair Use in Europe. Examining the mismatch between copyright law and technology-influenced evolving social media norms in the European Union”, *Communications of the ACM* 2013, Vol. 56, No. 5, 27; R. XALABARDER, “Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?”, *JIPITEC* 2012, Vol. 3, No. 2, 164.

³⁵⁶ Spanish Supreme Court, 3 April 2012, 172/2012, *Megakini.com v. Google Spain*, 10; C. GEIGER and M. SENFTLEBEN, “Understanding the ‘three-step test’” in D.J. GERVAIS (ed.), *International Intellectual Property: A Handbook of Contemporary Research*, Cheltenham, Edward Elgar Publishing, 2015, 186; R. XALABARDER,

the law the Court referred to the doctrine of the *ius usus inocui*, the principle of good faith, the prohibition of abuse of right, as well as the Constitutional construction of property as a limited right.³⁵⁷ In connection with these principles, the Court examined the terms of “normal exploitation” and “legitimate interests” as imposed by the Three-Step test within the circumstances of this case and concluded that the claim was ultimately aimed at causing harm to Google, and even acquiring some fame, rather than at the protection of any copyright interests.³⁵⁸

99. **EVALUATION** – The Supreme Court gives a clear message with the outcome of this ruling. According to the Court 1) the protection of copyright and its limitations do not allow for abusive claims, 2) the closed regime of statutory limitations should not lead to absurd scenarios and 3) copyright law must be exercised to protect copyright interests rather than to foster arbitrary claims aimed solely at harming the defendant.³⁵⁹

The important contrast to be noted between this Spanish case and the previous Belgian case lies in the divergence of interpretation by each court of the Three-Step test. The Brussels Court maintained a restrictive interpretation of the test, whereas the Spanish Court believes the test must *not* be read only as a restrictive instrument for the interpretation and application of the limitations, but rather as a flexible tool to allow for its doctrines and principles of law to be taken into account when interpreting and applying copyright law.³⁶⁰

“Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?”, *JIPITEC* 2012, Vol. 3, No. 2, 164.

³⁵⁷ Spanish Supreme Court, 3 April 2012, 172/2012, *Megakini.com v. Google Spain*, 7; C. GEIGER and M. SENFTLEBEN, “Understanding the ‘three-step test’” in D.J. GERVAIS (ed.), *International Intellectual Property: A Handbook of Contemporary Research*, Cheltenham, Edward Elgar Publishing, 2015, 186; R. XALABARDER, “Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?”, *JIPITEC* 2012, Vol. 3, No. 2, 164.

³⁵⁸ Spanish Supreme Court, 3 April 2012, 172/2012, *Megakini.com v. Google Spain*, 10; R. XALABARDER, “Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?”, *JIPITEC* 2012, Vol. 3, No. 2, 164.

³⁵⁹ Spanish Supreme Court, 3 April 2012, 172/2012, *Megakini.com v. Google Spain*, 11; C. GEIGER and M. SENFTLEBEN, “Understanding the ‘three-step test’” in D.J. GERVAIS (ed.), *International Intellectual Property: A Handbook of Contemporary Research*, Cheltenham, Edward Elgar Publishing, 2015, 186; R. XALABARDER, “Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?”, *JIPITEC* 2012, Vol. 3, No. 2, 164-165.

³⁶⁰ C. GEIGER and M. SENFTLEBEN, “Understanding the ‘three-step test’” in D.J. GERVAIS (ed.), *International Intellectual Property: A Handbook of Contemporary Research*, Cheltenham, Edward Elgar Publishing, 2015, 186; R. XALABARDER, “Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?”, *JIPITEC* 2012, Vol. 3, No. 2, 165-166.

5.2.4 Germany: the Google Vorschaubilder (thumbnails) cases

100. **DISPUTE MATTER** – Compared to the Belgian and Spanish cases, it can be said that Germany takes a middle-ground position regarding the Google search issue. The German cases³⁶¹ did not concern the news or cache services from Google, but Google Images. Google’s search engine includes an image search function, which allows users to enter search terms to search for images that third parties have published on the internet in connection with that search term.³⁶² The images which are subsequently revealed by the search engine are displayed in the search results as scaled down preview pictures (thumbnails) which have a smaller pixel size than the images shown on the original website.³⁶³ The preview pictures also include a link which allows the user to access the website which displays the original photo.³⁶⁴

Important to note here when reading the discussion of the Vorschaubilder cases below, is that Google offers instructions on its website on how to block some or even all images appearing on certain user’s websites.³⁶⁵ Users can add a robots.txt file to the root of the server, blocking the image and specifying the user-agent of their websites as “Googlebot-Image.”³⁶⁶ The software Google uses for operating its search (called “web crawlers”) will recognize this specification and the blocked images will be excluded from the search.³⁶⁷

³⁶¹ German Federal Supreme Court, 29 April 2010, I ZR 69/08, “*Vorschaubilder I*”; German Federal Supreme Court, 19 October 2011, I ZR 140/10, “*Vorschaubilder II*”; German Federal Supreme Court, 21 September 2017, I ZR 11/16, “*Vorschaubilder III*”.

³⁶² F. PÖTZLBERGER, “Google and the Thumbnail Dilemma – “Fair Use” in German Copyright Law?”, *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 142; M. SENFTLEBEN, “The International Three-Step Test. A Model Provision for EC Fair Use Legislation”, *JIPITEC* 2010, Vol. 1, No. 2, 72; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 20 October 2011, 1.

³⁶³ A. GÄRTNER and I. KRUSE, “Right of communication: German Federal Supreme Court applies GS Media to internet search engines”, *Cecile Park Media* 2017, 16; F. PÖTZLBERGER, “Google and the Thumbnail Dilemma – “Fair Use” in German Copyright Law?”, *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 142; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 20 October 2011, 1.

³⁶⁴ B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 20 October 2011, 1.

³⁶⁵ F. PÖTZLBERGER, “Google and the Thumbnail Dilemma – “Fair Use” in German Copyright Law?”, *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 143; Google Website, *Prevent Your Images From Appearing in Google Search Results – Webmaster Tools Help*, <https://support.google.com/webmasters/answer/35308>.

³⁶⁶ F. PÖTZLBERGER, “Google and the Thumbnail Dilemma – “Fair Use” in German Copyright Law?”, *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 143; Google Website, *Prevent Your Images From Appearing in Google Search Results – Webmaster Tools Help*, <https://support.google.com/webmasters/answer/35308>.

³⁶⁷ F. PÖTZLBERGER, “Google and the Thumbnail Dilemma – “Fair Use” in German Copyright Law?”, *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 143; Google Website, *Prevent Your Images From Appearing in Google Search Results – Webmaster Tools Help*, <https://support.google.com/webmasters/answer/35308>.

101. **VORSCHAUBILDER I** – In the first case, the plaintiff was an artist and owner of a website, where she displays her own art works.³⁶⁸ She complained and claimed copyright infringement on the fact that Google had displayed her works as thumbnails whenever her name had been entered as a search term into Google’s search engine.³⁶⁹

The Federal Supreme Court ruled that Google did not infringe the artist’s copyright, even though Google’s unauthorized use of thumbnail images is not exempted by any existing statutory limitation.³⁷⁰ The claimant had not given Google an explicit or implied consent in by which she authorized Google the use of her works as preview pictures via Google’s image search.³⁷¹ However, the Court held that the reproduction of the images as preview pictures was not unlawful, because Google could interpret the plaintiff’s actions as consent to the display of her works in the search results.³⁷² The Court came to this decision since the plaintiff had made the content of her website accessible to search engines and had not made use of the technical measures available that would have allowed her to exclude her works from being searched and displayed by search engine providers.³⁷³ By doing so, she

³⁶⁸ German Federal Supreme Court, 29 April 2010, I ZR 69/08, “*Vorschaubilder I*”, 2; A. GÄRTNER and I. KRUSE, “Right of communication: German Federal Supreme Court applies GS Media to internet search engines”, *Cecile Park Media* 2017, 16; F. PÖTZLBERGER, “Google and the Thumbnail Dilemma – “Fair Use” in German Copyright Law?”, *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 147; E. KIRSCH and A. KLETT, “US and European courts split over fair use”, *Managing IP* 2009, 33.

³⁶⁹ German Federal Supreme Court, 29 April 2010, I ZR 69/08, “*Vorschaubilder I*”, 2; F. PÖTZLBERGER, “Google and the Thumbnail Dilemma – “Fair Use” in German Copyright Law?”, *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 147; E. KIRSCH and A. KLETT, “US and European courts split over fair use”, *Managing IP* 2009, 33.

³⁷⁰ German Federal Supreme Court, 29 April 2010, I ZR 69/08, “*Vorschaubilder I*”, 20; P.B. HUGENHOLTZ, “Law and Technology. Fair Use in Europe. Examining the mismatch between copyright law and technology-influenced evolving social media norms in the European Union”, *Communications of the ACM* 2013, Vol. 56, No. 5, 27; F. PÖTZLBERGER, “Google and the Thumbnail Dilemma – “Fair Use” in German Copyright Law?”, *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 147; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 29 April 2010, 1; M. SENFTLEBEN, “The international Three-Step Test: A Model Provision for EC Fair Use Legislation”, *JIPITEC* 2010, no. 67, 72; E. KIRSCH and A. KLETT, “US and European courts split over fair use”, *Managing IP* 2009, 33.

³⁷¹ German Federal Supreme Court, 29 April 2010, I ZR 69/08, “*Vorschaubilder I*”, 20; A. GÄRTNER and I. KRUSE, “Right of communication: German Federal Supreme Court applies GS Media to internet search engines”, *Cecile Park Media* 2017, 16; F. PÖTZLBERGER, “Google and the Thumbnail Dilemma – “Fair Use” in German Copyright Law?”, *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 147; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 29 April 2010, 1; E. KIRSCH and A. KLETT, “US and European courts split over fair use”, *Managing IP* 2009, 33.

³⁷² German Federal Supreme Court, 29 April 2010, I ZR 69/08, “*Vorschaubilder I*”, 20; A. GÄRTNER and I. KRUSE, “Right of communication: German Federal Supreme Court applies GS Media to internet search engines”, *Cecile Park Media* 2017, 16; F. PÖTZLBERGER, “Google and the Thumbnail Dilemma – “Fair Use” in German Copyright Law?”, *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 146-147; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 20 October 2011, 1; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 29 April 2010, 1; M. SENFTLEBEN, “The international Three-Step Test: A Model Provision for EC Fair Use Legislation”, *JIPITEC* 2010, no. 67, 72; E. KIRSCH and A. KLETT, “US and European courts split over fair use”, *Managing IP* 2009, 33.

³⁷³ German Federal Supreme Court, 29 April 2010, I ZR 69/08, “*Vorschaubilder I*”, 20; A. GÄRTNER and I. KRUSE, “Right of communication: German Federal Supreme Court applies GS Media to internet search engines”,

provided her implied consent to the reproduction of her works as thumbnail preview pictures.³⁷⁴ According to the Court, a search engine provider (such as Google) may only be liable for copyright infringement once it had obtained knowledge of the unlawful nature of the data it had stored.³⁷⁵

102. **VORSCHAUBILDER II** – In the second case, the plaintiff was a photographer.³⁷⁶ Two pictures he had taken of a German TV presenter were shown as Google thumbnails, referring to websites that were not his.³⁷⁷ He argued that he had not granted the owners of these websites any exploitation rights for those photographs.³⁷⁸ In a second order he sued Google for copyright infringement.³⁷⁹ However, the plaintiff had granted other website owners the right to publish the pictures in question on their websites.³⁸⁰

In extension of the first *Vorschaubilder* case, the Federal Supreme Court ruled that an implied consent for reproduction of works can also to be assumed where the copyright protected works are uploaded to the internet by a third party and not the copyright owner

Cecile Park Media 2017, 16; F. PÖTZLBERGER, “Google and the Thumbnail Dilemma – “Fair Use” in German Copyright Law?”, *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 147; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 20 October 2011, 1; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 29 April 2010, 1; M. SENFTLEBEN, “The international Three-Step Test: A Model Provision for EC Fair Use Legislation”, *JIPITEC* 2010, no. 67, 72; E. KIRSCH and A. KLETT, “US and European courts split over fair use”, *Managing IP* 2009, 33.

³⁷⁴ German Federal Supreme Court, 29 April 2010, I ZR 69/08, “*Vorschaubilder I*”, 20; F. PÖTZLBERGER, “Google and the Thumbnail Dilemma – “Fair Use” in German Copyright Law?”, *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 147; F. PÖTZLBERGER, “Google and the Thumbnail Dilemma – “Fair Use” in German Copyright Law?”, *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 146; M. SENFTLEBEN, “The international Three-Step Test: A Model Provision for EC Fair Use Legislation”, *JIPITEC* 2010, no. 67, 72; E. KIRSCH and A. KLETT, “US and European courts split over fair use”, *Managing IP* 2009, 33.

³⁷⁵ German Federal Supreme Court, 29 April 2010, I ZR 69/08, “*Vorschaubilder I*”, 20; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 20 October 2011, 1; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 29 April 2010, 1.

³⁷⁶ German Federal Supreme Court, 19 October 2011, I ZR 140/10, “*Vorschaubilder II*”, 2.

³⁷⁷ German Federal Supreme Court, 19 October 2011, I ZR 140/10, “*Vorschaubilder II*”, 2; A. GÄRTNER and I. KRUSE, “Right of communication: German Federal Supreme Court applies GS Media to internet search engines”, *Cecile Park Media* 2017, 17; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 20 October 2011, 1.

³⁷⁸ German Federal Supreme Court, 19 October 2011, I ZR 140/10, “*Vorschaubilder II*”, 2; A. GÄRTNER and I. KRUSE, “Right of communication: German Federal Supreme Court applies GS Media to internet search engines”, *Cecile Park Media* 2017, 17; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 20 October 2011, 1.

³⁷⁹ German Federal Supreme Court, 19 October 2011, I ZR 140/10, “*Vorschaubilder II*”, 2; A. GÄRTNER and I. KRUSE, “Right of communication: German Federal Supreme Court applies GS Media to internet search engines”, *Cecile Park Media* 2017, 17; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 20 October 2011, 1.

³⁸⁰ German Federal Supreme Court, 19 October 2011, I ZR 140/10, “*Vorschaubilder II*”, 2.A. GÄRTNER and I. KRUSE, “Right of communication: German Federal Supreme Court applies GS Media to internet search engines”, *Cecile Park Media* 2017, 17; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 20 October 2011, 1.

himself.³⁸¹ That is, if the copyright owner gave his consent to upload the pictures, but again without taking any technical precautions to prevent these images from being found and displayed by search engine providers.³⁸² The plaintiff had not granted exploitation rights to these particular third party website owners, but to other website owners.³⁸³ Nevertheless the Court ruled that search engines, in their automated search for images on the internet, do not differentiate between images that have been published by legitimate sources or by unauthorised sources.³⁸⁴ Therefore, the implied consent also included images that are published by website owners that had *not* been granted exploitation rights.³⁸⁵ In my opinion, this second *Vorschaubilder* case is consistent with the first *Vorschaubilder* case, and draws the same conclusion as the first one, namely that a search engine provider (such as Google) may only be liable for copyright infringement once it had obtained knowledge of the unlawful nature of the data it had stored.³⁸⁶

103. **VORSCHAUBILDER III** – In the most recent Supreme court case of 2017, the plaintiff was also a photographer.³⁸⁷ Eight photos which he had taken of two models were displayed in a Google results list.³⁸⁸ He claimed that the photos were only made accessible in the password-protected area of his website, to which only paying customers had exclusive access.³⁸⁹ He argued that the photos in question had been downloaded by customers in an unauthorized manner and subsequently uploaded illegally onto a free and freely accessible

³⁸¹ German Federal Supreme Court, 19 October 2011, I ZR 140/10, “*Vorschaubilder I*”, 13; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 20 October 2011, 1; M. SENFTLEBEN, “The international Three-Step Test: A Model Provision for EC Fair Use Legislation”, *JIPITEC* 2010, no. 67, 73.

³⁸² German Federal Supreme Court, 19 October 2011, I ZR 140/10, “*Vorschaubilder II*”, 13; A. GÄRTNER and I. KRUSE, “Right of communication: German Federal Supreme Court applies GS Media to internet search engines”, *Cecile Park Media* 2017, 17; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 20 October 2011, 1; M. SENFTLEBEN, “The international Three-Step Test: A Model Provision for EC Fair Use Legislation”, *JIPITEC* 2010, no. 67, 73;

³⁸³ German Federal Supreme Court, 19 October 2011, I ZR 140/10, “*Vorschaubilder II*”, 13; A. GÄRTNER and I. KRUSE, “Right of communication: German Federal Supreme Court applies GS Media to internet search engines”, *Cecile Park Media* 2017, 17; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 20 October 2011, 1.

³⁸⁴ German Federal Supreme Court, 19 October 2011, I ZR 140/10, “*Vorschaubilder II*”, 13; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 20 October 2011, 2.

³⁸⁵ German Federal Supreme Court, 19 October 2011, I ZR 140/10, “*Vorschaubilder II*”, 13; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 20 October 2011, 2.

³⁸⁶ German Federal Supreme Court, 19 October 2011, I ZR 140/10, “*Vorschaubilder II*”, 13; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 20 October 2011, 1; B. CLARK, “BGH: Google’s image search is no copyright infringement”, *The IPKat*, 29 April 2010, 1.

³⁸⁷ German Federal Supreme Court, 21 September 2017, I ZR 11/16, “*Vorschaubilder III*”, 2.

³⁸⁸ German Federal Supreme Court, 21 September 2017, I ZR 11/16, “*Vorschaubilder III*”, 2; N. RAUER, “German Federal Court rules on Google’s Image Search”, *World Trademark Review* 2017, 1.

³⁸⁹ German Federal Supreme Court, 21 September 2017, I ZR 11/16, “*Vorschaubilder III*”, 2; N. RAUER, “German Federal Court rules on Google’s Image Search”, *World Trademark Review* 2017, 1.

website, which is how Google's Image search had been able to detect them.³⁹⁰ He claimed copyright infringement for the listing of his photos as a preview in the context of an image search, as it violated his right to make photos available to the public.³⁹¹

In deciding this case, the Court referred to, and interpreted as well, some case law of the European Court of Justice.³⁹² The German Federal Supreme Court did not see the display of the preview images as an act of "making available a copyright work" in the sense of the copyright law.³⁹³ It was of no relevance to the Court whether the content was uploaded illegally.³⁹⁴ The Court came to this conclusion by applying the *Svensson* case of the European Court of Justice, in which it was decided that the use of a hyperlink is not a copyright-relevant act.³⁹⁵ It is a mere reference and should not be confused with an act of copying content.³⁹⁶ In its *GS Media* case, the European Court further build up on this ruling and added that insofar the linked content has been made available to the public without the consent of the right holder, the decisive factor is whether the person who placed the hyperlink on his website knew or should have known about the illegal nature of the content he linked to.³⁹⁷ If the hyperlink in question is used in a commercial context (a pursuit of profit), then the knowledge of the illegality is refutably presumed.³⁹⁸

³⁹⁰ German Federal Supreme Court, 21 September 2017, I ZR 11/16, "*Vorschaubilder III*", 2; N. RAUER, "German Federal Court rules on Google's Image Search", *World Trademark Review* 2017, 1.

³⁹¹ German Federal Supreme Court, 21 September 2017, I ZR 11/16, "*Vorschaubilder III*", 2. N. RAUER, "German Federal Court rules on Google's Image Search", *World Trademark Review* 2017, 1.

³⁹² German Federal Supreme Court, 21 September 2017, I ZR 11/16, "*Vorschaubilder III*", N. RAUER, "German Federal Court rules on Google's Image Search", *World Trademark Review* 2017, 1.

³⁹³ German Federal Supreme Court, 21 September 2017, I ZR 11/16, "*Vorschaubilder III*", 8-9; N. RAUER, "German Federal Court rules on Google's Image Search", *World Trademark Review* 2017, 1.

³⁹⁴ German Federal Supreme Court, 21 September 2017, I ZR 11/16, "*Vorschaubilder III*", 8-9; N. RAUER, "German Federal Court rules on Google's Image Search", *World Trademark Review* 2017, 1.

³⁹⁵ German Federal Supreme Court, 21 September 2017, I ZR 11/16, "*Vorschaubilder III*", 9; A. GÄRTNER and I. KRUSE, "Right of communication: German Federal Supreme Court applies GS Media to internet search engines", *Cecile Park Media* 2017, 17; N. RAUER, "German Federal Court rules on Google's Image Search", *World Trademark Review* 2017, 1.

³⁹⁶ German Federal Supreme Court, 21 September 2017, I ZR 11/16, "*Vorschaubilder III*", 9; A. GÄRTNER and I. KRUSE, "Right of communication: German Federal Supreme Court applies GS Media to internet search engines", *Cecile Park Media* 2017, 17; N. RAUER, "German Federal Court rules on Google's Image Search", *World Trademark Review* 2017, 1.

³⁹⁷ German Federal Supreme Court, 21 September 2017, I ZR 11/16, "*Vorschaubilder III*", 10; A. GÄRTNER and I. KRUSE, "Right of communication: German Federal Supreme Court applies GS Media to internet search engines", *Cecile Park Media* 2017, 17; N. RAUER, "German Federal Court rules on Google's Image Search", *World Trademark Review* 2017, 1.

³⁹⁸ German Federal Supreme Court, 21 September 2017, I ZR 11/16, "*Vorschaubilder III*", 10; A. GÄRTNER and I. KRUSE, "Right of communication: German Federal Supreme Court applies GS Media to internet search engines", *Cecile Park Media* 2017, 17; N. RAUER, "German Federal Court rules on Google's Image Search", *World Trademark Review* 2017, 1.

In the *Vorschaubilder III* case, the defendant clearly operated within a commercial background, which triggered the application of the *GS Media* case.³⁹⁹ However, after the consideration of that case law, the German Supreme Court came to the conclusion that the notion of a refutable presumption was not appropriate under the given circumstances.⁴⁰⁰ The press release on this case reads as follows: “*This assumption does not apply to search engines and to hyperlinks leading to a search engine because of the particular importance of Internet search services for the functionality of the Internet. The provider of a search function cannot be expected to check whether the images found by the search engine in an automated process have been legally posted on the Internet in first place before listing them as thumbnails on its website.*”⁴⁰¹ Because the Court found that there was no positive knowledge nor an obligation to have known, the Court decided in favour of the defendant.⁴⁰²

104. **EVALUATION** – These *Vorschaubilder* cases are not a direct application of the Three-Step test as it is to be found in European Law. Nevertheless, these cases have an important relevance to the subject matter of this master thesis as they illustrate the problem of the restrictive European law system in a clear manner. What strikes me in these three cases ruled by the German Federal Supreme Court, is that the Court invokes an alternative reasoning when deciding on each of these three cases, instead of applying the Three-Step test. In the first two cases the Court reverted to the implied consent doctrine, and in the last one it referred to European case law on the doctrine of the refutable presumption of knowledge of the illegal nature of a publication. Because of this striking different way of reasoning, a crucial question arises: *why* is the application of these alternative reasonings necessary, and why did the Court not simply apply the statutory available exceptions and limitations, and the Three-Step test?

³⁹⁹ German Federal Supreme Court, 21 September 2017, I ZR 11/16, “*Vorschaubilder III*”, 10; A. GÄRTNER and I. KRUSE, “Right of communication: German Federal Supreme Court applies *GS Media* to internet search engines”, *Cecile Park Media* 2017, 17; N. RAUER, “German Federal Court rules on Google’s Image Search”, *World Trademark Review* 2017, 1.

⁴⁰⁰ German Federal Supreme Court, 21 September 2017, I ZR 11/16, “*Vorschaubilder III*”, 11; A. GÄRTNER and I. KRUSE, “Right of communication: German Federal Supreme Court applies *GS Media* to internet search engines”, *Cecile Park Media* 2017, 16; N. RAUER, “German Federal Court rules on Google’s Image Search”, *World Trademark Review* 2017, 1.

⁴⁰¹ Bundesgerichtshof, *Keine Urheberrechtsverletzung durch Bildersuche bei Google* (Mitteilung der Pressestelle nr. 93/2010), 29 April 2010; A. GÄRTNER and I. KRUSE, “Right of communication: German Federal Supreme Court applies *GS Media* to internet search engines”, *Cecile Park Media* 2017, 17; N. RAUER, “German Federal Court rules on Google’s Image Search”, *World Trademark Review* 2017, 1.

⁴⁰² German Federal Supreme Court, 21 September 2017, I ZR 11/16, “*Vorschaubilder III*”, 11; A. GÄRTNER and I. KRUSE, “Right of communication: German Federal Supreme Court applies *GS Media* to internet search engines”, *Cecile Park Media* 2017, 17; N. RAUER, “German Federal Court rules on Google’s Image Search”, *World Trademark Review* 2017, 1.

As most European Member States, the German Copyright Act⁴⁰³ provides an enumerative catalogue of exceptions and limitations from the exclusive rights granted to the copyright owner.⁴⁰⁴ Notwithstanding the statutory framing and the Court's previous case law on the interpretation of exceptions and limitations, the Court reverts to other, more general law doctrines.⁴⁰⁵ This seems to be a makeshift solution.⁴⁰⁶ The Court itself states that the exemptions within the Copyright Act are not only exclusive, but also have to be strictly interpreted, since they deviate from the general principle of the exclusiveness of copyrights.⁴⁰⁷ Because no exemption was available, the Court reverted to other doctrines (such as implied consent) as the last option available.⁴⁰⁸ When there is no statutory exemption available but a use seems like it should be exempted, the German Court seems to be able to bypass the narrow scope of exemptions by applying the more general doctrines.⁴⁰⁹ But this approach appears to be a necessary makeshift solution that is acceptable, but not foreseen by the law.⁴¹⁰ It shows the need for legislative action within this field.

5.3 General comparison

105. **CASE OUTCOMES** – The above case studies clearly illustrates the difference in approach between the American and the European system. Where in the U.S. the cases follow a certain constructive line, Europe shows knows a major divergence in outcomes depending

⁴⁰³ Gesetz vom 9 September 1965 über Urheberrecht und verwandte Schutzrechte, BA 9 September 1965.

⁴⁰⁴ F. PÖTZLBERGER, "Google and the Thumbnail Dilemma – "Fair Use" in German Copyright Law?", *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 146; M. SENFTLEBEN, "The international Three-Step Test: A Model Provision for EC Fair Use Legislation", *JIPITEC* 2010, no. 67, 73; E. KIRSCH and A. KLETT, "US and European courts split over fair use", *Managing IP* 2009, 33.

⁴⁰⁵ F. PÖTZLBERGER, "Google and the Thumbnail Dilemma – "Fair Use" in German Copyright Law?", *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 149; M. SENFTLEBEN, "The international Three-Step Test: A Model Provision for EC Fair Use Legislation", *JIPITEC* 2010, no. 67, 73; E. KIRSCH and A. KLETT, "US and European courts split over fair use", *Managing IP* 2009, 33.

⁴⁰⁶ F. PÖTZLBERGER, "Google and the Thumbnail Dilemma – "Fair Use" in German Copyright Law?", *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 149.

⁴⁰⁷ F. PÖTZLBERGER, "Google and the Thumbnail Dilemma – "Fair Use" in German Copyright Law?", *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 149; M. SENFTLEBEN, "The international Three-Step Test: A Model Provision for EC Fair Use Legislation", *JIPITEC* 2010, no. 67, 73; E. KIRSCH and A. KLETT, "US and European courts split over fair use", *Managing IP* 2009, 33.

⁴⁰⁸ F. PÖTZLBERGER, "Google and the Thumbnail Dilemma – "Fair Use" in German Copyright Law?", *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 149-150; M. SENFTLEBEN, "The international Three-Step Test: A Model Provision for EC Fair Use Legislation", *JIPITEC* 2010, no. 67, 83; E. KIRSCH and A. KLETT, "US and European courts split over fair use", *Managing IP* 2009, 33.

⁴⁰⁹ F. PÖTZLBERGER, "Google and the Thumbnail Dilemma – "Fair Use" in German Copyright Law?", *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 150; M. SENFTLEBEN, "The international Three-Step Test: A Model Provision for EC Fair Use Legislation", *JIPITEC* 2010, no. 67, 73.

⁴¹⁰ F. PÖTZLBERGER, "Google and the Thumbnail Dilemma – "Fair Use" in German Copyright Law?", *Journal of Law and Policy for the Information Society* 2013, Vol. 9, No. 1, 150.

on the jurisdiction. Belgium seems to rely on a restrictive interpretation of the Three-Step test, contrary to Spain who tends to keep a more flexible approach, similar to the American fair use doctrine. When it comes to Germany, the Three-Step test does not seem sufficient to help courts reach a decision as they resort to other instruments. Especially the outcomes of the German cases appear very interesting to me. Even though the German court recognized the benefits of advanced search engine services of Google, they did not manage to provide the required breathing space within the current system of copyright exceptions. This contrasts with the U.S. case outcomes, where courts seem to be able to formulate an adequate answer that reflects their favourable assessment of the search engine services on the basis of the U.S. system of copyright exceptions.

106. **REVIEW OF THE EUROPEAN SYSTEM** – Where fair use cases are said to have an unpredictable outcome, the specific provisions in European copyright law offer the courts less flexibility and make decisions more predictable. But the previous European cases have demonstrated that such view is not necessarily correct: European courts seem forced in particular cases to resort to different doctrines such as the presumption of implied consent. In my opinion this shows the inadequacy of the current European copyright law. This divergence in outcomes in Europe shows the need for a critical review of the European closed list of permitted exceptions and limitations to copyright. How this can be approached will be further discussed in my personal proposal in chapter 6.

6. Personal proposal for an updated European copyright system

6.1 Problem setting: the law vs. the digital age

107. **INADEQUACY OF THE LAW...** – The case study above, it shows that copyright law has largely failed to adequately respond to the technological developments and progressions of the online services and activities of search engines. Rigid copyright laws have been (and are still being) applied to these types of online activities. The problem is that at the time these legislative provisions were drafted, the digital evolution we are currently experiencing has not been contemplated, and this was not even possible to foresee. The law that governs these activities is the InfoSoc Directive of 2001. Hence these provisions are now over seventeen years old, and have never been properly reviewed by the European Commission.

108. **... VS. THE UNNEGLECTABLE ONLINE ENVIRONMENT** – However, the inadequacy of the law is not only to be seen as a negative thing. It has been argued that the revolution which search engines have brought to the online world, has only been made possible by the fact that search engines have been able to exercise many of the exclusive rights of the copyright owner, which would not have been possible in the non-digital world.⁴¹¹ Search engines such as Google and Yahoo have proven their worth over the years as critical means for accessing online knowledge, by enabling users to search and retrieve information surfing the internet. Therefore, it is essential to accommodate the copyright laws to the great potential these search engines have to offer. In this master thesis I only focused on the issue of online search engines, but the problem of the inadequacy of copyright law extends to many other domains regarding the internet environment which should also be addressed. For instance hyperlinking, social media and video sharing platforms,...

6.2 Regarding the issue of search engines

109. **SEARCH ENGINE LIABILITY?** – Throughout the world there seems to be an overall uncertainty as to whether search engines can or should be held liable for infringing copyright. There should be created more certainty in this regard. It is proposed, and I agree, that the WIPO should convene a conference on search engine liability.⁴¹² Such a conference could assess the effectiveness and the problem areas of the current copyright law that applies to the functioning of search engines, and how they can operate without constantly having to bear the fear of being sued. As always in copyright law, a balance should be pursued between on the one hand the interests of the copyright owners to express, own and exploit their creativity, and on the other hand the ability of users to access and reuse this information.
110. **SHARING INTERESTS** – As I noted above (*supra* section no. 84), a problem factor in this consideration is that Over-The-Top companies such as Google and Yahoo make an enormous amount of money in providing access to information, to the detriment of the copyright owners who lose income. But for the whole “information providing system” to

⁴¹¹ B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 1; G. GREENLEAF, “Creating commons by friendly appropriation”, *SCRIPT-ed* 2007, Vol. 4, No. 1, 124.

⁴¹² B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, “Search Engine Liability for Copyright Infringement”, in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 14-15.

work, it is necessary to tolerate, to a certain level, the reproduction and communication performed by these search engines. Moreover, the operating of search engines is not only disadvantageous to copyright owners, as they get more profiling and publicity. The essential issue here is not whether search engines should be given greater immunity from liability, but how much advertising revenue they are willing to share with copyright owners for buying such immunity.⁴¹³ In my opinion, a possible solution to his problem can be found in adopting a similar approach as already exists with other forms of online databases. Allow authors to open up their works for use by others, but compensate them by giving them a certain percentage for their authorisation each time a work is used in a different context. This shifts the current situation of a clash of interests between search engines and copyright owners, to a cooperation between both parties and mutual benefits.

6.3 Regarding the issue of copyright law

6.3.1 *Adaptation through legislation*

111. **DIFFERENT WAYS TO LEGISLATE** – As stated already multiple times throughout this master thesis, the current European copyright system needs a review regarding the exceptions and limitations. In my opinion, there are three possible approaches when it comes to copyright uses. 1) Not legislate at all and leave everything to the parties in the field. This does not seem advantageous to me in any way as there won't be any boundaries to the use of copyright protected materials, so consequently no incentive for authors to produce anything at all. The ultimate result would be the cease of cultural development. 2) Legislate the use of copyright protected materials in a very strict and comprehensive way. This makes the application of the law easy in present cases, but necessitates frequent revisions as the law will become obsolete and irrelevant. 3) Legislate in such a manner that the law is applicable to the present, and also flexible enough to adapt itself to the immediate and more distant future.

Currently, the European position is situated in the second situation with strict provisions on copyright exemptions. The system should evolve to the third situation, enabling more flexibility in the law. This desired flexibility is necessary, on the one hand to give authors

⁴¹³ B. FITZGERALD, D. O'BRIEN and A. FITZGERALD, "Search Engine Liability for Copyright Infringement", in A. SPINK and M. ZIMMER (eds.), *Web Search. Information Science and Knowledge Management*, Vol. 14, Berlin, Springer-Verlag Berlin Heidelberg, 2008, 14-15.

the freedom to find new ways to express and develop themselves, and on the other hand to enable authors to creatively build on the works of others.⁴¹⁴ The current closed list cannot provide this flexibility, and must therefore be adjusted. However, the benefits from a prescribed list of exemptions, resulting from a high degree of legal certainty, may not be neglected. A reform of the European copyright law should not aim to abolish the long-standing current exceptions into a broad fair use clause. Such a fundamental transformation is not necessary either as it is possible to maintain a comprehensive list of exceptions, supplemented rather than substituted with an open norm.

112. **INTRODUCTION OF A FLEXIBLE NORM** – An obvious way to provide more flexibility is to allow Member States to set up further reaching exceptions and limitations to permit the unauthorised use of copyright protected works. This means Member States could go beyond the exhaustive list of exemptions if it seems appropriate to them in a present case. A suitable limit to this extended liberty could be that all copyright uses have to comply with the Three-Step test. Such a system would mean a combination of the present system with prescribed exceptions, with an open norm resembling the fair use doctrine.

An appropriate wording of such a semi-open norm can easily be found in the European Copyright Code that has been drafted in 2010 as an attempt to solve this issue. The drafters inserted an article allowing any kind of use, as long as it meets the requirements of the Three-Step test. Article 5.5 of this Code reads as follows:

“Any other use that is comparable to the uses enumerated in art. 5.1 to 5.4(1) is permitted provided that the corresponding requirements of the relevant limitation are met and the use does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the legitimate interests of third parties”.

6.3.2 Adaptation through interpretation

113. **LEGISLATIVE REVIEW MIGHT NOT BE THE BEST OPTION** – Although such a norm seems very suitable to me, I have to admit that the idea might be too ambitious. I hereby refer to the paragraphs above on the slow law-making process (*supra* section no. 52). Especially on

⁴¹⁴ B. PATRY, “Fair Use Is Good for Creativity and Innovation”, *PIJIP Research Paper Series* 2017, No. 2017-01, 31-32

the European level, the pace of law making is very slow: it can take more than 10 years to review and adopt a directive. Moreover, it is an illusion that an adjustment of the law is always the best solution; it would be naïve to believe that the law is inherently precise and applicable to every situation. It seems unrealistic to me to think that a closed list of exemptions can at the same time be precise *and* broad enough to cover uses that were not foreseen at the time of the drafting. No legislature, no matter how meticulously and carefully drafted, can predict the future. Hence it is practically impossible to draft laws that will be effective for a future it can not predict. So in the short run a resort to other options is necessary.

114. **A FLEXIBLE APPLICATION OF THE PRESENT LAW** – If I continue building upon the statement that no law is ever going to be precise and applicable enough, this brings me to the next statement to say that the interpretation of the law is key. I am very convinced of this statement as I believe that it is not the text of the law that matters the most, but its analysis and application in a present case. Furthermore, in my opinion, copyright laws must allow a flexible interpretation of its texts because that lays the basis of creativity and innovation. This is exactly what copyright law pursues, to stimulate and protect in the first place. Therefore, I refer to the above-mentioned argument (*supra* section no. 63) that fair use is already compatible with the Three-Step test. This argument allows the introduction of the fair use concept on the national level, which seems a more realistic and achievable adjustment than on the European level. The Three-Step test is inherently flexible as it sets forth open-ended criteria. Instead of reading the test as a literal provision that further constraints copyright exceptions, European courts and law makers should recognize that the open-ended criteria also allow for the broadening of old exceptions and introduction of new ones. With this approach, no textual review of the law at the European level is necessary, but the society would still be helped.

7. Final conclusions

The most important conclusion of the research of this master thesis, is that the problem and need for a more flexible copyright approach has been acknowledged in Europe and is currently being addressed by both jurisprudence and case law. However, as things stand, a legal reform at the European level will remain off for the time being.

When comparing the European Three-Step test and the U.S. fair use doctrine, interesting differences are being revealed.

The American and European copyright systems each arise from a different **foundation**. The underlying goal of American copyright is to promote the creation of new works of authorship, whereas European copyright serves to promote artistic respect and artefact preservation. Despite this fundamental difference, the American fair use doctrine and the European Three-Step test share the same **purpose**. They form a means for safeguarding a fair balance of rights and interests between the different stakeholders, notably right holders and right users.

On the **theoretical level**, Europe knows a closed list of exceptions and limitations, supplemented with the Three-Step test. The American fair use doctrine works with four open factors to be considered in every case. The fair use doctrine has some advantages compared with the Three-Step test: for instance, it is considered to be more flexible and technology-neutral. However, there are some disadvantages to this doctrine as well: counterparts claim that fair use is unpredictable. Furthermore, the American system does not take into account moral rights and the possibility of fair compensation for the original author in case fair use is to be found.

On the **practical level** of case law regarding search engines, the American cases follow a certain constructive line, whereas Europe shows a divergence in outcomes depending on the jurisdiction. Following the theoretical opinion, fair use cases are said to be unpredictable and the European cases should be more predictable because of the specific legal provisions. The above outlined European cases, however, have demonstrated that such view is not necessarily correct: European courts seem forced in particular cases to resort to different doctrines, such as the presumption of implied consent. In my opinion this shows the inadequacy of the current

European copyright law and the need for a critical review of the European closed list of permitted exceptions and limitations to copyright.

Personally, I see two options for Europe to **meet the need for more flexible copyright law**. A first option would be for the Commission to adapt new legislation in the form a new flexible provision. But taking into account the slow pace of law making in the European Union, and the fact that introducing more laws does not always present a better solution, this first option is not my preferred one. A second option concerns the interpretation of the current law, instead of providing for the introduction of new legislation. The Three-Step test is already inherently flexible as it sets forth open-ended criteria. Instead of reading the test as a literal provision that further constraints copyright exceptions, European courts and law makers should recognize that the open-ended criteria also allow for the broadening of old and introduction of new exceptions. In my opinion, this approach could hold a solution for the current imminent need for more flexibility, while in the long term can be worked on a new legislative provision, if desired.

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