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Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law

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ABSTRACT

Do copyright limitations have the ability to promote creativity and innovation in an effective way? This question may initially sound astonishing because this incentive function is traditionally attributed to the exclusive rights and not to their limitations. However, it should not be forgotten that innovation often builds on existing creations. As a consequence, by depriving the copyright holder of the right to consent to certain acts, one might in turn encourage creative uses. In addition, it is possible for legislatures to draft limitations in order to guarantee that the permitted uses are not for free by providing for a just monetary return for right holders, for example by establishing a workable "limitation-based" remuneration system. In many European countries, uses legitimated by copyright limitations are often coupled with the payment of remuneration, from which the creators often profit in a considerable manner. Thus, this Article seeks to reflect on the limitations and exceptions to copyright from the perspective of the creators and their interests and, on this occasion, to express some free thoughts concerning the principle of exclusivity in copyright law.

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Copyright is currently facing a serious crisis of legitimacy, mostly because of what many scholars consider to be its "over-protectionist" tendencies.[1] Additionally, copyright seems to have

1. On this "expansionist" tendency of intellectual property, see ROCHELLE COOPER DREYFUSS ET AL., EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY (Oxford University Press 2001); William R. Cornish, *The Expansion of Intellectual Property Rights. in* 9 GEISTIGES EIGENTUM IM DIENSTE DER INNOVATION (Gerhard Schricker et al., eds., Baden-Baden: Nomos 2001); Reto M. Hilty, *The Expansion of Copyright Law and its Social Justification, in* 1 COPYRIGHT LAW AND THE INFORMATION SOCIETY IN ASIA (Christopher Heath & Kung-Chung Liu, eds., Hart Publishing 2007); Peter Gyertyánfy, *Expansion des Urheberrechts—Und kein Ende?*, 21 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT, INTERNATIONALER TEIL 557 (2002) (Ger.); Hugh Laddie, *Copyright: Over-strength, Over-regulated, Over-rated?* 18 EUR. INTELL. PROP. REV. 253 (1996);

become progressively creator-unfriendly, which is highly problematic, particularly in those countries that have "creator-centered" copyright legislation.[2] As a consequence, there is a strong demand by the general public to redefine copyright law's scope of protection in a more balanced way. As it is very difficult to take away rights once they have been granted, scholars have high hopes for the improvement of the limitations and exceptions to those rights.[3] In recent times, many calls for an international instrument on limitations and exceptions (or on their interpretation) can be heard in academic circles and in international forums.[4] Past scholarly discussions were mainly centered on how to expand the copyright system and how to adapt it to the challenges of new technologies. Now, however, it seems that the focus has shifted to the question of how to guarantee an appropriate balance between protection and free uses[5]—meaning, in short, how

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Ben Depoorter, *The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law*, 9 VA. J. L. & TECH. 4 (2004).

2. This is the case in most of the civil law countries, where the copyright legislation's emphasis on the person who has created the work is very important. In these "creator-centered" statutes, the term "authors' rights" is preferred to the term "copyright" in order to establish the clear link between the creator and the rights he owns. The difference between common law countries and civil law countries should not be exaggerated and the internationalization of the subject has narrowed the gap considerably. *See* Gillian Davies, *The Convergence of Copyright and Authors' Rights—Reality or Chimera?*, 26 INT'L REV. INDUS. PROP. & COPYRIGHT L. 964 (1995).

3. *See, e.g.*, P. Bernt Hugenholtz & Ruth Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, FINAL REP. (University of Amsterdam Institute for Information Law, Amsterdam, Neth.), Mar. 2008, at 1, *available at* http://www.ivir.nl/publicaties/hugenholtz/finalreport2008.pdf; Christophe Geiger, *Rethinking Copyright Limitations in the Information Society: The Swiss Supreme Court Leads the Way*, 39 INT'L REV. INDUS. PROP. & COPYRIGHT L. 943 (2008); Christophe Geiger, *The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information*, INTELL. PROP. Q. (forthcoming 2010) [hereinafter Geiger, *The Future of Copyright in Europe*]; Annette Kur, *Of Oceans, Islands, and Inland Water—How much Room for Exceptions and Limitations under the Three-Step Test?*, RES. PAPER SERIES NO. 08-04 (Max Planck Institute for Intellectual Property, Munich, Ger.) (forthcoming 2010). For the European perspective, see *Copyright in the Knowledge Economy*, GREEN PAPER, (Commission of the European Communities, Brussels, Belg.) (2008), at 5, *available at http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf*, (identifying exceptions and limitations as the key to secure the balance of interest in the Commission of the European Communities copyright legislation).

4. *See e.g.*, P. Bernt Hugenholtz & Ruth Okediji, *supra* note 3, at 11; Christophe Geiger, *Implementing an International Instrument for Interpreting Copyright Limitations and Exceptions*, 40 INT'L REV. INTELL. PROP. & COMP. L. 627 (2009).

5. *See, e.g.*, Geiger, *The Future of Copyright in Europe*, *supra* note 3; Llewellyn Gibbons & Xiao Li Wang, *Striking the Rights Balance Among Private Incentives and Public Fair Uses in the United States and China*, 7 J. MARSHALL REV. INTELL. PROP. L. 488 (2008); Reto M. Hilty & Christophe Geiger, *The Balance of Interest in Copyright Law* ONLINEPUBS.,: (Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich, Ger.) 2006, *available at* http://www.intellecprop.mpg.de/ww/de/pub/forschung/publikationen/online_publikationen.cfm.

and where something can be taken away from the scope of the right where too much has previously been given.

Many oppose such a fine-tuning of the copyright system, especially in the copyright industries. The adversaries of the expansion and improvement of the limitations systems primarily argue that if too much is taken away from right holders, no more incentive to create or to invest in the creation of the new works will exist. This lack of incentive would be detrimental for society, as it will lead to economic and cultural losses, along with the accompanying consequences, such as unemployment, the loss of cultural influence, or the need to import innovative products. The position of these adversaries is based on the assumption that only exclusive rights can incentivize innovation. This Article takes the opposite position. It argues that in a knowledge-based society, a well-designed limitation system can greatly benefit innovation and creativity, and also readjust the copyright balance in favor of creators, assuring that they receive their fair share of profits generated by their works. Part I of this Article exposes how a limitation-friendly copyright could be conceived. Part II then verifies that this approach is compliant with imperatives resulting from constitutional, European, and international law.

I. CONCEIVING A "LIMITATION FRIENDLY" APPROACH FOR COPYRIGHT: A SAFEGUARD FOR CREATIVITY AND FOR CREATORS

When conceiving a "limitation-friendly" approach, it is crucial to first understand what the boundaries of copyright are. International, European, and national legislatures, for example, never use uniform terminology when they refer to limits imposed on exclusive rights, which is certainly not a coincidence. In fact, the terms "limitation" and "exception" are always used together systematically in international copyright treaties and European legislation.[6] This difference in vocabulary might profoundly affect the understanding of such legal instruments, as each term might refer to different legal realities in different national traditions.[7] A prominent

6. *See, e.g.*, Directive 2001/29, art. 5, 2002 O.J. (L 167) (EC) (Directive of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society); World Intellectual Property Organization (WIPO) Copyright Treaty art. 10, Dec. 20. 1996, 36 I.L.M. 65; WIPO Performances and Phonograms Treaty art. 16, Dec. 20, 1996, 36 I.L.M. 76; Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) art. 13, Apr. 15, 1994, 33 I.L.M 1197.

7. *See* Martin R. F. Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three Step Test, in* INTERNATIONAL AND EC COPYRIGHT LAW 22 (Kluwer Law International 2004) [hereinafter Senftleben, *Copyright, Limitations*]. Professor Senftlben interestingly points out that the parallel use of both terms in international agreements such as

example is the problem of the proper interpretation of copyright boundaries, which in fact can depend on the exact contextual meaning of a limitation or an exception. Therefore, this Article explains the legal meaning of "limitations and exceptions" so as to shed light on their interpretation and on the scope of copyright protection. The Article also examines whether the principle of exclusivity is always the appropriate instrument to achieve the objectives that copyright law pursues. Additionally, the Article discusses whether the principle of exclusivity can even be reconsidered in certain cases in conformity with international, European, and constitutional law.

A. Limitations and Exceptions as a Mean to Secure Future Creativity

There are many ways of drafting copyright limitations: (1) as open-ended provisions, (2) as a catalogue of allowed exempted uses, or (3) as a combination of both. The first possibility is often found in common law countries,[8] while the second is typical for civil law countries.[9] The open-ended provision allows judges to react in a more flexible way to new situations, but the results are less predictable.[10] With a catalogue of allowed exempted uses, however, the legislation is more rigid, but there is more legal security. The lack of flexibility in this type of provision tends to be accentuated in civil law countries by a narrow reading of these limitations, even if this principle of narrow interpretation is increasingly challenged in doctrine, and courts do not

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TRIPS was not an accident, but rather a compromise between the so-called "droit d'auteur" (or monistic style copyright protection, in which there is especial emphasis on the relation between the work and its author) and common law copyright traditions. *See also* SÉVERINE DUSOLLIER, DROIT D'AUTEUR ET PROTECTION DES OEUVRES DANS L'UNIVERS NUMÉRIQUE: DROITS ET EXCEPTIONS À LA LUMIÈRE DES DISPOSITIFS DE VERROUILLAGE DES OEUVRES ¶ 546 (Larcier 2005) [hereinafter DUSOLLIER, DROIT D'AUTEUR] (discussing the use of both terms as a way to accommodate different legal cultures in the Copyright Directive of 2001); MICHEL VIVANT & JEAN-MICHEL BRUGUIÈRE, DROIT D'AUTEUR ¶ 556 (Dalloz 2009) [hereinafter VIVANT & BRUGUIÈRE] (noting it is important to pay increased attention to the vocabulary used in this context to determine the scope of copyright protection).

8. *See, e.g.*, Copyright Act of 1976, 17 U.S.C. § 107 (1909) (amended 1976) (Fair Use Clause).

9. For a discussion regarding the difference between civil law and common law countries in respect of limitations and exceptions, see Pierre Sirinelli, *Synthesis of the ALAI Study Days*, *in* THE BOUNDARIES OF COPYRIGHT: ITS PROPER LIMITATIONS AND EXCEPTIONS (Libby Baulch et al. eds., Australian Copyright Council 1998).

10. For a discussion of fair use in the United States, see David Nimmer, *The Public Domain, Fairest of Them All, and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROB. 280 (2003); *see also* Christophe Geiger, *Flexibilising Copyright—Remedies to the Privatisation of Information by Copyright Law*, 39 INT'L REV. INTELL. PROP. & COMP. L. 196 (2008) [hereinafter Geiger, *Flexibilising Copyright*] (proposing a combination of a close catalogue of limitations and exceptions with an opening clause (based on the "three-step test" provision)),

always apply these interpretations systematically.[11] Once a limitation covers a certain use, the use can be free of charge or lead to the payment of an equitable remuneration.[12] The limitation is then also often called "statutory license." However, this situation, frequent in many European countries (especially in the context of private copy), is rare or even absent in most common law countries. The fact that an exempted use is not necessarily a free use is important to keep in mind and will affect the proposed model of limitation-friendly approach on copyright. As a result, the approach proposed in this Article might therefore be considered very European in its spirit, as most countries in Europe are civil law countries, and might be surprising (or even rather strange) to a copyright expert from a common law tradition.

1. What Are Copyright "Limitations and Exceptions," and What Legal Realities Hide Behind the Terminology?

What are, legally speaking, limitations and exceptions? Although they are located in the center of all current discussions on copyright, this crucial question has not been definitively clarified yet.[13] Many misunderstandings, which possibly include the principle of the narrow interpretation of copyright limitations, likely originate in the different associations of the legal terms "limitations" and "exceptions." Also, it seems that—as so often in jurisprudence—linguistic terms eventually stand for creeds. A narrow interpretation can, for example, only be justified if, in legal terms, a limit is considered to be an exception to the exclusive copyright, according to the principle *exceptio est strictissimae interpretationis.*[14]

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11. *See, e.g.*, Christophe Geiger, *L'avenir des exceptions au droit d'auteur, Observations en vue d'une nécessaire adaptation et harmonisation du système*, 1 LA SEMAINE JURIDIQUE, ÉDITION GÉNÉRALE 186 (2005) (discussing examples in France and Germany); *Irrtum: Schranken des Urheberrechts sind Ausnahmebestimmungen und sind restriktiv auszulegen, in* POPULÄRE IRRTÜMER IM URHEBERRECHT, FESTSCHRIFT FÜR R.M. HILTY 79 (Mathis Berger & Sandro Macciacchini eds., Schulthess Verlag 2008).

12. *See* Thomas Hoeren, *Die Schranken des Urheberrechts in Deutschland, in* PERSPECTIVES D'HARMONISATION DU DROIT D'AUTEUR EN EUROPE 265 (Christophe Geiger et al., eds., Litec 2007).

13. For an attempt to conceptualize the nature of exceptions and limitations, see Andrew Christie, *Fine Tuning the System: Conceptualising the Nature and Scope of Exceptions to Intellectual Property Rights*, (forthcoming 2010)ATRIP CONF. PAPERS 2008 (Cheltenham, UK/ Northampton, MA) [hereinafter Christie, *Fine Tuning the System*].

14. Of course, this principle of narrow interpretation of exceptions is not uncontested. *See, e.g.*, Markus Würdinger, *Die Analogiefähigkeit von Normen*, 206 DAS ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 946, 965 (2006). In France, nuanced positions are argued in civil law doctrine. *See* GÉRARD CORNU, 12 DROIT CIVIL: INTRODUCTION, LES PERSONNES, LES BIENS ¶ 417, (Montchrestien 2005) (arguing that limitations must be interpreted in consideration of their

The term "exception" implies a certain symbolic status, which, like the term "intellectual property," is often used purposefully. As explained in previous scholarly work,

> the term "exception" implies a hierarchy. If the use is not exactly covered by the definition of the exception, one must return to the principle of exclusivity. In order to illustrate this figuratively, one could say that an exception is a kind of an island in a sea of exclusivity. The term "limitation" implies a different grading. The scope of exclusivity is determined by its limitations. Beyond these borders, the author is no longer in control of his work. In order to use the same picture again, the right would then have to be considered as an island of exclusivity in a sea of freedom.[15] In any case, if one assumes that the different rights are equally important and that a fair balance between the various interests is to be achieved, there can be no hierarchy in favor of the author. On the contrary, copyright law grants exploitation rights only under certain conditions. Copyright law protects the expression, not the content, and furthermore only those expressions which exhibit "individuality" or "originality." Therefore, freedom must be considered as the principle, and exclusivity as the exception that has to be justified.[16] Thus, copyright limitations are no exception to the exclusive right of the author, but rather legal techniques that determine the exact scope of copyright.[17]

If one sees limitations as instruments that determine the scope of a right, and thus specifies the actual legal range of the right by clarifying the uses that copyright law does *not* capture, it seems unnecessary to differentiate between the scope of protection on the one hand and the limitations to copyright on the other. Copyright then

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justification, so that an expansive interpretation shall be possible when it is required to achieve the objective of the limitation).

15. *See* Christophe Geiger, *Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?*, 35 INT'L REV. INTELL. PROP. & COMP. L. 268 (2004). The analysis is not different when a limitation provides for the payment of a remuneration. In this case, "sailing on the ocean of freedom" is still available to everyone, but subject to the payment of a fair remuneration to the creator, just like the use of highways in some countries is open to all car drivers but requires the buying of a sticker, or how the use of the underground is open to all passengers but requires the buying of a ticket. *See id.*

16. *See* Geiger, *Les exceptions au droit d'auteur en France (analyse critique et prospective, in* PERSPECTIVES D'HARMONISATION DU DROIT D'AUTEUR EN EUROPE 349 (Litec 2007) [hereinafter GEIGER, EXCEPTIONS]; Reto M. Hilty, *Sündenbock Urheberrecht?, in* GEISTIGES EIGENTUM UND GEMEINFREIHEIT 107 (Tübingen: Mohr Siebeck 2007) [hereinafter Hilty, *Sündenbock*]; Thomas Hoeren, *Access Right as a Postmodern Symbol of Copyright Deconstruction?, in* ADJUNCTS AND ALTERNATIVES TO COPYRIGHT: PROCEEDINGS OF THE ALAI CONGRESS, (ALAI, New York), June 13-17, 2001; Detlef Kröger, *Enge Auslegung von Schrankenbestimmungen—wie lange noch?*, M.M.R. 18, 20 (2002).

17. Christophe Geiger, *De la nature juridique des limites au droit d'auteur*, 13 PROPRIETES INTELLECTUELLES 882 (2004); Christophe Geiger, *Der urheberrechtliche Interessensausgleich in der Informationsgesellschaft*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT, INTERNATIONALER 815 (2004); P. Bernt Hugenholtz, *Fierce Creatures, Copyright Exemptions: Towards Extinction?, in* RIGHTS, LIMITATIONS AND EXCEPTIONS: STRIKING A PROPER BALANCE 13, Amsterdam, Oct. 30-31, 1997, P. Bernt Hugenholtz, *Adapting Copyright to the Information Superhighway, in* THE FUTURE OF COPYRIGHT IN A DIGITAL ENVIRONMENT, PROCEEDINGS OF THE ROYAL ACADEMY COLLOQUIUM 81, 94 Kluwer Law International, 1996). For a conceptualisation of the nature of exceptions and limitations, see Christie, *Fine Tuning the System, supra* at 13.

can be seen with both an active and a passive aspect as a whole and cannot be separated.[18] Accordingly, the exploitation rights and the limitations to those rights are two sides of the same coin.[19]

As the Supreme Court of Canada interestingly held in a March 2004 decision, "The fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence."[20] Although this holding does not correspond to the classic understanding—at least in Europe[21]—it could be asserted that the term of protection and its conditions also limit (and/or define) the exploitation right.

Copyright limitations, like the right to make a citation and a work in the public domain (such as a work whose protection term has expired), share the crucial characteristic that the author cannot prohibit its use if certain conditions are fulfilled. The use is outside of

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18. *See also* Abraham Drassinower, *Exceptions Properly So-Called*, *in* LANGUAGE AND COPYRIGHT 237 (Ysolde Gendreau & Abraham Drassinower eds., Carswell/Bruylant 2009) (according to whom "scope limitations define the very nature of the right, and therefore the boundaries constitutive of the copyright holder's entitlement); J. Forns, *Le droit de propriété intellectuelle dans ses relations avec l'intérêt public et la culture*, LE DROIT D'AUTEUR 25, 28 (Mar. 15, 1951); Jaap H. Spoor, *General Aspects of Exceptions and Limitations to Copyright*, *in* THE BOUNDARIES OF COPYRIGHT: ITS PROPER LIMITATIONS AND EXCEPTIONS, ALAI Study Days 1998, 27 (Sydney, NSW: Australian Copyright Council, 1999). As VIVANT & BRUGUIÈRE, *supra* note 7, at ¶ 565: "Dis-moi quelles sont tes exceptions, je te dirais quel est ton droit" ("Tell me what are your exceptions and I will tell you what your right is" (translated by author)).

19. *See* also Haimo Schack, *Urheberrechtliche Schranken, übergesetzlicher Notstand und verfassungskonforme Auslegung*, *in* PERSPEKTIVEN DES GEISTIGEN EIGENTUMS UND WETTBEWERBSRECHTS, FESTSCHRIFT FÜR GERHARD SCHRICKER ZUM 70, 511 (Beck 2005). [hereinafter Shack, *Urheberrechtliche Schranken*].

20. CCH Canadian Ltd. v. Law Society of Upper Can., [2004] 1 S.C.R. 339, at ¶ 48 (Can.).

21. *See, e.g.*, Kur, *supra* note 3. Professor Kur advocates for the distinction between limitations such as the duration of the right, general protection requirements, or subject matter exclusions, and limitations "which, in spite of a right been granted (and not having expired), pose an obstacle for the right holder to enforce it in specific situations, or expressed the other way round, rules that function as *defences* against claims based on valid, unexpired rights," the classical example being—according to this author—the quotation right. *See id.* at 5. For further discussion, see decision of the Paris Court of appeal, CA Paris, 4th Division A, 4 April 2007, (2008) 39 IIC 360, according to which the private copy exception can only be invoked as a defense to a copyright claim and not "in support of an action in the main case, in the light of the principle of 'no action without rights," solution approved by the French Supreme Court (1st civil division, 19 June 2008, (2008) 217 R.I.D.A. 299). *See* also French Supreme Court, 1st civil division, 27 November 2008, (2009) 46 RLDI 10, comment by O. Pignatari. This classical understanding might already be challenged in Europe through the implementation in some national laws of provisions allowing a user to "enforce" a limitation in the presence of a technical measure blocking a use exempted by law. *See, e.g.*, Urheberrechtsgesetz [UrhG, Copyright Act], Sept. 6, 1965 BGBl. I at 1273, § 95b, *available at* http://transpatent.com/gesetze/urhg.html, updated through Sept. 1, 2009 (F.R.G). In this case, it seems that the limitation does not serve only as a mere defense, but can also be invoked offensively against the right holder using technical measures. *See* Christophe Geiger, *Copyright and Free Access to Information, For a Fair Balance of Interests in a Globalised World*, 28 EUR. INTELL. PROP. REV. 366, at 370 (2006).

the creator's assigned control area. Additionally, the justifications for restrictions such as the copyright term or the conditions of protection are often similar to those that are raised in connection with traditional limitations. For example, the principle of freedom of ideas (or the idea/expression dichotomy, to use a common law terminology) and the quotation right (or a "fair use" for citation purposes, in a U.S. context) have the same functions—namely, to allow creators to build on existing ideas, and to prevent an unnecessary interference while dealing with existing works, an essential requirement to enable creative activity.[22] Another argument against such a strict categorical distinction is that it often can be difficult to distinguish between a determination of the scope of copyright protection and a corresponding limitation.[23] This, for instance, became apparent within the meaning of Article 5 of the directive on the harmonization of copyright in the information society (hereafter called "Info-Soc Directive" in the context of temporary reproduction in the internal memory (so-called "RAM")) of the computer made in the context of browsing and catching on the Internet.[24] Is this a traditional limitation, as the systematic classification in the Directive indicates? Or is this kind of reproduction so insignificant and, moreover, necessary to use the work (which shall not be covered by copyright law) that it does not belong to the protected area of reproduction?[25]

The French Supreme Court addressed this problem with regard to the reproduction of a work as an insignificant accessory ("exception de reproduction accessoire") in situations when, for example, a work accidentally reproduces another one in the background.[26] Does this involve a copyright limitation that a jurisdiction created without statutory basis? Or is such an economically insignificant use one that the right of reproduction should not cover because the use is not an act

22. *See* CHRISTOPHE GEIGER, DROIT D'AUTEUR ET DROIT DU PUBLIC A L'INFORMATION, APPROCHE DE DROIT COMPARE 209 (Litec 2004) [hereinafter GEIGER, DROIT D'AUTEUR].

23. *See* also VIVANT & BRUGUIÈRE, *supra* note 7, at ¶ 557 (admitting that the different situations are not easy to distinguish and that the same situation can lead to different readings).

24. Commission Directive 2001/29, art. 5, 2001 O.J. (L 167) 10 (EC) (Commision Directive of 22 May 2001 on the harmonisation of certain aspects of copyright and neighbouring rights in the information society) (exempts temporary acts of reproduction "whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance.").

25. *See e.g.*, ANDRE LUCAS, DROITD'AUTEUR ET NUMERIQUE ¶ 243 (Litec 1998); VIVANT & BRUGUIÈRE, *supra* note 7, at ¶ 594; P.Bernt Hugenholtz, *Why the Copyright Directive is Unimportant, and Possibly Invalid*, EUR. INTELL. PROP. REV. 501 (2000).

26. Cour de cassation [CC] [supreme court], Cass. 1e civ., Mar. 15, 2005, Bull. civ. I, No. 567 (Fr.); *see also* Christophe Geiger, *Creating Copyright Limitations without Legal Basis: The "Buren" Decision, A Liberation?*, 36 INT'L REV. INTELL. PROP. & COMPETITION L. 842 (2005).

of exploitation of the work?[27] According to the Court, an accessory use of a work "does not enter into the scope of the monopoly of copyright protection and should therefore not be submitted to internal rules of this monopoly."[28]

Another example is the private use of a work. Is the private use of a work a classic copyright limitation, or is the exclusive right arguably not applicable to the private sphere, as the exclusive right should apply only to uses of the work in the public sphere?[29] Ultimately, the controversy does not appear to be so decisive if we keep in mind that in both cases, the author cannot prohibit the use of his work or parts of his work. But, what seems to be much more crucial in this context is the function of a copyright restriction. It is indisputable that copyright law must create free spaces that enable the creative use of existing works. Through these free spaces, common constitutional values like the freedom of expression, freedom of information, and freedom of art shall be secured, and the public interest in a comprehensive cultural life shall be served.[30] In brief, limitations are about the promotion of creativity, or, to use an economic terminology, innovation.[31] Innovation is also one function that the exploitation rights have to fulfill.[32]

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27. *See, e.g.*, VIVANT & BRUGUIÈRE, *supra* note 7, at ¶ 564.

28. Cour de cassation [CC] [supreme court], Cass. 1e civ., Mar. 15, 2005, Bull. civ. I, No. 567 (Fr.).

29. *See, e.g.*, VIVANT & BRUGUIERE, *supra* note 7, at ¶ 562, 583; Philippe Gaudrat, *Réflexion disperses sur l'éradication méthodique du droit d'auteur dans la 'société de l'information*, RTD COM. 87, 102 (2003).; Philippe Gaudrat & Frédéric Sardain, *De la copie privée (et du cercle de famille) ou des limites au droit d'auteur*, COMM. COM. ELECTR., Nov. 2005, at 6; *see also* PIERRE-YVES GAUTIER, PROPRIETE LITTERAIRE ET ARTISTIQUE ¶ 338(PUF 6th ed. 2007) ("[T]he foundation of the author's right is the public use of the work in an economic perspective"); Abraham Drassinower, *Authorship as Public Address: On the Specificity of Copyright Vis-à-vis Patent and Trade-Mark*, 1 MICH. ST. L. REV. 199, 200 (2008) [hereinafter Drassinower, *Authorship as Public Address*] ("[C]opyright is less an exclusive right of reproduction than an exclusive right of public presentation. Copying for personal use, for example, falls outside the purview of an author's copyright.").

30. *See* Christophe Geiger, *Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?*,
35 INT'L REV. INTELL. PROP. & COMP. L. 268 (2004).

31. *See also* Ruth L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries*, UNCTAD-ICTSD PROJECT ON IPRS AND SUSTAINABLE DEVELOPMENT, ISSUE PAPER NO. 15 (2006) [hereinafter Okediji, *International Copyright System*] "The unlimited grant or exercise of rights without corresponding and appropriate limitations and exceptions has serious adverse long-term implications not only for development priorities, but indeed for the creative and innovation process itself." *Id.*at *x* (Executive Summary).

32. *See also* Annette Kur & Jens Schovsbo, *Expropriation of Fair Game for All? The Gradual Dismantling of the IP Exclusivity Paradigm*, *in* INTELLECTUAL PROPERTY IN A FAIR WORLD TRADE SYSTEM—PROPOSALS FOR REFORMING TRIPS (forthcoming 2010). "In spite of their

2. Supporting Creativity, a rationale of the Copyright System

From a utilitarian perspective, innovation is the superior objective of the copyright system: "to promote the progress of science and useful arts," as it is written significantly in the American Constitution.[33] Here, it again becomes clear that in a function-oriented view of the copyright system, it seems strange to differentiate between exploitation rights and copyright limitations because both have the same goal—they are legal instruments for the promotion of creativity.[34] From this point of view, the debate whether copyright limitations are granting rights to the user appears as a somewhat technical discussion which focuses, at least in Europe, on the concept of subjective rights ("subjective Rechte"/ "droits subjectifs").[35] In fact, someone who uses a work in a way that a copyright limitation legitimates relies not on a limitation-protected interest, but on the copyright in its negative aspect. He thus relies also on a right, namely copyright as a whole, which materializes as a result of a balancing between exclusivity and the need to keep a creation free of a monopoly.[36]

From a function-oriented point of view, there is no hierarchy between exploitation rights and limitations; what ultimately counts is the result.[37] This means that copyright limitations cannot be separated from exploitation rights; both form a whole, which serves

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canonisation as a special type of human rights, and irrespective of the strong flavour of personal rights permeating copyright law, IPR in the first place have been created to 'do a job'—namely to foster creativity and innovation." *Id.*

33. U.S. CONST., art. I, § 8, cl. 8.

34. *See also* Gerhard Schricker, *Urheberrecht zwischen Industrie- und Kulturpolitik*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT, INTERNATIONALER 246 (1992), (arguing that the public interest is a reason for both, the protection and the restriction of copyright).

35. *See* Christophe Geiger, *Right to Copy v. Three-Step Test, The Future of the Private Copy Exception in the Digital Environment*, 2005 COMPUTER L. REV. INT'L 7.

36. *See CCH*, 1 S.C.R. 339, at ¶ 48 ("The fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence . . . . The fair dealing exception, like other exceptions in the Copyright Act, is a *user's right.*"). Referring to this decision, see Drassinower, *Authorship as Public Defense*, *supra* note 28, at 200 ("Fair dealing in Canada or fair use in the United States is less an exception to copyright infringement than a "user's right" unambiguously *integral* to copyright law." (emphasis added)). *See also* Marie-Christine Janssens, *The Issue of Exceptions: Reshaping the Keys to the Gates in the Territory of Literary, Musical and Artistic Creation*, *in* RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT 347 (Estelle Derclaye, ed.,Edward Elgar 2009) (emphasizing that the balancing mechanism between exclusive rights and exceptions "is ingrained in the copyright system and is of paramount importance for its legitimacy and credibility.").

37. *See also* Kur & Schovsbo, *supra* note 31: "Exclusivity should be the dominant regulatory model only where and to the extent that other, non-exclusive schemes cannot achieve the same or better results, and/or generate more beneficial effects for society as a whole." *Id.*

the promotion of creativity.[38] The range of a right is determined by its limitations; beyond these limitations, the author has no control over his work. Thus, the demand for a more extensive and rigorous protection,[39] as well as the postulate of a narrow interpretation of copyright limitations, represent a purely political statement. In this context, what should matter is only whether copyright regulation achieves the desired purpose, not what legal technique (exclusive right or limitation) is used.[40] If the objectives can be achieved by a greater curtailment of the scope of protection using extensively interpreted or additional copyright limitations, then there should be no objection to it.

Furthermore, even in economic terms, the value of limitations can be measured in various forms, typically showing the benefits of such a system.[41] There are, in fact, numerous businesses that use "free" material—meaning material where uses are permitted by a limitation (so-called "added value services")—to generate income and economic growth.[42] Even if the limitation provides for the payment of remuneration, the absence of costs related to finding the right holder and the negotiation of a license (not to mention, in case of problems, the costs related to litigation), also has a measurable value, and therefore facilitates the creative reuses of existing works.

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38. *See* Okediji, *International Copyright System*, *supra* note 22, at XI. "Limitations and exceptions should correspond with the rights granted to authors." *Id.*

39. For a persuasive discussion of this topic, see Alexander Peukert, *Ein möglichst hohes Schutzniveau des Urheberrechts fördert Kreativität und dynamischen Wettbewerb: Ein Irrtum?!*, *in*, POPULÄRE IRRTÜMER IM URHEBERRECHT, FESTSCHRIFT FÜR RETO M. HILTY 39 (Mathis Berger & Sandro Macciacchini, eds.Schulthess, 2008) 39 [hereinafter Peukert, *Ein möglichst*].

40. For a discussion regarding the purpose of copyright protection, see Dusollier, *Droit d'auteur*, *supra* note 5, at 216; Geiger, *Droit d'auteur*, *supra* note 14, at 20 .

41. *See* Llewellyn Gibbons, Valuing Fair Use, Paper Presentation at the Conference on Innovation and Communication Law, University of Turku, Finland (July 17, 2008).

42. THOMAS ROGERS & ANDREW SZAMOSSZEGI, FAIR USE IN THE US ECONOMY: ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE (Computer & Communications Industry Association, Washington DC) (2007); *see* Llewellyn Gibbons & Xiao Li Wang, *Striking the Rights Balance Among Private Incentives and Public Fair Uses in the United States and China*, *supra* note 3, at 494 (referring to the findings of the study). Using the research methodology established in the 2003 WIPO Guide on Surveying the Economic Contribution of the Copyright-Based Industries, the study found "[f]air use dependent industries grew at a faster pace than the overall economy, were more productive, and were responsible for an estimated [$]194 billion in exports in 2006." ROGERS & SZAMOSSZEGI, *supra*, at 44. According to this study, the economic significance of fair-use based industries would then be substantially larger than that of copyright-based industries. *See id.*

B. Limitations as Protection Mechanisms of the Interests of Creators

On the other hand, fostering creativity is not the only aim that copyright law pursues. At least in continental European countries, the protection of the creator is another essential basis for the system. For example, it is surely not by accident that the German Copyright Act is called "Urheberrechtsgesetz," meaning the "Authors' Right Act."[43] Even if other interests are taken into account and a fair balance between different interests is sought,[44] the German Act is a commitment to the fact that a special role within the system shall be granted to the creator of the work.[45] This explains some juridical particularities of the so-called "Authors' Right" countries, such as the rights granted to the creator (which is contrary to the "work made for hire" doctrine), the author's moral rights, or the contractual protection of the author that copyright contract law provides. Putting the author in the center of the system does not conflict, as it is often claimed, with the above-mentioned utilitarian approach. On the contrary, both approaches complement each other well—to reach an optimal promotion of creativity, allocation of a special role to the person who performs the social added value, the creator,[46] makes sense.

Copyright limitations do not mean that works can always be used free of charge, and legislatures may provide a right to appropriate remuneration for all uses that copyright limitations legitimate. Recital 36 of the "Info-Soc Directive" clarifies this unambiguously when it prescribed that the member states "may provide for fair compensation for right holders also when applying the optional provisions on exceptions or limitations which do not require such compensation."[47] In German law, for instance, remuneration is provided in most limitation provisions. This remuneration is what is

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43. Urheberrechtsgesetz [UrhG, Copyright Act], Sept. 6, 1965 BGBl. I at 1273, *available at* http://transpatent.com/gesetze/urhg.html, updated through Sept. 1, 2009 (F.R.G).

44. *See* RETO M. HILTY & CHRISTOPHE GEIGER, EDS., THE BALANCE OF INTEREST IN COPYRIGHT LAW, *supra* note 3.

45. For a detailed overview concerning the different interests in German copyright law, see Reto M. Hilty, *Urheberrecht in der Informationsgesellschaft: 'Wer will was von wem woraus?'—Ein Auftakt zum "zweiten Korb"*, 47 ZEITSCHRIFT FUR URHEBER UND MEDIENRECHT [ZUM] 983 (2003).

46. *See* Christophe Geiger, *Intérêt général, droit d'accès à l'information et droit de propriété, La propriété intellectuelle analysée à la lumière des droits fondamentaux, in* L'INTERET GENERAL ET L'ACCES A L'INFORMATION EN PROPRIETE INTELLECTUELLE 177 (Mireille Buydens & Séverine Dusollier, eds., Bruylant, 2008).

47. Commission Directive 2001/29, art. 5 2001 O.J. (L 167) 10 (EC) (Commision Directive of 22 May 2001 on the harmonisation of certain aspects of copyright and neighbouring rights in the information society)

often called, mostly in common law countries, quite improperly,[48] a copyright "levy." These remunerations, which are split between authors and exploiters most of the time in an author-friendly manner, are—as it has been stressed recently—often much more desirable to the authors than the royalty payments they receive from contracting parties.[49] Furthermore, these limitation-based remuneration rights are sometimes considered *inalienable* for creators,[50] in contrast to the exclusive right which is usually transferred to exploiters. Besides the protection provided through copyright contract law,[51] copyright limitations can be considered as additional suitable instruments to achieve a reasonable balance of interests between authors and exploiters. Given that copyright contract law does not exist in many nations' bodies of law and that the results in those countries that have such rules are not yet fully satisfactory,[52] the limitation-based remuneration system seems to be an interesting and viable option.

1. Copyright "Levies:" "Remuneration" or "Compensation" for the Author?

In light of what has been argued previously in this Article, it can be unclear and inappropriate when a European legislature speaks of "compensations" in connection with copyright limitations and the right of creators to receive a fair remuneration for permitted uses.[53] Recital 35 of "Info-Soc Directive", for example, says that "[i]n certain cases of exceptions or limitations, rightholders should receive *fair compensation* to compensate them adequately for the use made of their protected work or subject matter."[54] The French wording is

48. *See* Discussion *infra* Part I.B.1.

49. *See* Adolf Dietz, *Continuation of the Levy System for Private Copying also in the Digital Era in Germany*, A&M 348 (2003) (regarding private copying); Reto M. Hilty, *Verbotsrecht vs. Vergütungsanspruch: Suche nach Konsequenzen der tripolaren Interessenlage im Urheberrecht*, *in* PERSPEKTIVEN DES GEISTIGEN EIGENTUMS UND WETTBEWERBSRECHTS, FESTSCHRIFT FÜR GERHARD SCHRICKER ZUM 325 (Beck 2005).

50. Urheberrechtsgesetz [UrhG, Copyright Act], Sept. 6, 1965 BGBl. I at 1273, *available at* http://transpatent.com/gesetze/urhg.html, updated through Sept. 1, 2009 (F.R.G). The limitation-based remuneration claims can only be transferred in advance to a collective society. *See also* Commission Directive 2006/115/EC, art. 5.2 2006 O.J. L 376/28 (EC) (Commission Directive of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property).

51. *See* Adolf Dietz, *Les aspects contractuels du droit d'auteur en Allemagne*, *in* GEIGER, ET AL., PERSPECTIVES D'HARMONISATION, *supra* note 8, at 465.

52. *See* Dietz, *supra* note 49 (providing examples of court decisions).

53. *See* discussion *supra* I B.

54. Commission Directive 2001/29, art. 5, 2001 O.J. (L 167) 10 (EC) (Commision Directive of 22 May 2001 on the harmonisation of certain aspects of copyright and neighbouring rights in the information society).

similar: "Dans le cas de certaines exceptions ou limitations, les titulaires de droits doivent recevoir une *compensation* équitable afin de les *indemniser* de manière adéquate pour l'utilisation faites de leurs œuvres ou autres objets protégés."[55]

This "compensation" or "indemnity" terminology seems to imply that some kind of damage has to be redressed. Given the above discussion, however, these terms appear to be incorrect. One should speak of "remuneration" instead of "compensation." Hence, there would be remuneration by way of license and remuneration through a copyright limitation. It is preferable to use the term "limitation-based remuneration rights" than the more established and misleading term of "levies."

The same can be said about the economically-oriented term "liability rule," often used to describe legal situations where, instead of a right to forbid, the rights owner only receives monetary reward for the use of his works, as the notion of liability implies a prejudice that needs to be compensated.[56] The term "statutory license," which is often used for limitations coupled with a right to receive fair remuneration, seems more suitable to express the concept of remuneration for the use of a copyrighted work.[57] Surprisingly, the wording in the German version of recital 35 is clearly more neutral: "In certain cases of exceptions or restrictions the right holders shall receive a fair equalization in order to receive an appropriate *remuneration* ("Vergütung") for the use of their protected works or other subjects of protection."[58] Likewise, in the "Lending and Rental Right Directive," the European legislature explicitly stated that authors and performers enjoy a non-waivable "right to obtain an equitable remuneration" for the rental of their work that cannot be

55. *Id.*

56. *See* Kur et al., *supra* note 31 (defining liability rules as a "legal structure permitting third parties to undertake certain actions without prior permission, provided that they compensate the injured person for the trespass."); *see generally* Guido Calabresi & A. Douglas Melamed, *Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (reminding that the liability paradigm was primarily developed in the context of tort law).

57. *See id.* Although the term "statutory license" is itself not entirely felicitous, as it implies that there is an exclusive right and that only the permission to use is given by the law. As already mentioned above, copyright limitations are to be understood as limits to the exclusive right of the author, beyond which he may not have any control over his work anymore. Therefore it seems that it would be better to speak of limitations with remunerations (or "limitation-based remuneration claims") and limitations without remunerations. *See id.*

58. Commission Directive 2001/29, art. 35 2001 O.J. (L 167) 10 (EC). The German version of Recital 35 is: "In bestimmten Fällen von Ausnahmen oder Beschränkungen sollen Rechtsinhaber einen gerechten Ausgleich erhalten, damit ihnen die Nutzung ihrer geschützten Werke oder sonstiger Schutzgegenstände *angemessen vergütet* wird". *Id.*

waived.[59] The European Court of Justice, interpreting this concept, ruled that the right to equitable remuneration had to be viewed "as enabling a proper balance to be achieved between the interests of performing artists and producers in obtaining *remuneration* for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable."[60]

The question is whether these different terms represent different conceptions of copyright limitations and how to handle the remuneration claims involved. In France, copyright legislation in the context of private copying refers to the "right to receive a remuneration for the reproduction of the work" and avoids the misleading term of "compensation"[61] In the end, it is probably not dispositive whether one starts from "compensation" or "remuneration"—the decisive aspect is likely that in both cases, there is a possibility for the author to participate in the fruits of his work. In this regard, only the *effectiveness* of the participation is important.

What does a very extensive and developed exclusive right mean to the author if hardly any remuneration flows back to him in the end?[62] If author participation is to be better reached by way of limitations, then the limitation-based remuneration option should be preferable to the one resulting from the exclusive right.[63] There are

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59. Commission Directive 2006/115/EC, art. 5.2 2006 O.J. L 376/28 (EC) (Commission Directive of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property)

60. Case C-245/00, Stichting ter Exploitatie van Naburige Rechten v. Nederlandse Omroep Stichting, 2003 E.C.R. I-1251, at § 36.

61. Code de la propriété intellectuelle (Intellectual Property Code) art. L. 311-1 (Fr.).

62. *See* Martin Kretschmer & Philip Hardwick, *Authors' Earnings From Copyright and Non-Copyright Sources: A Survey of 25.000 British and German Writers* (Center for Intellectual Property Policy & Management, Bournemouth University),Dec. 2007. The authors conclude, "that current copyright law has empirically failed to meet the aim of producing the necessary resources and safeguarding the independence and dignity of artistic creators and performers (Recital 11, Directive 1001/29/EC). The rewards of best-selling writers are indeed high but as a profession, writing has remained resolutely unprosperous." *Id*

63. *See* Kur et al., *supra* note 31 (stating that "in order to establish the system best suited for the challenge, each regulator must check the pros and cons in view of the specific task which shall be solved," avoiding any generalizations). The authors rightly underline the assumption that a liability-based system leads towards "chronic under-compensation" seems quasi impossible to verify, as "empirical evidence is seldom found, and where it exists, it is often inconclusive." *Id.* Therefore, "a robust and reliable liability system rendering fair returns may be preferable, also under investment aspects, to a weak and insecure regime of property rules." *Id.*; *see also* Kamiel Koelman, *The Levitation of Copyright: An Economic View of Digital Home Copying, Levies and DRM, in* INTELLECTUAL PROPERTY LAW 2004, 437 (Intersentia, 2005) (concluding that "both a levy scheme and a system based on, either statutory or technological, exclusivity may have social costs and benefits. Economic arguments can be made both in favour

currently many situations in which collecting societies, and not the authors individually, manage the exclusive right. This especially applies to the case of mass uses of copyrighted works, where their individual exploitation would be practically impossible anyway. The same collecting societies are also in charge of collecting the remuneration resulting from the limitation-based uses of a work. Especially in countries like Germany where the collecting societies are subject to an obligation to contract with the users,[64] there is practically no difference between the collection of remuneration based on the exclusive right and a limitation-based remuneration claim. In many cases, the distinction between the exclusion right and its limitation therefore loses its practical relevance.

2. Case Law Favoring a Limitation-Based Remuneration Approach

In its highly regarded decision on July 11, 2002, the German Federal Supreme Court saw the potential of "limitation-based remunerations" as an effective protection of the creator while extensively interpreting the press review limitation of Article 49 of the German Copyright Act.[65] The Court decided that electronic press reviews made by companies for internal use are covered by the press review limitation on the grounds that a considerable part of the received payment would flow to the authors themselves and that a narrow interpretation of the limitation would thus not improve the author's position.[66]

The Swiss Supreme Court recently expanded on the German Federal Supreme Court's decision.[67] In a very interesting and innovative decision, the Swiss Supreme Court held that the activity of a company that commercially prepares and delivers electronic press reviews (so-called "press clipping and documentation delivery services" or "value-added information services") is covered by limitation for personal use according to Article 19 of the Swiss Copyright Act, which allows the reproduction of a work by third

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and against either approach. At this stage, it cannot be determined which approach is the most desirable from an economic point of view.").

64. Urheberrechtswahrnehmungsgesetz) (German Act for Collective Management of Authors Rights), Jun. 23, 1995, BGB1. I, § 11 (F.R.G.)

65. Bundesgerichtshof [BGH], 11 July 2002, "Elektronische Pressespiegel," [2003] JZ 473, comment by T. Dreier.

66. *Id.*

67. Schweizerisches Bundesgericht [BGer] [Federal Court] June 26, 2007, 133 Entscheidungen des Schweizerischen Bundgerichts [BGE] III 473 (Switz.). *See also* Christophe Geiger, *Rethinking Copyright Limitations in the Information Society: The Swiss Supreme Court Leads the Way*, 39 INT'L REV. INTELL. PROP. & COMP. L. 943 (2008).

parties.[68] In examining whether this extensive interpretation of the limitation violates the so-called "three-step test" of the Berne Convention,[69] the court held:

> It can not be assumed that the interest of the right holder is restricted in an unreasonable manner, if he gets a claim for remuneration instead of the right to prohibit the use, because both the interest of the journalists and those of the publishers have to be considered. With reference to the press review, indeed an exclusive right would perfectly serve the publisher's interests, who normally owns the rights of the journalists, because then he can freely decide whether he wants to prevent the reproduction of the works or to give his approval against payment of a corresponding remuneration. The journalist as the author of the single article, however, has no interest in such an exclusive right. On the one hand, he is interested in his articles being available to many readers. On the other hand, he only makes money out of the reproductions made for the press clipping and documentation services if he is entitled to a remuneration.[70]

Based on this argument, an increased number of limitations, when coupled with an obligation to pay an appropriate remuneration, can serve the author's interests by securing a financial reward for his creative activity. If one really wants to achieve effective copyright protection, this benefit is not to be disregarded in connection with the interpretation of the existing limitation system, as well as with its adaptation in the future.[71]

In any case, the copyright limitation protects not only the remuneration interest of the author who has already created a work, but also the interests of the author during the creation process. At this stage, the authors themselves are the major beneficiaries of limitations to copyright. How could authors deal with existing works critically if they had no right to quote? How could university professors and scientists work without the possibility of copying articles in order to prepare their own cultural contributions?[72] The free spaces left by copyright law ensure the free creation of works.

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68. BGer, 133 BGE III 473.

69. Berne Convention for the Protection of Literary and Artistic Works, art. 9(2), Sept. 9, 1886, revised, July 24, 1971, 828 U.N.T.S. 221. "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." *Id.*

70. BGer, 133 BGE III 473.

71. Katerina Gaita & Andrew F. Christie, *Principle or Compromise? Understanding the Original Thinking behind Statutory License and Levy Schemes for Private Copying*, INTELL. PROP. Q. 426 (2004); *see also* Hilty, *Sündenbock*, *supra* note 8.

72. *See* Reto M. Hilty, *Five Lessons About Copyright in the Information Society: Reaction of the Scientific Community to Over-Protection and What Policy Makers Should Learn*, 53 J. COPYRIGHT SOC'Y U.S.A. 103 (2006); *see also* Geiger, *Exceptions*, *supra* note 8, at 349; Reto M. Hilty, *Copyright Law and Scientific Research*, *in* COPYRIGHT LAW: A HANDBOOK OF CONTEMPORARY RESEARCH 315 (Paul Torremans, ed., Edward Elgar 2007) [hereinafter TORREMANS, HANDBOOK].

However, the existing system still shows weaknesses because it does not sufficiently account for the fact that in the creation processes that authors use, elements of existing copyrighted works give rise to new works.[73] The techniques of sampling in music or appropriation uses in visual arts are popular examples, among many others.

Thus, introducing a wider limitation for creative uses and converting the right to prohibit into a right to receive remuneration should be seriously considered.[74] The exclusive right would thus be reduced considerably because it would become an exclusive right to prohibit only the take-over *telle quelle* of the work. Expressed in economic terms, the author could therefore only control the primary market of the work, but not the derivative markets. Such a solution would require an absolutely new reconsideration of the principle of exclusivity. The principle of exclusivity is, after all, only a means to an end. If this end is better reached through an expanded limitation system, then considerations in the direction suggested here should not be rejected merely because they do not correspond to the historical tradition in copyright law.[75]

II. IMPLEMENTING THE "LIMITATION-FRIENDLY" APPROACH OF COPYRIGHT: HOW MUCH ROOM TO MANEUVER FOR LEGISLATURES AND JUDGES?

Of course, legislatures and judges can only follow such a "limitation-friendly" approach if it is compatible with higher-ranking legal provisions. This raises the crucial question of what room there is to maneuver, considering the requirements that international, European, and constitutional law impose. This is a very complex issue which certainly requires comprehensive explanations. Therefore, within the limits of this Article, only a few thoughs can be provided, which surely could be supplemented with a more detailed analysis. In what follows, this Article will try to demonstrate that the existing

73. *See* Brian Fitzgerald, *Copyright 2010: The Future of Copyright*, EUR. INTELL. PROP. REV. 43, 46 (2008) ("There is a growing need to sensibly articulate the right to engage in transformative reuse of copyright material in international and national laws.")

74. *See* Christophe Geiger, *Copyright and the Freedom to Create, A Fragile Balance*, 36 INT'L REV. INTELL. PROP. & COMP. L. 707 (2007); Christophe Geiger, *Les limites au droit d'auteur en faveur de la création dérivée*, *in* COPYRIGHT AND FREEDOM OF EXPRESSION 350 (Aladda 2008).

75. Kur et al., *supra* note 31, stating that "the choice between the traditional system based on exclusivity and an alternative system based on liability rules should be founded on a comparison of the social benefits and costs involved in both models."

legal frame is not as narrow as it is often assumed to be,[76] and that numerous options are available in terms of limitations.

A. Constitutional Imperatives

Copyright law is very rarely expressly mentioned in constitutions or similar legal instruments.[77] A prominent exception is the Universal Declaration of Human Rights of 1948, which provides that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."[78] A provision of the International Covenant on Economic, Social and Cultural Rights of 1966 (the so-called "civil pact") adopted virtually identical language.[79] It is immediately evident that while the protection of the relevant moral and material interests is affirmed, the way in which this protection is to be achieved is not. There is no mention in either of these documents of exclusive rights, or even of property. Thus, it is compatible with these provisions to guarantee the protection of the material interests of the author by means of copyright limitations if they are tied to an appropriate remuneration.

1. Copyright as Property

Such an approach appears problematic in countries in which copyright is subsumed, in the absence of autonomous constitutional

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76. For a discussion of the flexibilities left by this system, see Christophe Geiger, "Flexibilising Copyright", *supra* note 10; P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*," FINAL REP., Mar. 2008, *available at* http://www.ivir.nl/publicaties/hugenholtz/finalreport2008.pdf [hereinafter Hugenholtz & Okediji, *Conceiving*]; Kur, *Oceans*, *supra* note 3; *see* also Peukert, "Ein moglichst," *supra* note 29, at 45 (challenging the rigorous view of intellectual property rights, especially of the copyright law, from a legal (primarily relating to international, constitutional and comparative law) and an economical point of view).

77. *But see, e.g.*, Portuguese Constitution, art. 42(2); Swedish Constitution, art. 2, sec. 19; Slovakian Constitution, Art. 43(1); Slovenian Constitution, Art. 60; Czech Charter on Fundamental Rights, Art. 34; Russian Constitution, Art. 44(1).

78. Universal Declaration of Human Rights (UDHR),G.A. Res. 217A, at 71, U.N. Doc. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), at art. 27(2).

79. International Covenant on Economic, Social and Cultural Rights of 16 December 1966, art. 15 (1), Dec. 16, 1966, 993 U.N.T.S.53.

> The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Id.

protection of copyright,[80] under the protection of property.[81] This is the case in most European countries, and seems to be the case in the United States too,[82] although it seems to have been less of an issue in U.S. courts to date. At the European level, copyright enjoys protection under the European Convention of Human Rights.[83]

The Charter of Fundamental Rights of the European Union of 2000 even contains the succinct clause, "intellectual property shall be protected," without explanation of the scope that this protection shall have.[84] Due to its atypical wording, the exact scope of this provision is unclear.[85] Unfortunately, the preparatory documents do not provide any clarity in this regard. That this provision is at risk of being in the center of future debates on intellectual property is a significant problem. For example, the Treaty of Lisbon[86] gives the Charter of Fundamental Rights of the European Union a legally binding force, and integrates this text in the primary legislation of the European

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80. Some countries in Europe mention copyright at the constitutional level. *See, e.g.*, Portuguese Constitution, art. 42(2); Swedish Constitution, art. 2, sec. 19; Slovakian Constitution, Art. 43(1); Slovenian Constitution, Art. 60; Czech Charter on Fundamental Rights, Art. 34; Russian Constitution, Art. 44(1).

81. *See* FRANK FECHNER, GEISTIGES EIGENTUM UND VERFASSUNG (Tübingen: Mohr Siebeck 1999); Christophe Geiger, *"Constitutionalising" Intellectual Property Law?, The Influence of Fundamental Rights on Intellectual Property in Europe*, 37 INT'L REV. INTELL. PROP. & COMP. L. 381 (2006).

82. *See, e.g.*, Chavez v. Arte Publico Press, 204 F.3d 601, 605 n.6 (5th Cir.2000). "The Supreme Court [has] held . . . that patents are considered property within the meaning of the due process clause . . . . Since patent and copyright are of a similar nature, and patent is a form of property . . . *copyright would seem to be so, too.*" *Id.* (emphasis added)."

83. This has been decided for the European Court on Human Rights for various IP rights. See, e.g., Balan v. Moldova, Eur. Ct. H.R. (2008) (regarding copyright law); Paeffgen GMBH c/ Allemagne, Eur. Ct. H.R.. (2007) (regarding domain names); Smith Kline and French Laboratories Ltd. v. The Netherlands, 66 D.R. 70 (1990) (regarding patent rights); Burkhart Goebel, Trade Marks are "Possessions", as Are Applications, 2 J. INTELL. PROP. L. & PRAC. 197 (2007), available at http://jiplp.oxfordjournals.org/cgi/content/full/2/4/197 (discussing AnheuserBusch Inc. v. Portugal, Eur. Ct. H.R. (2005)). For a detailed analysis of the intellectual property case law of the European Court of Human Rights, see Laurence R. Helfer, The New Innovation Frontier? Intellectual Property and the European Court of Human Rights,49 HARV. INT'L L.J. 1 (2008); see also European Convention on Human Rights (ECHR), Protocol 1, Sept. 3, 1953, 213 U.N.T.S. 222 (long title: Convention for the Protection of Human Rights and Fundamental Freedoms).

84. European Convention on Human Rights (ECHR), art. 17(2), Sept. 3, 1953, 213 U.N.T.S. 222 (long title: Convention for the Protection of Human Rights and Fundamental Freedoms).

85. *See* Christophe Geiger, *Intellectual Property Shall Be Protected!? Article 17 (2) of the Charter of Fundamental Rights of the European Union: a Mysterious Provision with an Unclear Scope*, EUR. INTELL. PROP. REV.113 (2009) (criticizing the intellectual property clause in the E.U. Charter of Fundamental Rights).

86. *See* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2008 O. J. (C115) 1.

Union. Hence, there is no doubt that the Court of Justice of the European Union will justify its future decisions with direct reference to the provisions of the Charter.

Even before the Treaty of Lisbon came into force, the European Court of Justice had already focused directly on the Charter of Fundamental Rights when testing the validity of community secondary legislation.[87] According to the court, even if the Charter is not yet a legally binding instrument, it still reaffirms the general principles of community law resulting from the European Convention for the Protection of Human Rights and the constitutional provisions common to the member states.[88] These principles are, without a doubt, binding on European legislatures.[89] The European Commission refers more and more directly to Article 17(2) of the Charter to justify its actions, notably when strengthening and expanding existing intellectual property protection.[90]

It therefore seems that Article 17(2) of the Charter somewhat dictates the policy of the European Commission that tends to assure "a high level of protection" of intellectual property rights at any cost, and sets up "a rigorous and effective system"[91] of installing a "maximalist" conception of intellectual property in the European

87. *See, e.g.*, Case C-303/05, Advocaten voor de Wereld, 2007 E.C.R. I-03633, at paras. 45-46; Case C-540/03, Parliament v. Council, 2006 E.C.R. I-05769, at ¶ 38.

88. Case C-540/03, Parliament v. Council, 2006 E.C.R. I-05769, at ¶ 38.

89. *See also* Case C-432/05, *Unibet*, 2007 E.C.R. I-02271, at ¶ 37 (applying the principle of effective judicial protection).

90. In fact, one can read in Recital 32 of the EC, *Commission Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights*, [2004] O.J. L 157, 30 April 2004, at 32, that "this Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for intellectual property, in accordance with Article 17 (2) of that Charter." *See also Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights of 26 April 2006*, at 12, COM (2006) 168 final (Mar. 26, 2006). For a critical approach of the semantic umbrella of property, leading to an expansionist conception of IP, see Alexander Peukert, Intellectual property as an end in itself?, Paper Presentation at the ATRIP conference, "Can One Size Fit All?," Munich, 21 July 2008; Raquel Xalabarder, The development of protection objectives. How far have we moved away from the roots?, Paper Presentation at the ATRIP conference "Can One Size Fit All?" Munich, 21 July 2008.

91. *See* Green Paper of the Commission of the European Communities of 16 July 2008, Copyright in the Knowledge Economy, COM 466 (2008):

> A high level of protection is crucial for intellectual creation . . . . A rigorous and effective system for the protection of copyright and related rights is necessary to provide authors and producers with a reward for their creative efforts and to encourage producers and publishers to invest in creative works.

Id. For a critical comment, see Christophe Geiger et al., *What Limitations to Copyright in the Information Society? A Comment on the European Commissions Green Paper "Copyright in the Knowledge Economy"*, 40 INT'L REV. INTELL. PROP. & COMP. L. 412 (2009). Similar phrases can be found in numerous directives.

Union. Indeed, it seems that in the opinion of the Commission, a duty to secure the protection of existing intellectual property rights derives from this provision, as well as an obligation for the community legislature to expand protection. One could reasonably wonder about the origin of the Commission's opinion, which seems to clearly dictate a certain approach with regard to intellectual property, and thus leaves little space to maneuver. The opinion is even more surprising given the wording of Article 17(2) of the Charter in its English, French, and German versions. It is indeed interesting to notice that "intellectual property shall be protected" is translated into "la propriété est protégée" or "Geistiges Eigentum ist geschüzt" (which, correctly translated, would be "intellectual property *is* protected").[92] Without a doubt, there is a significant difference between "intellectual property *is* protected" and "intellectual property *shall be* protected." Only the second could be understood as implying a duty for member states to strengthen protection.

Despite its erroneous interpretation, the consequences of this provision should not be overestimated. Indeed, the preparatory documents of the Charter clearly seem to exclude an absolutist concept of intellectual property, as the drafters specified that "the guarantees laid down in paragraph 1 [of Article 17] shall apply as appropriate to intellectual property."[93] This means that intellectual property—just like the right to physical property—can be limited in order to safeguard the public interest. Article 17(2) could then be considered to be nothing more than a simple clarification of Article 17(1). Consequently, there would be absolutely no justification to expand remedies on the ground of Article 17 (2).[94] Furthermore, it should not be forgotten that the Charter of Fundamental Rights provides for the protection of a series of other fundamental rights of equal value[95] which have to be taken into account, and against which

92. European Convention on Human Rights (ECHR), Protocol 1, Sept. 3, 1953, 213 U.N.T.S. 222 (long title: Convention for the Protection of Human Rights and Fundamental Freedoms) (published in the Official Journal of the European Communities, Dec. 18, 2000 (2000/C 364/01).

93. Note from the Praesidium, Draft Charter of Fundamental Rights of the European Union, Charte 4473/00, Brussels, Oct. 11, 2000, at 20 (providing helpful explanations relating to the complete text of the Charter).

94. *See* Christophe Geiger, *Intellectual "Property" After the Treaty of Lisbon, Towards a Different Approach in the New European Legal Order?*, (forthcoming 2010).

95. This clearly results from the general principles of application of the Charter enunciated by Article 51, especially from the principle of proportionality (Art. 52 (1)). Hence, the freedom of expression and information (Art. 11), the freedom of the arts and sciences (Art. 13), the respect for private and family life and the protection of personal data (Arts. 7 and 8), the freedom to choose an occupation and to conduct a business (Arts. 15 and 16), the right to education (Art. 14) as well as certain other objectives such as social protection (Art. 34), the

intellectual property rights must be balanced.[96] Furthermore, it is important to not lose sight of the prohibition of abuse of rights laid down in Article 54 of the Charter.[97] Moreover, the separate mentioning of intellectual property in the second paragraph of Article 17 could also be interpreted as the expression of a certain will of the drafters of the Charter's express intent to point out the specificity of intellectual property in comparison to the general right to property, underscoring that it is a property of a special kind, a property with a strong social function, which should therefore not be equated with physical property.[98] Under this interpretation, intellectual property would then have to be considered as having an even more limited nature than the right to physical property.

2. Consequences of the Constitutional Property Protection

The next important question is whether the treatment of copyright as property presents an impediment to any expansion of the limitation system. At this point, only the constitutional side should be considered because in private law, treatment of intellectual property as property has always been problematic and is still today discussed intensively.[99]

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protection of health care (Art. 35), the protection of the environment (Art. 37) and consumer (Art. 38), are all "values" that have to be considered by the Community legislator as well and which could be opposed to an "expansionist" approach of intellectual property. Note from the Praesidium, Draft Charter of Fundamental Rights of the European Union, Charte 4473/00, Brussels, Oct. 11, 2000, at 20.

96. For a discussion of the advantages of a constitutional dimension of intellectual property see Christophe Geiger, *The Constitutional Dimension of Intellectual Property*, *in* TORREMANSINTELLECTUAL PROPERTY, *supra* note 52, at 101 [hereinafter Geiger, *Constitutional Dimension*]; *see generally* Laurence R. Helfer, *Towards A Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971 (2007). For a discussion of the relationship of intellectual property and human rights, see Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039 (2007); Peter K. Yu,*Ten Common Questions About Intellectual Property and Human Rights*, 23 GA. ST. U. L. REV. 709 (2007).

97. According to this Article, the abusive utilization of any right guaranteed by the Charter is forbidden, a principle that could equally be brought forward to thwart an oversized conception of intellectual property.

98. *See generally* Christophe Geiger, *Copyright's Fundamental Rights Dimension at EU Level*, *in* DERCLAYE 35. . As has already been underlined, even the general right to property is understood in the Charter as a right having strong social bounds. *See* Christian Calliess, *The Fundamental Right to Property*, *in* EUROPEAN FUNDAMENTAL RIGHTS AND FREEDOMS 448, 456 (Dirk Ehlers, ed., De Gruyter 2007) (stating that the social function "serves as a justification for and limitation of the restrictions imposed on property utilisation").

99. *See, e.g.*, CYRILL P. RIGAMONTI, GEISTIGES EIGENTUM ALS BEGRIFF UND THEORIE DES URHEBERRECHTS (Baden-Baden: Nomos 2001); Ysolde Gendreau, *À la recherche d'une propriété perdue*, 17 CAHIERS DE PROPRIÉTÉ INTELLECTUELLE 551 (2005); Horst-Peter Götting, *Der Begriff des Geistigen Eigentums*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT,

In any case, it seems that from a constitutional point of view, there is a kind of a "juridical problem zone" in which different conclusions are often drawn with reference to the protection of intellectual property.[100] In particular, advocates of a wide expansion of exclusive rights have always pointed to natural law and later to the fundamental right of protection of property to justify their claims. The natural law question cannot be analyzed in detail here, but it should be noted that even among the advocates of a natural-law-based view of property, it was *always* considered as a right inherently restricted by public interests. Thus, in a comprehensive analysis of the different theories on the natural-law-based foundations of property, for example, Dr. Jakob Cornides, administrator at the European Commission and Human rights expert, concludes, "The most important conclusion to be drawn . . . is that property is not an end in itself. Obviously, it must be used in a way that contributes to the realisation of the higher objectives of human society."[101]

Similarly, property has always been considered legitimate only if it serves public interests.[102] Within constitutional law, this thought was considered again in the principle of the "social bounds" of property ("Sozialbindung des Eigentums").[103] Especially in Germany, there is detailed case law concerning the protection of copyrights under Article 14 (protection of property) of the German Constitution.[104] What must be emphasized here is that it is incumbent upon the legislature to define the subject matter of copyright. This means that the state must first create the associated property rights in order for constitutional

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INTERNATIONALER 353 (2006); Ansgar Ohly, *Geistiges Eigentum?*, *in* JURISTENZEITUNG 545 (Mohr Siebeck, Tübingen 2003) (2003); Laurent Pfister, *Is Literary Property (a form of) Property? Controversies on the Nature of the Authors' rights in the Nineteenth Century*, 205 REVUE INTERNATIONALE DU DROIT D'AUTEUR 117 (2005).

100. *See* Bernd Grzeszick, *Geistiges Eigentum und Art. 14 GG*, 51 ZUM 346 (2007).

101. Jakob Cornides, *Human Rights and Intellectual Property, Conflict or Convergence?*, 7 J. WORLD INTELL. PROPT. 143 (2004).

102. The philosophers of the Enlightment, who developed the idea of a legal recognition of private property, stated it very clearly. *See, e.g.*, JEAN JACQUES ROUSSEAU, CONSTITUTIONAL PROJECT FOR CORSICA 1765 (Kessinger Publishing 2004). "It is sufficient to explain my idea, which is not to destroy private property absolutely, since that is impossible, but to confine it within the narrowest possible limits . . . and keep it ever subordinate to the public good." *Id.*

103. On the theory of the social bounds of intellectual property and copyright, see FELIX LEINEMANN, DIE SOZIALBINDUNG DES GEISTIGEN EIGENTUMS (Nomos, Baden-Baden 1998) (discussing intellectual property generally); Chrisptophe Geiger, *La fonction sociale des droits de propriété intellectuelle*, 2010 RECUEIL DALLOZ 510 (discussing copyright) [hereinafter Geiger, *La fonction sociale*]; ERIC PAHUD, DIE SOZIALBINDUNG DES URHEBERRECHTS (Stämpfli, Berne Verlag 2000) (discussing copyright).

104. *See, e.g.*, German Federal Constitutional Court BVerfGE, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT, INTERNATIONALER 481 (1972).

law to protect this property.[105] In designing copyright law, the state has to bring the different interests and the competing fundamental rights in a proportional balance, with the public welfare serving as a guideline. Therefore, the legislature has broad powers with which to act. Professor Bernd Grzeszick recently discussed this point in a detailed analysis of the relationship between intellectual property and Article 14 of the German Constitution:

> At first, the obligation to grant protected privileges is rather weak. This minimum level of constitutional protection merely requires that the assets resulting from the activity of the author or inventor are in principle attributed to them by the simple legal order. He must have the right to dispose of the result in principle and most notably to be able to utilize his proprietary position economically. As a result, only a *minimum set of rights* is required for the purposes of an institutional guarantee. Beyond this institutional guarantee, the public welfare shall be the guideline for any admissible legal development. As far as the law grants protected privileges, the proprietor owns an individual and exclusive space of proprietary freedom. However, a sufficient consideration of third party interests and the general public is also possible. The individual interest of the author has no unconditional priority over the interests of the community. Merely in terms of remuneration, there is a stronger protection of intellectual property, which can be overcome only in exceptional circumstances.[106]

Thus, the German Federal Constitutional Court, in the context of the protection of intellectual property in the German Constitution, is focused on guaranteeing that the "assets resulting from the creative activity are in principle attributed to the author."[107] The author shall be able to receive remuneration for the use of his works. By what means he receives this remuneration is not necessarily prescribed. Consequently, this participation in the fruits of his labor can be reached by a limitation-based remuneration right as legitimately as by an exploitation right.

However, the German Federal Constitutional Court also considers that the freedom to dispose of the author's work is also a part of protected essence.[108] Therefore, property protection probably prevents a total transformation of the exclusive right into a limitation-based remuneration right. Nevertheless, the German Federal Constitutional Court has also recognized the admissibility of numerous restrictions of the exclusive right in the past when important public interests are concerned. In the famous "schoolbook" decision, for instance, the court held,

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105. This is not limited to the German legal situation, but also extends to the protection of fundamental rights at the European level. *See* Calliess, *supra* note 97, at 449.

106. Grzeszick, *supra* note 65 at 353.

107. BVerfGE, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT, INTERNATIONALER 481 (1972).

108. *Id.*

> With the exclusion of the author's right to prohibit access, the public interest in having access to the cultural assets is satisfied sufficiently; this exclusion clearly defines the social obligation of copyright in this decisive area. It does not follow from Article 14 paragraph 2 of the Constitution, however, that in these cases the author would have to make his intellectual asset available to the general public free of charge.[109]

It can thus be concluded that it should be possible to limit the author's exclusive right if important public interests require it. The remuneration, however, may be avoided only in the rarest cases. The order of priorities is therefore clear—remuneration is the most important aspect of the constitutional protection of copyright, and the principle of exclusivity follows behind it.

One could, of course, argue that there is significant public interest in the creative use of copyrighted material.[110] Authors nowadays often build on existing material that is copyright-protected, and do so all the more when protection levels are relatively low.[111] For innovation-policy reasons, there are very good arguments to put authors in the best possible conditions for the creation process to function. For example, authors should be able to create as freely as possible, without being restricted or handicapped by exclusive rights that can prohibit the creative re-use of protected material.

This idea is already accepted in Europe in the area of competition law. In the famous *Magill* decision by the European Court of Justice, for example, the use of an exclusive right to prevent the commercialization of a new product was the target of the complaint, and a judicial compulsory license was granted as a result.[112] Such a decision could be "internalized" in copyright law[113] by introducing a copyright limitation for creative uses, which is tied to a remuneration claim. The exclusive right would therefore continue to exist, but only to prevent pure copying (except, of course, in cases in which other limitations are applicable, for example for private copies, or for scientific or teaching purposes). From the standpoint of a function-oriented analysis of intellectual property, this would be unobjectionable.

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109. *Id.* at 484.

110. *See* GEIGER, DROIT D'AUTEUR, *supra* note 14, at ¶ 366–80.

111. *See* Gernot Schulze, *L'étendue de protection du droit d'auteur en Allemagne*, *in* Christophe Geiger, , PERSPECTIVES D'HARMONISATION, *supra* note 8, at 117.

112. Joined Cases C-241/91 P and C-242/91 P, Radio Telefis Eireann (RTE) and Indep. Television Publ'ns Ltd. v. Comm'n, 1995 E.C.R. I-00743.

113. *See also* Thomas Dreier, *Regulating Competition by Way of Copyright Limitations and Exceptions*, *in* TORREMANS HANDBOOK, *supra* note 46, at 232; Annette Kur, *Limiting IP Protection for Competition Policy Reason—A Case study Based on the EU Spare-parts—Design Discussion*, *in* RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND COMPETITION LAW 313 (Josef Drexl, ed., Edward Elgar 2008).

B. European Union Treaty Law Imperatives

Other imperatives to account for when redefining the appropriate scope of copyright protection in the European Union are the essential principles established in the European Union Treaties, such as free movement of goods and antitrust law. To accommodate the national protection of copyright in accordance with the essential principles of European Union law, the European Court of Justice has adopted a function-oriented approach to intellectual property.[114] Since the *Magill* decision, European antitrust law can control the use of an exclusive right if it is incompatible with the "essential function" of this right.[115] Quite characteristically, the European Court of First Instance specified that the essential function of copyright is to "protect the moral rights in the work and ensure a reward for creative effort."[116] In this decision, the court identifies clearly the central aims of copyright law—the protection of the author's moral right and the author's remuneration.[117] The exclusive right is not mentioned. The German version of this same decision is less clear, as the "essential function" is defined as to "ensure the protection of the rights in the intellectual work and the remuneration for creative activity."[118] What then is to be understood by "the protection of the rights in the intellectual work?"[119] A look at the French version of the same decision tells us that the focus is clearly on the moral rights and not on the exploitation rights—"la fonction essentielle du droit est d'assurer la protection morale de l'œuvre et la rémunération de l'effort créateur."[120] This suggests that limitation-based remuneration rights can also be achieved through statutory licenses, provided that the author's moral rights persist.[121] In fact, the self-determination aspect of property can also be reached by the "droit moral."

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114. *See also* Christophe Geiger, *La fonction sociale*, *supra* note 102, at 514.

115. Case C-241/91, *Radio Telefis Eireann*, 1995 E.C.R. I-00743.

116. Decision of the Court of First Instance (EuG), Case T-76/89, Indep. Television Publ'ns Ltd. v. Comm'n, 1991 E.C.R. II-575, at ¶ 58.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Admittedly, this position has not yet been consolidated in the European courts. *See, e.g.*, Case T-184/01 R, IMS Health Inc. v. Comm'n, 2001 E.C.R. II-03193.

> The fundamental rationale of copyright is that it affords the creator of inventive and original works the exclusive right to exploit such works, thereby ensuring that there is a "reward for the creative effort." Copyright is of fundamental importance both for the individual owner of the right and for society generally. To reduce it to a purely economic right to receive royalties dilutes the essence of the right and is, in principle, likely to cause potentially serious and irreparable harm to the rightholder.

From a philosophical point of view, property has always shown a very personality right-based component and that it is even considered by some scholars as a "personality right."[122] Therefore, it would be justifiable that the author's moral rights, and not necessarily the author's exploitation rights, would assure control over the use of a work. The liberal element of property as means of financial self-determination, which serves as "a sufficient material basis for a sense of personal independence and self-esteem, which are both indispensable for the development of the moral assets,"[123] can possibly also be ensured by limitation-based remuneration rights, provided that the amount of the remuneration is satisfactory. In fact, the substantive element of freedom is to be able to make a living from the fruits of one's work. Professor Michel Vivant gets to the heart of it when he writes, "Because man is free, the author and the inventor must be able to live from the exploitation of their work or invention."[124]

There can be no doubt that, from a liberal perspective, it is essential that the author participates in the exploitation of his work. *How* this participation is organized legally (by way of an exclusive right or another limitation-based remuneration) is therefore not decisive.[125] Additionally, the "statutory license"[126] does not necessarily mean that the author completely loses control of his work. Statutory licenses can be drafted in a manner that incorporates authors into the

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Id. at ¶ 125 (citations omitted). Nevertheless, it is not explained nor demonstrated in this decision why a compulsory license creates a "potential serious and irreparable damage" and how this should be assessed. *See id.* It should be noted, however, that it is certainly controversial if exclusivity is an essential core element of copyright. *See* Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. 7 II-03601, reviewed in 39 INT'L REV. INTELL. PROP. & COMPETITION L. 504 (showing that the European courts continue to control the exertion of rights by means of anti-trust law and do not hesitate to restrict the exclusive right in certain cases by granting a compulsory license, demonstrating that the attribute of exclusivity is not considered untouchable).

122. *See, e.g.*, Gerhard Luf, *Philosophische Strömungen in der Aufklärung und ihr Einfluss auf das Urheberrecht*, *in* WOHER KOMMT DAS URHEBERRECHT UND WOHIN GEHT ES? 9 (Robert Dittrich, ed., Manzsche Verlags- und Universitätsbuchhandlung 1988). In common law countries, the closest equivalent to personality rights would be the right to privacy. *See* HUW BEVERLEY-SMITH ET AL., PRIVACY, PROPERTY AND PERSONALITY (Cambridge University Press 2005).

123. JOHN RAWLS, DIE IDEE DES POLITISCHEN LIBERALISMUS, AUFSÄTZE 1978-1989, 68 (Suhrkamp 1994). For a discussion of the theories of Professor Rawls concerning the property, see Andrea Esser, *Faire Verteilung oder absoluter Schutz des Eigentums? Eine klassische Alternative in der neueren Diskussion: John Rawls und Robert Nozick*, *in* WAS IST EIGENTUM? PHILOSOPHISCHE POSITIONEN VON PLATON BIS HABERMAS 127 (Beck 2005).

124. MICHEL VIVANT, LES CRÉATIONS IMMATÉRIELLES ET LE DROIT 11 (Ellipses 1997).

125. Michel Vivant, *Pour une épure de la propriété intellectuelle*, *in* PROPRIETES INTELLECTUELLES. MELANGES EN L'HONNEUR DE ANDRE FRANÇON 415, 423 (Dalloz 1995).

126. *See supra* note 37.

licensing process, particularly with regard to the amount of remuneration provided to the authors. A statutory license may provide that the creator cannot oppose the use of his work, but the amount of remuneration must be negotiated between the parties. If no arrangement is reached, it is possible to establish arbitration bodies that will determine the amount of remuneration and thus ensure the author participates in the negotiation as required.

C. Imperatives Resulting from International Conventions in the Field of Intellectual Property

Any domestic legislation implementing such a limitation-friendly approach must comply with obligations that international conventions have imposed. In this respect, it should not be disregarded that in international copyright agreements, the "exclusive right" is expressly protected. This is the case in the Berne Convention,[127] the WIPO Copyright Treaty,[128] and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[129] speak of the "right to authorize or to prohibit" a certain use of the work. However, all of these agreements also contain limitations and compulsory licenses, thus restricting this exclusive right. In the same way, a function-oriented approach can be read into this agreement at different points. In this context, the preamble of the World Intellectual Property Organization (WIPO) Copyright Treaty of 1996 is often cited, which recognizes "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information."[130] Likewise, Article 7 of the TRIPS Agreement clarifies,

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge

127. Berne Convention, for the Protection of Literary and Artistic Works, art. 11, July 24, 1971, 1161 U.N.T.S. 31.

128. World Intellectual Property Organization (WIPO) Copyright Treaty (WPT), art. 6, Dec. 20, 1996, *available at* http:// www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.

129. Trade-Related Aspects of Intellectual Property Rights (TRIPS), art. 11, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1126 (1994).

130. World Intellectual Property Organization (WIPO) Copyright Treaty (WPT), Dec. 20, 1996, *available at* http:// www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.

> and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.[131]

This obviously concerns an innovation-oriented approach, which, as noted above, may be achieved better in certain cases by copyright limitations than by exclusive rights. Article 8 of the same Agreement provides measures for the member states "to promote the public interest in sectors of vital importance to their socio-economic and technological development" as well as those which are necessary "to prevent the abuse of intellectual property rights by right holders."[132] According to these provisions, the rights in intellectual property can—and/or must—be developed in such a way that they realize social interests. In particular, they must realize the goals of the agreement—the promotion of innovation in the interest of the general public[133]—which a limitation-friendly approach could also ensure.

These measures, however, must be compatible with the TRIPS Agreement, as Article 8 further specifies.[134] Regarding the limitations to copyright, the Agreement contains only one guideline in Article 13—limitations may not contravene the so-called "three-step test."[135] This limitation on limitations can be found with a similar text in many international treaties on copyright and intellectual property.[136] These provisions require the compliance of the contracting parties and impose a number of conditions on introducing limitations into their national copyright law. In order to fulfill the criteria, the limitation must (1) describe a certain special case, (2) not conflict with the normal exploitation of the work, and (3) not unreasonably prejudice

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131. Trade-Related Aspects of Intellectual Property Rights (TRIPS), art. 7, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1126 (1994).

132. Trade-Related Aspects of Intellectual Property Rights (TRIPS), art. 8, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1126 (1994).

133. *See* Henning Grosse Ruse-Khan, *Proportionality and Balancing within the Objectives for Intellectual Property Protection*, *in* TORREMANS, INTELLECTUAL PROPERTY 161 (OUP Oxford 2005); Kur, *Oceans*, *supra* note 13.

134. Trade-Related Aspects of Intellectual Property Rights (TRIPS), art. 8(1), Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1126 (1994) ("Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, *provided that such measures are consistent with the provisions of this Agreement.*" (emphasis added)).

135. *See, e.g.*, SENFTLEBEN, *COPYRIGHT, LIMITATIONS*, *supra* note 5; Christophe Geiger, *The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society*, E-COPYRIGHT BULLETIN, Jan.–Mar. 2007 [hereinafter Geiger, *Role of the Three-Step Test*]; Annette Kur, *Oceans*, *supra* note 13.

136. *See* Christophe Geiger, *From Berne to National Law, via the Copyright Directive: The Dangerous Mutations of the Three-Step Test*, EUR. INTELL. PROP. REV. 486 (2007).

the legitimate interests of the author[137] and/or the right holder.[138] A detailed examination of these very ambiguous and unclear guidelines cannot be done here. Let it suffice to note at this point that the terminology used leaves much for interpretation.[139]

Basically, the three-step test is similar to the requirements of international and European constitutional law, in whose light it should be interpreted anyway.[140] While the first step is the least demanding one, as it only requires that the uses covered by a limitation be generally determinable, the third step is the most important one, as it requires a fair balance of interests involved, which is reminiscent of the social function of copyright in the context of the constitutional order and of the related proportionality test. The second step ensures that the core of copyright is not eroded. In this spirit, the normal exploitation of the work is interpreted by some authors as including only the economic core of copyright.[141] The protected core arguably prohibits transforming the exclusive right *totally* into a right to receive a fair remuneration, but the possibility of a restriction should remain if important conflicting interests of the general public so require. Thus, for the purpose of a normative consideration of the three-step test, which some scholars already advocate,[142] it is arguable that the "normal" exploitation in some cases

137. *See generally* Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 1161 U.N.T.S. 31.

138. *See generally* Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1126 (1994). The full text of the TRIPS agreement is available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

139. *See* Christophe Geiger, *Exploring the Flexibilities of the TRIPS Agreements Provisions on Limitations and Exceptions*, *in* CAN ONE SIZE FIT ALL?—PROCEEDINGS OF THE ATRIP-CONGRESS 2008(forthcoming 2010); Jonathan Griffiths, *The Three-step Test In European Copyright Law: Problems and Solutions*, INTELL. PROP. Q. 428 (2009); Hugenholtz & Okediji, *Conceiving*, *supra* note 3, at 25; Kur, *Oceans*, *supra* note 13.

140. *See* Geiger, *Constitutional Dimension*, *supra* note 61, at 101; Geiger, *Flexibilising Copyright*, *supra* note 50.

141. *See* Martin R.F. Senftleben, *Die Bedeutung der Schranken des Urheberrechts in der Informationsgesellschaft und ihre Begrenzung durch den Dreistufentest*, *in* INTERESSENAUSGLEICH IM URHEBERRECHT 182 (Reto M. Hilty & Alexander Peukert, eds., Baden-Baden: Nomos 2004).

142. For a discussion favoring a normative approach to the second step, see SAM RICKETSON & JANE C. GINSBURG, 2 INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS—THE BERNE CONVENTION AND BEYOND § 13.21 (Oxford University Press, 2006); Geiger, *Flexibilising Copyright*, *supra* note 50, at 194; Jane Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions*, 187 REVUE INTERNATIONALE DU DROIT D'AUTEUR 23 (2001); Martin R.F. Senftleben, *Towards a Horizontal Standard for Limiting Intellectual Property Rights?—WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law*, 37 INT'L REV. INTELL. PROP. & COMP. L. 407 (2006).

can also be achieved by limitation-based remuneration rights. The exclusive right would then only cover the right to oppose the sole copy of the work (primary market) and not its creative use (derivative markets).[143]

III. CONCLUSION

This Article has analyzed the legal framework in which a redrafting of the scope of copyright protection should be embedded, and has identified what obstacles could exist to such a rebalancing of the different interests involved. There is much more flexibility than one might think to implement a limitation-friendly copyright protection, even if doing so would require rethinking the principle of exclusivity on which intellectual property is based. The approach proposed here admittedly seems rather radical, mostly because the scope of the exclusive right is reduced to the prevention of the mere copy of the work, and does not cover the creative re-uses. However, the proposed model would, of course, need some major additional research in order to become workable. It is by no means the intention to propose this model as the truth, but instead just to explore what alternative possibilities exist to promote innovation, and to discern what room there is to implement such solutions. Of course, depriving creators of their exclusive right in certain circumstances will not necessarily benefit all authors equally. In particular, if the author is very successful, he might prefer to have full control over derivative works, as he will have a strong bargaining power that will allow him to get a higher sum for the re-use of his work than in a "limitation based" system.

The risk of intervening through such a mechanism too strongly in the market forces is not to be neglected (which might then be criticized as leading to a "socialization of IP"). In order to preserve as much decision-making power for right holders as possible, a limitation-based copyright, in addition to the one already existing, could be implemented. The two different copyright regimes would then co-exist, and the creator could then decide if he prefers the

143. If one does not follow this admittedly quite liberal interpretation of the three-step test, there is still the possibility of subordinating creative uses to the mandatory collective administration of works, as this would not be a limitation, but a way of exercise of the exclusive right, which would therefore not be covered by the three-step test. *See* Geiger, *Role of the Three-Step Test*, *supra* note 84; Silke von Lewinski, *Mandatory Collective Administration of Exclusive Rights—A Case Study on Its Compatibility with International and EC Copyright Law*, E-COPYRIGHT BULLETIN, Jan.–Mar. 2004.

traditional regime or the limitation-friendly copyright protection.[144] As shown above, since the limitation-friendly solution has major advantages for creators—for example regarding the sums redistributed to them—it might attract many of them, while others would be free to remain under the classical copyright regime. The success of "open content"—licenses that many creators use to make their work available to the public for free—demonstrates that alternative innovation mechanisms are attractive.[145]

The proposed solution combines the advantages of proprietary and open models for innovation. It would allow creators to freely elaborate on existing works while ensuring that the creator of the existing works receives a share of the financial reward: free creative use, but no re-use for free. For this reason, it deserves attention and further scholarly work.

144. Such a dual system has been proposed in the context of peer-to-peer file-sharing. *See* A. Peukert, *A Bipolar Copyright System for the Digital Network Environment*, 28 HASTINGS COMM. & ENT. L.J. 1 (2005).

145. *See* Catharina Maracke, *Creative Commons International: The International License Porting Project*, 1 J. Intell. Prop., Info. Tech. & E-Commerce Law (2010) (discussing the open content movement and more generally the Creative commons licence).