# The extent of harmonization for co-authored works under EU copyright law

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## Abstract

*This research aims to undertake a doctoral study to develop coherent copyright regulation of multi-authored works in the European Union and to establish whether there should be a maximum or a minimum level of harmonization. The methodology of the study will be doctrinal, drawing on relevant legislation and case law from the Member States and the European Union. The literature provides little guidance when it comes to developing an actual solution to multi-authored copyright works. The majority of the literature focuses on the difference between the approaches adopted by numerous European countries and the USA. Even proposals regarding the European Copyright Code do not offer a solution to multi-authored works. This research project will, therefore, appeal to legislators, policy makers and academics. It is ardently hoped that the project will constitute a recommendation for the European Commission with regard to a policy review in copyright. A coherent approach to multi-authored works will resolve some of the key issues that need to be resolved before fully, effective harmonization of European Union copyright law can occur.*

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Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases 1996 (077)

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

Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property

Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights 2006

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs

Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related

rights 2011 (265)
Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 - on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC 2019 34
Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)
Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

**EU Green Papers**

A Digital Agenda for Europe. COM (2010) 245 Final
A Single Market for Intellectual Property Rights Boosting Creativity and Innovation to Provide Economic Growth, High Quality Jobs and First Class Products and Services in Europe. COM(2011) 287 Final
Completing the Internal Market. White Paper from the Commission to the European Council (Milan, 28-29 June 1985). COM (85) 310 Final, 14 June 1985
Copyright and Related Rights in the Information Society - Green Paper. COM (95) 382 Final, 19 July 1995
Creative Content in a European Digital Single Market Challenges for the Future : A Reflection Document of DG INFSO and DG MARKT
Follow-up to the Green Paper on Copyright and Related Rights in the Information Society. COM (96) 586 Final, 20 November 1996
Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action. COM (88) 172 Final, 7 June 1988
Green Paper on Copyright in the Knowledge Economy, COM (2008) 466 Final, Brussels, 16 Jul. 2008
Green Paper on the Online Distribution of Audiovisual Works. COM (2011) 427 Final
Leaked Draft Impact Assessment <https://www.statewatch.org/media/documents/news/2014/apr/eu-com-copyright-ia-draft.pdf> accessed 10 January 2022
Report from the Commission to the Council, the European Parliament and the Economic and

Social Committee on the Question of Authorship of Cinematographic or Audiovisual Works in the Community - COM 2002/0691
Report on Europe and the Global Information Society: Recommendations of the High-Level Group on the Information Society to the Corfu European Council. Bulletin of the European Union, Supplement No. 2/94.
Working Programme of the Commission in the Field of Copyright and Neighbouring Rights. Follow-up to the Green Paper. COM (90) 584 Final, 17 January 1991

**FRANCE**

French Code of Civil Procedure
Intellectual Property Code 1992 (consolidated version of January 1, 2014)

**GERMANY**

German Civil Code (Bürgerliches Gesetzbuch)
German Author's Rights Law 1965 (Urheberrecht)

**IRELAND**

Copyright and Related Rights Act, 2000

**UNITED KINGDOM**

Copyright, Designs and Patents Act, 1988

**UNITED STATES**

Copyright Act 1976, Pub L No 94-553, 90 Stat 2541, codified in 17 USC

# CHAPTER I: INTRODUCTION; METHODOLOGY & NORMATIVE CONTEXT

## 1. Introduction

Copyright works are not always the product of individual creativity. Several persons may make creative contributions and become co-authors of a work, whether cinematographic, musical or literary. National laws and international treaties mostly recognise the concept of multiple authorship. However, the details of this particular concept, such as which works are multi-authored or how the exploitation of the work will occur, diverge at the national level and are left unanswered in international law. This discrepancy between national laws leads to controversy in authorship status, ownership and exploitation of the work, and calculation of the term of protection.

This inconsistency has significant effects in the European Union, where copyright-protected works have freedom of movement. A natural or sometimes legal person can be accepted as a co-author in one Member State and not accepted in another in the single market. While works have freedom of movement, authorship status does not share the same freedom. Moreover, according to the Commission, 'The new products and services are increasingly the outcome of a process in which a great many people have taken part - their contributions often being difficult to identify - and in which several different techniques have been used'.[1] Therefore, co-authored works have increasing importance in the information society. The significance of the creative sectors in the European Union turns this gap into a severe problem. According to a recent study, 'IP intensive industries contribute 26% of EU employment and 39% of GDP. The core copyright intensive industries generate 7 million jobs, contribute approximately EUR 509 billion and produce a trade surplus'.[2] Also, copyright intensive industries have a 69% wage premium compared to non-IP intensive industries.[3] Copyright has the second highest place in

[1] European Commission, 'Copyright and Related Rights in the Information Society - Green Paper. COM (95) 382 Final, 19 July 1995' <http://aei.pitt.edu/1211/>.

[2] Creativity Works, 'Creativity Works! 11 Key Principle' <http://creativityworks.eu/wp-content/uploads/2013/09/Creativity-Works-General-Principles.pdf>.

[3] Office European Patent, Union European and Market Office for Harmonization in the Internal, 'Intellectual Property Rights Intensive Industries : Contribution to Economic Performance and Employment in Europe : Industry-Level Analysis Report' 9 <http://ec.europa.eu/internal_market/intellectual-property/docs/joint-report-epo-ohim-final-version_en.pdf>.

the external trade within IP-intensive sectors with EUR 15 billion.[4] This gap in the creative sector harms the single market and limits further benefits to the European Union.

There is, however, an absence of a legal solution to multiple authorship. The absence is evident in the international treaties and the European Union *acquis*. Both international and supranational harmonisation efforts do not answer this question of multiple authorship. While international treaties deal with numerous cross-border copyright problems, there is no attempt to solve the issue of co-authorship. Concerning the *acquis communautaire*, the solution is partial and inadequate.

The contribution of this thesis is to use a comparative law method to propose a harmonisation framework for multiple authorship in the European Union, including with model provisions of a directive. The contribution is therefore twofold: identifying commonalities between different traditions within the European Union and, where differences arise, suggesting how they can be reconciled so as to provide a platform for harmonisation.

This is a significant and original contribution for three key reasons. First, as will be shown in section 2.1 below, there is very limited harmonisation in the international and European Union *acquis*. The Berne Convention deals only with term of protection for certain multi-authored works and other major treaties – The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), The WIPO Copyright Treaty (WCT), The Universal Copyright Convention (UCC) – do not address these gaps. Meanwhile, the European Union harmonisation thus far has been partial in focusing on audiovisual works and co-authorship in musical composition. Second, as discussed in section 2.2 below, a proposal for harmonisation of multiple authorship would assist in the further harmonisation of foundational copyright concepts in the European Union copyright law framework and, in turn, help with the goals of the internal market. Third, comparative law studies in this field, as will be discussed in section 2.3, do not provide the detailed investigation of a workable multiple authorship model in the European Union copyright law. This thesis takes a micro-level comparative approach that looks for the same functional legal rules in the following jurisdictions: Germany, France and the United Kingdom/Ireland.

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[4] ibid 10.

## 2. Legal gaps and literature review

### 2.1. International and the European Union position

In the case of multiple authorship, the Berne Convention deals only with the term of protection in Article 7bis.[5] Article 7bis utilises the last surviving author method.[6] According to von Lewinski, the provision applies to the basic formulation of co-authorship and excludes composite/combined or collective works.[7] Furthermore, the Convention does not define the notion of multiple authorship or any possible ramifications it may bring, other than concerning duration. The silence of the Berne Convention on this matter renders the issue one for the national laws.[8] Additionally, the Convention does not touch authorship directly,[9] which, according to Ricketson and Ginsburg, further complicates multiple authorship.[10] Similarly, other international treaties, specifically TRIPs, WCT and UCC cannot remedy the gap left by the Berne Convention and leave authorship and co-authorship to their signatories. The Tunis Model Law on Copyright, on the other hand, contains several relevant provisions regarding co-authored works.[11] Section 18 Definitions describes work of joint authorship and according to Section 11(1), joint authors are co-owners of the said rights. Section 13(2) states the last surviving author method for the duration of economic rights in joint authorship. These provisions and the rest of the model law resemble the copyright tradition rather than the author's right tradition. It is not a fusion of these two systems. Therefore, it may not contain a suitable answer for the European Union. Nevertheless, it is a source that could provide a guidance.

In the European Union, several directives touch on the concept of co-authored works. The Term[12] and Rental[13] Directives deal with co-authorship in audiovisual works. The Directives designate the director as one of the co-authors. It is an attempt to circle the uncertainties in the

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[5] Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979) 1979.
[6] This is a calculation method for copyright protection which is based on the last surviving author's death as a starting point for 70 years (in the case of the European Union).
[7] Silke von Lewinski, *International Copyright Law and Policy* (Oxford University Press 2008) s 5.129.
[8] Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights : The Berne Convention and Beyond* (2nd edn, Oxford University Press 2006) s 7.06.
[9] The Convention indirectly deals with the authorship through originality, however it is still far from a clear answer to the problem in ibid 7.04.
[10] ibid 7.06.
[11] Unesco and intellectuelle Organisation mondiale de la propriété, *Tunis Model Law on Copyright : For Developing Countries* (Unesco ; WIPO 1976).
[12] Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights 2011 (265).
[13] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

European film industry. Unfortunately, the harmonisation attempt is not based on the analysis of co-authorship models in the European Union.[14] The effort remains limited to this instance and does not offer any normative guidance. In the Term Extension Directive, co-authorship in musical composition with lyrics is somewhat harmonised.[15] Article 1(7) of the Directive targets multiple-authored works but does not offer a harmonisation that affects authorship status. The Directive's solution is to provide a unified duration of protection to the entire work based on the last surviving author, even though authors are not legally co-authors. This harmonisation aims to boost the music industry in the European Union by dealing with the issue of split copyright. However, the solution is a patchwork and disregards the mechanism established in the national laws. Furthermore, this divided approach is against the principle of proportionality.[16]

In practice, the lack of harmonisation on this subject is tackled with copyright contracts. Copyright contracts, however, are not sufficient to resolve the core issues. Copyright contracts are standard tools to ensure the transfer of proper rights and protection of future remunerations when it comes to cross border agreements. Brussels I,[17] Rome I[18] and Rome II[19] regulations closely relate to copyright-protected materials with a cross border nature in the European Union. Brussels I Regulation mainly covers jurisdictional problems. Applicable law has two components. The former is the breach of contract and mainly dealt with in the Rome I Regulation. The latter is infringement without contract and it is the subject of the Rome II regulation.

In breach of a copyright contract clause, two questions require answering; jurisdiction regarding the dispute and the applicable law regarding the contract. Per Article 7(1) of the Brussels I Regulation, the obligation's performance place has jurisdiction in matters relating to a contract. The applicable law, however, is not as easily solved as the jurisdiction. Parties have the freedom to choose the applicable law (Article 3 of the Rome I Regulation). It can be an express choice

[14] Pascal Kamina, *Film Copyright in the European Union* (2nd edn, Cambridge University Press 2016) 146.
[15] Term Extension Directive.
[16] Hugenholtz and others – See page 154
[17] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[18] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
[19] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

or implied by the circumstances or by the contract. The courts look for clues in the contract without an express choice. For example, the characteristic performance of the contract could be a decisive factor. Unfortunately, there are as many characteristic performances as the number of authors in the case of multiple-authored copyright works. Therefore, it is not an adequate factor when co-authors are from the different Member States. The courts usually look for contract's coverage to find the closest connection. For instance, if a contract is about publishing a book in country A, then A's law would be applicable. This solution, however, is not helpful when there are multiple countries in the publication agreement. Then, the publisher's or the broadcaster's establishment remains as the only option that is constant in this equation. Consequently, this could point to a foreign jurisdiction to authors where they have to defend their rights. This jurisdiction's understanding of multiple authored work may not corresponds to the author's national law. Also, foreign jurisdictions can apply overriding statutes to the conflict at hand, even though the applicable law has a different provision for that issue.

In the case of an infringement, according to Article 8(1), the law of the country where the protection is sought is the applicable law. When it comes to co-authored works, Article 8(1) causes issues. The basic or secondary formulations may not correspond to the country where protection is sought. The protection in question could be related to a moral right, where a defendant could argue that the claimant is not a co-author. The issue deepens when it comes to multi-state cases, so-called ubiquitous infringement. With the help of the internet, such infringements are now possible. In that case, authors have to justify their status and rights in several jurisdictions.

### 2.2. Filling the gap

The gap of harmonized understanding around co-authored works is evident. The European Union and international treaties have been fruitless in their attempts to address the problem. Nonetheless, the gap requires even more attention with the recent convergence towards a European Copyright Code. Creative Content paper by the Commission mentions the possibility of a unified copyright.[20] Method or any possible approach, however, remains a mystery. There are three possible approaches which can be embraced by the Commission; a unification through regulation, further harmonization by directives and finally guidance with recommendations.

[20] European Commission, *Creative Content in a European Digital Single Market Challenges for the Future : A Reflection Document of DG INFSO and DG MARKT* (European commission 2009).

The abovementioned study by Hugenholtz and others defend the idea of a unified European Copyright Code (a unitary code which trumps all national copyright laws).[21] According to them 'working on part-based harmonization could prove more complicated than establishment of unitary European Copyright Code'.[22]

Hugenholtz argues that a code would enhance legal security and increase transparency for users and right holders. Directives are limited and cannot demonstrate expected benefits. Hence, he argues that the Commission should consider establishing a code instead of more directives.[23] These arguments grasp a valid point in their examination of the overall picture. Any harmonization attempt could prove inadequate, without addressing the issues that are intrinsically connected to each other. Furthermore, Walter's argument of pointing to lack of harmonized copyright law as an obstacle to free movement of goods and services strengthens the reason for unification.[24]

Multiple authored works is an issue which needs to be resolved before achieving any unitary copyright code. The Wittem Group's proposal, which remains the single effort to formulate a unified code, consists of five chapters; works, authorship, moral rights, economic rights and limitations. The proposal refrains from proposing any viable formulation to co-authorship and identifies the issue of co-authored works as a non-core legal issue.[25] This omission is regarded as a special problem by Ginsburg.[26] It is not surprising that the major criticisms of the proposal converge on the scope of the work. Rosati argues that the proposed code 'is not as comprehensive as might have been hoped. In fact, attention is paid only to the main elements

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[21] P Bernt Hugenholtz and others, *The Recasting of Copyright & Related Rights for the Knowledge Economy* (Institute for Information Law 2006) 259 and 358.
[22] ibid 259 and 258.
[23] P Bernt Hugenholtz, 'Copyright in Europe: Twenty Years Ago, Today and What the Future Holds' (2012) 23 Fordham Intell. Prop. Media & Ent. LJ 503.
[24] Michel M Walter, 'Updating and Consolidation of the Acquis, The Future of European Copyright' <http://ec.europa.eu/internal_market/copyright/docs/docs/2002-06-santiago-speech-walter_en.pdf>.
[25] 'Focus of the code is core legal issue therefore it does not deal with collaborative or joint works' P Bernt Hugenholtz, 'The Wittem Group's European Copyright Code' in Tatiana-Helenē Synodinou (ed), *Codification of European copyright law: challenges and perspectives* (Kluwer Law International 2012) 344.
[26] 'That said, works with multiple contributors may present special problems. Footnote 15 adopts the Term Directive's simplification of the authorship status of audiovisual works, but thereby leaves ambiguous the status of other creative contributors, such as cinematographers. In the absence of other European rules determining authorship status in the case of a multiplicity of potential creative claimants, the proposed Code offers no guidance beyond the implicit instruction to ascertain whether the claimed contribution meets the 'own intellectual creation' standard.' Jane C Ginsburg, 'European Copyright Code-Back to the First Principles (With Some Additional Detail)' (2010) 58 J. Copyright Soc'y USA 265.

of copyright'.[27] Ginsburg[28], Derclaye and Cook[29], likewise, point out the same issue in their review of the Wittem Group's proposal. In their defense, the group claims that they never aimed to produce a comprehensive proposal.[30] The non-comprehensive approach of the group is apparent regarding multiple authored works. [31] It is evident that any viable proposal to unitary copyright code requires a workable solution to multiple authored works.

The Term Extension Directive[32] tries to solve the issue of split copyright in musical compositions with lyrics.[33] The study by Hugenholtz and others commissioned by the European Commission argued against such solution envisaged by the Directive. In spite of the study's opposition to co-written musical works, the Directive included them.[34] Therefore, it has commonly been assumed that the Commission deliberately avoided any harmonization effort regarding co-authorship.[35] Hugenholtz, in his open letter to the President of the Commission, criticizes this disregard of the study.[36] They are proposing a unified approach to authorship and claiming that, 'to only harmonise the concept of joint authorship would not aid consistency of the acquis'.[37] The concept of authorship, the originality criterion and adaptations are closely linked to the problem: one cannot be solved without touching the others.[38] Observers have already drawn attention to the Directive's failure against the principle of proportionality.[39] The attempt to remedy the issue of split copyright is an attempt to revitalize the music industry in the European Union. By providing certainty, the Commission hoped to achieve more stable music licensing. Unfortunately, questions have been raised about the success of the attempt. The term 'co-written musical composition' remains ambiguous. A more comprehensive

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[27] Eleonora Rosati, 'The Wittem Group and the European Copyright Code' (2010) 5 Journal of Intellectual Property Law & Practice 862 <http://dx.doi.org/10.1093/jiplp/jpq140>.
[28] Ginsburg, 'European Copyright Code-Back to the First Principles (With Some Additional Detail)' (n 26).
[29] Estelle Derclaye and Trevor Cook, 'An EU Copyright Code: What and How, If Ever?' (2011) 3 Intellectual Property Quarterly 259.
[30] Hugenholtz, 'The Wittem Group's European Copyright Code' (n 25).
[31] Rosati, 'The Wittem Group and the European Copyright Code' (n 27).
[32] Term Extension Directive.
[33] Article 1(7) ibid.
[34] Silke von Lewinski and Michel M Walter, *European Copyright Law-A Commentary* (Oxford Univ Press 2010) s 8.1.39.
[35] ibid.
[36] IViR, 'Re: Open Letter Concerning European Commission's `Intellectual Property Package'' (4 March 2011) <https://web.archive.org/web/20110304114918/https://www.ivir.nl/news/Open_Letter_EC.pdf> accessed 18 July 2021.
[37] Hugenholtz and others (n 21).
[38] ibid 154.
[39] ibid.

solution should contain a fundamental and unified approach to co-authorship. With this approach, benefits to the functioning of the internal market will be more quantifiable.

As a result, there are suggestions and compelling grounds for harmonising copyright rules throughout the internal market. A uniform European copyright code can significantly benefit a digital single market. To do this, the Commission must settle the challenges concerning works with multiple authors.

### 2.3. Literature review

The main reference books in international copyright law can shed some light on co-authored works. *Copyright throughout the world*[40] and *International copyright law and practice*[41] provide significant information regarding the national copyright laws of the countries. *International copyright law and practice* (edited by Nimmer until 1985 and then by Geller until 2013) is edited by Bently and Ong, and updated regularly throughout the year. The 4[1][a] section of each country explains the the ownership and transfer of joint works in that country. The descriptions are usually supplemented by several key national court decisions, but it is limited. Also, special categories, like audiovisual works and works made for hire, have their own separate sections with detailed descriptions. However, the book contains descriptions regarding twenty-three countries and only eleven of them are members of the European Union.

*Copyright throughout the world* is edited by von Lewinski and shares a similar book design with *International copyright law and practice*. The book 'aims at facilitating access and understanding of selected foreign laws on a comparative basis' and its main envisaged readership is identified as US attorneys in the preliminary section of the book.[42] It is also regularly updated and new countries are added to widen the scope. Currently (last update was in December 2020), there are thirty-one countries and ten of them are members of the European Union. Under each country, Section 16 is titled as 'coauthorship/joint authorship' and chiefly deals with the basic formulation of co-authored works in that country. Furthermore, Section 17 'Other forms of work influenced by several persons' contains discussions regarding secondary formulations, collective works and composite works where they exists in that particular jurisdiction. The descriptions are sometimes too short and shallow, other times detailed and

[40] Silke von Lewinski (ed), *Copyright throughout the World* (Thomson/West 2020).
[41] Lionel Bently (ed), *International Copyright Law and Practice* (LexisNexis 2016).
[42] Lewinski (n 40) s Preliminary Materials.

supported by court decisions and references. The level of description under each jursidiction presents inconsistency. This diminishes the the value of several European jurisdictions in the book.

While the number of jurisdictions studied by the books are close to each other, the overlap between their selections is weak. Consequently, combining these two books offers greater coverage in the European Union, however there are still several missing jurisdictions. Another drawback of these books is a lack of comparative study between countries. Whereas division of sections are exactly same under each category, there is not a combined study to show similarties and differences among jurisdicitons.

On the other hand, several comparative studies focus on the European Union and their formulation of multiple authored works. There are two important studies that contain numerous jurisdictions with a spotlight on the issue of co-authorship in the European Union. The first one is commissioned by the European Commission in response to invitation to tender Markt/2005/08/D. *The Recasting of Copyright & Related Rights for the Knowledge Economy* by Hugenholtz and others deals with issues raised by the Commission. In Chapter 4 authors focus on possible alignment of the term of protection of co-written musical works. This chapter highlights differences between national laws with regards to their method of dealing with co-written musical works. While examining the disparities between the Member States, authors look for the formulations in co-authored work to answer whether a co-written musical works are considered under the basic formulation[43] or not. Under this spesific point jurisdictions are categorized and compared with each other with some detail. The shortcoming of this study is its scope. The study's main focus remains on the issue of co-written musical compositions and it does not provide any possible harmonized solution for the problem of multi-authored works more generally. However, it remains a powerful guideline to national legislations and court decisions of European Union Member States.

*The myth of European term harmonisation - 27 public domains for 27 member states* is a study published under the Institute for Information Law (IViR) of the University of Amsterdam by

[43] Which in this case triggers last surviving author method for the calculation of duration in copyright protection.

Angelopoulos.[44] The research is inspired by the European Public Domain Calculators.[45] The establishment of such calculator highlighted certain disparencies embedded in the national legislations. In Section 2, Angelopoulos identifies two gaps in conceptual harmonisation which are; works of joint authorship and collective works. As this reseach is going to discuss under the issue of split copyright, these issues were not addressed by the Term Directive and creates a gap in the *acquis*.[46] The study compares legislations regarding basic formulation and collective works in six Member States; the Netherlands, the UK, France, Italy, Spain and the Czech Republic. The secondary formulations like adaptations, connected works or composite works are outside the scope of the study. While it is a supporting document to show the gap in the field, it's limited scope and specific focus in the issue underscores the need for this broder scoped study.

Another comparative study by Perry and Margoni starts from the point that co-authored works are treated differently in every jurisdiction.[47] However, they narrowly focus on the legal relationship between co-authors. In their claim, apart from copyright provisions, rules regarding property law are also influential with regards to co-authored works. Management and exploitation of the final work are two subjects that are intertwined with provisions about joint property in that jurisdiction. To prove their point, authors selected US and Italy as their two examples. Their selection fails to provide a general understanding to broader conflicts within the European Union.

One of the most comprehensive comparative study in the field is *Film Copyright in the European Union* by Pascal Kamina.[48] This book specifically deals with film work in the European Union. While Kamina's focus is narrowed down to France and the United Kingdom, in chapter 4 under authorship and initial ownership author compares and categorizes provisions regarding co-authored/joint authored works in the European Union Member States. On the issue

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[44] C Angelopoulos, 'The Myth of European Term Harmonisation - 27 Public Domains for 27 Member States' (2012) 43 IIC Int. Rev. Intellect. Prop. Compet. Law IIC International Review of Intellectual Property and Competition Law 567.

[45] 'Out of Copyright - Determining the Copyright Status of Works' (13 August 2019) <http://web.archive.org/web/20190813150304/http://outofcopyright.eu/calculators/> accessed 18 July 2021.

[46] See Chapter I [5.1]

[47] Mark Perry and Thomas Margoni, 'Ownership in Complex Authorship: A Comparative Study of Joint Works' (2011) 34 European Intellectual Property Review 22.

[48] Kamina (n 14).

of audiovisual works, the book remains the most significant resource published in English regarding the European Union.

Without providing any comparison, certain papers studied the internal dynamics of co-authored works. Zemer in his paper *Contribution and collaboration in joint authorship: too many misconceptions* questioned the position of emotional contributions.[49] He argues that joint authorship is different from sole authorship in terms of contributions and joint design. One of the authors could bear the mental responsibility of ideas, concepts and expertise, while other co-author focuses on to more tangible labors. Zemer studies this issue from the United Kingdom's perspective. The scope of the work is limited, but the ideas and suggestions are worth considering in this research.

Bently and Biron[50] in their paper *Discontinuities between legal conceptions of authorship and social practices*, point out that tests of co-authorship in most of the regimes have three distinct components: the relationship between participants; the level and kind of the contribution; and the degree of integration of contributions. The authors compare examples from scentific authorship, conceptual art and library editorship to the United Kingdom's understanding of the law. For instance, while Perkins and Fitzgerald are recognised as collaborators in the *Great Gasby*, it is impossible for them to considererd as joint authors according to UK copyright law. In their claim, social and legal authorship point in different directions in certain areas when it comes to joint authorship. They suggest an alternative system where right of attribution could be treated as a free standing right apart from the authhorship. In which case, legal authors are going to be the beneficiaries, however every social author would be attributed in the work. Even though they refrained from analyzing collective and composite/connected works due to practical reasons, their suggestion and analysis are unique in the literature. Their critisim and proposal are going to be further discussed in the proposal chapter of this research.

Similar to Bently and Biron, Simone also discussed a discrepancy between who are legal authors according to the law and who are treated as authors in scientific collaborations.[51] While

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[49] Lior Zemer, 'Contribution and Collaboration in Joint Authorship: Too Many Misconceptions' (2006) 1 Journal of Intellectual Property Law & Practice 283.
[50] Lionel Bently and Laura Biron, 'Discontinuities between Legal Conceptions of Authorship and Social Practices' [2014] The Work of Authorship 237.
[51] Daniela Simone, 'Recalibrating the Joint Authorship Test: Insights from Scientific Collaborations' (2013) 26 Intellectual Property Journal 111.

her focus is much narrower than Bently and Biron, her analysis is deeper than them. In her claim the United Kingdom's understanding of joint authorship is 'fairly inflexible and poorly adapted to situations involving multiple owners'. She argues that if the courts shift their perspective from quantitative view to qualitative view while considering which contributions are significant, a more flexible and adapt test of joint authorship could be achieved in the United Kingdom. Simone weaves this study into a much broader theoretical and doctrinal examination of the United Kingdom's view of joint authorship in her more recent work, along with some amendment recommendations to CDPA.[52]

In another article, Firth looks for the understanding of authorship in musical works.[53] Whereas her main focus is on the United Kingdom, she also involves numerous European jurisdiction in to the comparison. She claims that new changes in the case law is leading to an understanding that 'a collaborative authorship can occur even one co-author did not participate in the original conception of the work'. Musical works are an important aspect of the co-authored works. This example is another evidence that co-authorship is a fluid concept which can change its shape when it comes to different types of works.

Overall, these studies highlight the need for a comprehensive investigation which would include a comparative study of legislation and case law with regard to internal dynamics of co-authorship in specific works with a possible solution for any harmonization attempt. This thesis fills this gap in the literature by providing an in-depth analysis of each concept of multiple authored works and much balanced selection of jurisdictions within the European Union.

## 3. Methodology

Having established why this thesis makes an original and significant contribution to the field, this work turns now to discuss the comparative law method that underpins its research. Multiple authored works are one of the least harmonised aspects of copyright law in the world. The subject has complex relations with authorship, originality, presumptions in copyright, copyright contracts and many other features of modern copyright. This research aims to study the differences and complexities of multiple authorship in the European Union and its Member

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[52] Daniela Simone, *Copyright and Collective Authorship: Locating the Authors of Collaborative Work* (Cambridge University Press 2019).
[53] Firth Alison, 'Music and Co-Authorship/Co-Ownership' in Andreas Rahmatian (ed), *Concepts of Music and Copyright : How Music Perceives Itself and How Copyright Perceives Music* (Edward Elgar Publishing 2015).

States. As well, it will focus on the legal consequences of co-authored copyright works and the legal relationship between co-authors.

The European Union is a host of numerous different legal systems. Treaties give power to the Union as a supranational organisation to provide and promote harmonisation for its goals. This research seeks to study the prospect of harmonisation of a certain aspect of copyright law. Like many of the Commission's own research studies, this research is going to apply comparative law methodology to achieve its objectives.

Comparative law can be divided into two types of comparison; macro-level and micro-level.[54] In a macro-comparison, categories of legal systems are compared with each other. By contrast, a micro-comparison focuses on individual legal institutions, judgements or legal rules in selected countries. In other words,

> customarily the micro-comparison deals with specific legal rules, cases and institutions that are conceived from the point of view of actual problems or particular legal conflicts of interests, whereas the macro-comparison normally focuses on larger-scale themes and questions.[55]

Whereas, a macro-level study generally puts a classification of the legal systems at the centre, a micro-comparison, according to Zweigert and Kötz, searches for 'functional equivalence' in its subject legal systems.[56] This functional approach, developed by Zweigert and Kötz, is believed to be one of the best working tools for a micro-level comparative law.[57] This research focuses on multiple-authored works in copyright law, which could be a different shape in each country. Therefore, a micro-level comparison that looks for the same functional legal rules is the most appropriate methodology.

While a micro-comparison has a narrower focus, there is still need of categorisation for better comparison. Malmström, regarding this issue, explains that, "[i]n general works on

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[54] Husa Jaakko, 'The Future of Legal Families', *Oxford Handbooks Online: Scholarly Research Reviews* (Oxford University Press 2016).
[55] Jaakko Husa, 'Legal Families' in JM Smits (ed), *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* (Edward Elgar 2006) <https://papers.ssrn.com/abstract=1529574> accessed 18 July 2021.
[56] K Zweigert and H Kötz, *Introduction to Comparative Law* (3rd edn, Oxford: Clarendon Press 1998).
[57] Esin Orucu, 'Methodology of Comparative Law' in JM Smits (ed), *Elgar Encyclopaedia of Comparative Law* (Edward Elgar 2006) <http://eprints.gla.ac.uk/39788/>.

comparative law, attempts are made to organize the various legal systems of the world into 'groups', 'categories', or 'families', in fact to arrive at what could be called a system of legal systems.".[58] There are numerous types of legal family categorization, however, one should not expect an ideal categorisation that can fit into every comparative law study.[59] For instance, according to Zweigert and Kötz's categorisation, there are four main sub-groups in the Western legal family which are relevant for this research; Anglo-American, Romanistic, Germanic and Nordic.[60] Applying this type of categorisation reveals too much fragmentation inside Germanic and Romanistic sub-groups. Italy and France are members of the Romanistic sub-group, however, they have significantly different understandings on certain issues of multiple-authored works. Another categorisation suggested by historical traditions of copyright law divulges two sub-groups in Western legal family; author's right tradition and copyright tradition. Whereas copyright tradition corresponds to Anglo-American sub-group in former categorisation, author's right tradition is left with every other country in the European Union. This is, unfortunately, not a valid group for the research. Classification of western legal systems in Europe is especially difficult due to their interconnected nature under the European Union umbrella. Even, Lawson argues that common law and civil law in current state of Europe are not too different from each other.[61] Therefore, it is best to avoid general classifications and instead seek to find similarities in the concepts and functions in each jurisdiction like Van Hoecke and Warrington suggest in their work.[62]

In order to compare the right concept, it is wise to compartmentalize the multiple-authored works in copyright. What is the problem designed to be solved by co-authorship provisions? First of all, multiple authors should be eligible as authors. In each jurisdiction, as aforementioned, there is a slightly different understanding of what constitutes authorship. Hence, the first layer is authorship, every co-author must satisfy national requirements for authorship. Then the second layer for a co-authored work is the mental part. The requirement of collaboration or sometimes intent is an important factor for many jurisdictions in the

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[58] A Malmström, 'The Systems of Legal Systems, Notes on a Problem of Classification in Comparable Law' (1969) 13 Scandinavian Studies in Law/Ed. by Folke Schmidt. Stockholm 6.
[59] Author compares multiple categorization and states that it is impossible to create a perfect categorization. ibid.
[60] Zweigert and Kötz (n 56).
[61] Craig M Lawson, 'The Family Affinities of Common-Law and Civil-Law Legal Systems' (1982) 6 Hastings Int'l & Comp. L. Rev. 85.
[62] Mark Van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 The International and Comparative Law Quarterly 495 <http://www.jstor.org/stable/761422>.

European Union. However, it varies and results in different outcomes. For instance, a connected work in Germany does not seek a collaboration at the time of creation, whereas by way of contrast collaboration is a requirement for United Kingdom's notion of joint authorship. The second mental layer, even, reveals itself in different shapes in the same country from the perspectives of basic formulation, secondary formulation and collective works. The third layer is the final form of the work. In this layer, jurisdictions sometimes look for significant contribution, inseparable parts or indistinguishable contributions etc. Similar to the second layer, the third layer also differs from formulation to formulation in the same country. Therefore, this research proposes to focus on the second and the third layer in this equation and because they differ from formulation to formulation, it is best to classify them into similar formulations.

It is reasonable to divide the scope into three main sections; basic formulation, secondary formulation and collective works. This division assists in focusing on the principles that are comparable in each jurisdiction, despite the fact that the general methods are different. Legislation and court decisions serve as the key sources of information for this division and research. Secondary sources include academic legal publications and other resources that may be relevant in resolving the problem. Using these sources, comparisons will be drawn between the various categories. A representative from each category will be chosen for further comparison. At this step, both differences and similarities will be assessed and compared. Finally, the research aims to identify common ground between Member States and to propose a harmonised law for multiple authored works. It is critical to emphasise in this part that the purpose of this study is to assist the Commission and academics. Any comparison or assessment will emphasise the harmonisation objective and the single market's benefits.

The representatives are selected based on the composition of their group. However, France, Germany and the United Kingdom are favoured in any group due to their developed case law and their position as leaders of their respective traditions. For instance, France is a highly influential member of author's right tradition and the United Kingdom is the influential leader of copyright tradition. They both are linguistically accessible and have rich academic commentaries as secondary sources. Recently, the United Kingdom triggered Article 50 of TFEU to exit the European Union; the terms of UK's departure from the EU is finalized. For this reason, this study will be based on Ireland, however due to influential jurisprudence of the UK over Irish Copyright Law, the UK is added to the comparisons as well.

This section is going to explain, in the following three sections, how the selections for representative countries are made in each main chapter. The fourth section explains the relevance of audiovisual works and their differences from the basic formulation. The subsequent section argues that legal consequences are an internal part of this research and should be examined part by part under each formulation. The last section draws a table to show the basis of categorisation in this section.

### 3.1. Basic formulation

Basic formulation is the name for the fundamental rules in the national copyrights regarding co-authored works. These rules are usually located in the copyright or authors' right legislation of the Member State.[63] These provisions are frequently titled as collaborative works, joint works, co-authored works or sometimes as works of co-authorship. An initial survey of national legislations showed that differences among the Member States could be filtered down to four types of formulation. The first category is the common law approach, this approach emphasises the factual indivisibility between contributions and also adds several more requirements for co-authored works. The United Kingdom, Malta, Cyprus and the Republic of Ireland are the followers of this category. For the purpose of this research, the United Kingdom is selected as the representative of this approach. The United Kingdom is the natural leader in this category due to its historical role with the Commonwealth countries and due to the fact that common law and copyright tradition first developed and founded in the United Kingdom. However, due to the United Kingdom's exit from the EU, Ireland is also added to the comparison along with the United Kingdom.

The second category contains an indivisibility requirement but, in contrast to the first category, requires economic indivisibility rather than factual indivisibility. While in an economic divisibility the contributions can be identified as separate from each other, they cannot be exploited without each other. In other words, irrespective of contributions' recognisability as a separate unit, the key aspect of economical indivisibility is their non-marketable nature as a standalone entity.[64] The members of this category are Germany, Poland, Czech Republic and

[63] The Netherlands and Poland are the two Member States which deal with the basic formulation in their case law rather than in the legislation.
[64] The differences between *economical* and *factual* indivisibility are going to be demonstrated in Chapter II with more detail.

Hungary. Germany is selected as the representative of this category for further comparison. Given the importance of Germany as a political and economic power in the EU, it is the logical choice between these countries. Even though, Germany represents the Germanic tradition countries and is significantly distinct from France, Italian, Dutch and Scandinavian laws, its case law and doctrinal discussions are regarded as exemplary sources in other Member States. Moreover, availability of the language opens the literature and case law to the researcher.

Members of the third category also follow the factual indivisibility approach similar to the first approach. The members, however, are from author's right tradition and have differences from common law countries in terms of their understanding of originality and authorship. Followers of this type are the Netherlands, Latvia, Slovenia, Slovakia, Denmark, Finland, Sweden, Italy, Croatia, Greece and Austria. Given the chapter's scope in terms of fundamental formulation and the researcher's access to these countries, this category will be excluded from the comparison. Germany, on the other hand, represents the author's right tradition, while the United Kingdom and Ireland reflect the approach of factual indivisibility. Incorporating this category into the comparisons may appear to be redundant.

The final category regarding basic formulation is the supporters of divisibility. According to the follower of this category, factual or economic indivisibility is not a requirement for basic formulation. The members are France, Portugal, Luxembourg, Spain, Bulgaria, Estonia, Lithuania, Romania and Belgium. France is selected for further representation of this category. While France is the birthplace of the *droit d'auteur* tradition, it cannot represent all the members in the tradition. However, France has significant economic and political power in the EU and its copyright influenced most of the continental Europe due to *droit d'auteur*. Moreover, the French language is available to the research, which make it easier to access the materials. Finally, France is an obvious choice from a practical and scholarly standpoint.

### 3.2. Secondary formulation

Secondary formulation seeks to classify works that are formed or grouped together following the creation of at least one of them. They can be established by incorporating one existing work into another or by grouping existing works for joint exploitation following their creation.

Secondary formulations based on integrating a pre-existing work into a new work usually called adaptation. Adaptation is generally accepted in the European Union. However, its terminology

is vague and problematic. There is no consensus or a European understanding of adaptation. However, in some Member States work produced as an outcome of adaptation is called composite work. This categorization is applied by France, Denmark, Sweden, Finland, Spain, Portugal. Any harmonisation attempt on this subject require clarification of these concepts. This category is going to be analysed among France, Germany, the United Kingdom and Ireland. France applies composite work categorization. Germany, the United Kingdom and Ireland brings rich discussions on the subject by the courts and academics.

Secondary formulations based on joint exploitation are used by some of the Member States. They are not commonly accepted in the European Union. They usually called connected work and they can usually be found in the countries where there is a factual or an economic indivisibility in the basic formulation. According to connected work, two or more pre-existing works can be connected each other usually with an agreement for the purpose of joint exploitation. Germany, Hungary, Greece, Italy, Slovenia and Croatia have this type of secondary formulation in their legislation. Germany is going to be the selected jurisdiction regarding this type of secondary formulation. This category will be compared to the French basic formulation and the research's recommended basic formulation. This is because the scope of this category overlaps with the basic formulation. This is why this research will examine whether or not their coexistence is desirable.

### 3.3. Collective works and collections

Collective works are interpreted quite differently by the Member States. On the one hand, twelve Member States use the term ‘collective works’ as a direct equivalent of databases, as defined in the Database Directive.[65] On the other hand, other Member States use the term ‘collective work’ to provide an alternative formulation for multiple-authored works in copyright. Under this approach, the collective works category provides a solution for investment heavy copyright works and a tool of convenience to clear multitude of rights from contributors. The principal or a director who organizes and finances the collective work is granted copyright protection in the entire work.

[65] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases 1996 (077) 6.

One approach strips the copyrights from the authors regarding their contributions in the collective work. This method is followed by France, Romania, Hungary, Luxembourg, Spain, Portugal and Czech Republic. The other approach still allows the individual authors power to exploit their contribution elsewhere. This second approach is followed by Lithuania, Bulgaria, Latvia, the Netherlands, Estonia, Italy and Greece. Both of them allows convenience and protects the investment made by the principal.

Similarly to the second method, certain Member States, without initiating collective works, rely on a set of assumptions to accomplish a goal of convenience within a specified time period. The system outlined in German Authors' Rights Law Article 38 is the finest illustration of this. This strategy preserves the authors' initial vesting of rights. The publisher, on the other hand, can avoid time-consuming procedures for clearing rights with individual contributors.

France and Germany are used as reference countries for comparing these two methods. Apart from the reasons stated before, France was the first Member State to implement collective work. Germany, on the other hand, is approachable to researcher and offers an alternative to collective work. The research will compare the effectiveness of these two approaches in terms of accomplishing their objectives.

### 3.4. Audiovisual works

Audiovisual works represent a special category inside the basic formulation. Legislators at the national and EU level have passed several provisions designed for these works. Before intervention from the European Union, some Member States viewed audiovisual works as a related right while others confirmed its status as both authorial work and its recordings as related right. Currently, thanks to several decisions from local and European courts, the audiovisual works are firmly recognized as authorial works. This understanding is significant, because audiovisual works usually include several creative contributions. Consequently, contributors are accepted as authors of the work.

The issue, however, is the multitude and variety of contributions. A typical large-scale movie could consist of musical works, dramatic works, photography and creative contributions from directors. In addition to this complex situation, these works are financed by companies and organizations which is making the ownership a significant problem. There are historically two approaches to the issue of ownership. In former European Commonwealth countries (the UK,

Ireland, Malta and Cyprus), the audiovisual works were protected as a related right called 'film' in its recording format. The sole ownership of this right belonged to the producer. Such approach utilizes a utilitarian rationale, rewarding the investment with ownership while discarding authorial rights of the contributors.

This rationale, however, lost significant ground due to Term Directive, *Norowzian*[66] decision and finally *Luksan*[67] decision. The Term Directive distinguishes film from audiovisual works.[68] While recognising film as a fixation of moving parts, the directive also protects audiovisual works and considers the director as one of the authors of the work.[69] However, the directive lets the Member States to choose which actors should be the additional co-authors. With the introduction of the directive, the Member States changed their copyright law and created a semi-authorial right, semi-related right under films.[70] In the UK, following the decision of *Norowzian*, audiovisual works are now capable of being protected as a dramatic works. This decision affirmed the status of audiovisual works as authorial rights. Furthermore, in *Luksan* decision the CJEU found Austria in breach of right to property by omitting the director as an author of the audiovisual works in its copyright law. These developments ensured a European-wide understanding of audiovisual works as authorial rights.

On the other hand, the rest of the Member States not only do not recognise producer as an author, but also some of them have statutory lists to presume co-authors. In order to resolve the complexity of authorship caused by multitude of creative contributions, presumption of authorship represents a great guide. France, Italy, Latvia, Lithuania, Hungary, Poland embraced this approach. Their lists establish in some cases rebuttable or in other cases non-rebuttable[71] presumptions and most of them are non-exhaustive.[72] The other Member States do not have any statutory list in their legislation. They are Austria, Germany, Denmark, Finland and Sweden. The sole exception is Luxembourg. Luxembourg follows a path very similar to former example.

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[66] *Norowzian v Arks Ltd & Anor (No 2) [1999] EWCA Civ 3014* (EWCA (Civ)).
[67] Luksan v van der Let (C-277/10), 9th February 2012 *Martin Luksan v Petrus van der Let* [2012] ECR (CJEU).
[68] Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford University Press, USA 2014) 86.
[69] Article 2 of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights 2006.
[70] Bently and Sherman (n 68) 86.
[71] For example the author of pre-existing work in adapted audiovisuals are considered co-authors in France (Article L.113-7). Their status is non-rebuttable.
[72] There are some exceptions. For instance, Romanian Copyright Act (Article 66) foresees a non-exhaustive list which can only be changed by an agreement between the film director and the producer.

Even though, Luxembourg does not recognise 'films' as separate works, it regards the producer (which could be a legal person) as one of the co-authors.

So far, this section is established that audiovisual works are naturally co-authored and European-wide recognized as authorial works. This means that they are subject to one of the three formulations defined in this methodology section. The Member States prefer the basic formulation for this type of work. For instance, in the United Kingdom, according to CDPA Section 10(1A) and Section 9(2)(ab), an audiovisual work (film) is treated as a work of joint authorship. The Court of Cassation also designates audiovisual work as collaborative work and declined any possible classification of collective work.[73] Similarly, BGH categorizes the audiovisual works as co-authored works under the basic formulation.[74]

There are three potential restrictions to the basic formulation. First is the recognition of the producer as co-author. This is against the nature of authorship and creative contribution. The second is the non-rebuttable presumptions of co-authorship. These logically correspond to the rules in the basic formulation. For instance, the author of pre-existing work in adopted audiovisual works could easily be assumed to have creative contribution in the final work. However, there could be exceptions, it is a limitation. The third is the non-exhaustive statutory list of co-authors in legislation. Romania is using this method and it has a high potential to clash with authors derived from determination in basic formulation. Apart from these three concerns, audiovisual works are a subject of basic formulation and any change in the basic formulation have dramatic effect in determination of co-authors in these works.

Therefore, audiovisual works are going to be analyzed under the basic formulation. Since they depart from other works in several points, they require an individual section. Under the chapter for basic formulation, audiovisual works are going to have a special case section where this research will discuss its nature of co-authorship in detail.

### *3.5.* Legal consequences

The legal consequences of multiple authored works are not usually straightforward. For instance, if co-authors fail to determine their respective shares in the work, every co-author is

[73] *Cour de Cassation, Chambre civile 1, du 26 janvier 1994, 92-11701, Publié au bulletin* 162 RIDA 433.
[74] *Wenn wir alle Engel wären* [1959] BGH I ZR 17/58, GRUR 1959 335.

going to be presumed to have equal shares according to the law in Poland, Croatia, Greece, Italy, Bulgaria, Spain, Hungary. In the Czech Republic, Germany, Lithuania and Romania, however, the court would evaluate their respective contributions in the final work and determine the shares for each of the authors. This is one circumstance where a different type of practice could lead to different results.

Moreover, there are discrepancies in the usage of consent, the practice of good faith, the ability to bring an action against infringement as one of the co-authors. More importantly, the governing rules of legal partnership between co-authors is different due to distinct approaches in property law and civil code of each country. The legal consequences have examples in at least one of the countries that are selected before as representative. For instance, good faith is a well-established concept in Germany and consent has different uses in France and Germany, also legal partnership in the United Kingdom is significantly different from its German counterpart.

Legal consequences are going to be examined under each formulation. This way is more effective than devoting a separate chapter to the legal consequences. They are closely linked to their respective formulations. For instance, while the basic formulation in Germany is interpreted by joint tenancy provisions, tenancy in common rules are governing the second formulation. Therefore, a section in each main chapter is going to analyse the legal consequences of that formulation.

### 3.6. Table of the categorisation

| | Basic Formulation | | | | Secondary Formulation | | Collective Works | |
|---|---|---|---|---|---|---|---|---|
| **Member States** | Factual indivisibility (copyright) | Economic indivisibility | Factual indivisibility (author's right) | Divisible approach | Connected works | Composite works | Protection to principal | Protection to principal and contributors |
| Austria | | | + | | N/A | N/A | N/A | N/A |
| Belgium | | | | + | N/A | N/A | N/A | N/A |
| Bulgaria | | | | + | N/A | N/A | | + |
| Croatia | | | + | | + | | N/A | N/A |
| Cyprus | + | | | | N/A | N/A | N/A | N/A |
| Czech Rep. | | + | | | N/A | N/A | + | |
| Denmark | | | + | | | + | | |
| Estonia | | | | + | N/A | N/A | | + |
| Finland | | | + | | | + | | |
| France | | | | + | | + | + | |
| Germany | | + | | | + | | N/A | N/A |
| Greece | | | + | | + | | | + |
| Hungary | | + | | | + | | + | |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Ireland | + | | | | N/A | N/A | | |
| Italy | | | + | | + | | | + |
| Latvia | | | + | | N/A | N/A | | + |
| Lithuania | | | | + | N/A | N/A | | + |
| Luxembourg | | | | + | N/A | N/A | + | |
| Malta | + | | | | N/A | N/A | N/A | N/A |
| Netherlands | | | + | | N/A | N/A | | + |
| Poland | | + | | | N/A | N/A | N/A | N/A |
| Portugal | | | | + | | + | + | |
| Romania | | | | + | | | + | |
| Slovakia | | | + | | N/A | N/A | N/A | N/A |
| Slovenia | | | + | | + | | | |
| Spain | | | | + | | + | + | |
| Sweden | | | + | | | + | | |
| UK | + | | | | N/A | N/A | N/A | N/A |

## 4. Normative guidance

The purpose of this research is to articulate proposals infused in each section. Constructing these recommendations involves a selection process. The focus of this section is normative guidance on that process.

In legal research, the first place to look for normative guidance is justification/reasoning behind any given legal instrument. In particular to copyright, commentators, on the one hand, recognise a variety of copyright justifications stimulating national copyright laws.[75] However, two of them stand out as commonly accepted; natural rights doctrine and utilitarian justification.[76]

On the other hand, in comparison to copyright justifications, current EU copyright harmonisation is underpinned by supranational rationales. The main drive behind copyright directives is the functioning of the internal market. In harmonisation by judicial decisions, the CJEU uses the constitutional right to property[77] to defend the author's interest and is seen as a new justification for the potential expansion of copyright.[78] Other fundamental rights, such as freedom of speech, also construed as limiting factors against potential copyright over-expansion.[79]

The mere existence of co-authorship as a concept should not be taken for granted. Reasons behind supporting a system of co-authored works inside copyright can provide insights. There are individual drives specific for co-authored works, factors such as the need and desire to encourage partnerships. These drives can be better titled as internal pressures and interests. They should also be considered when it comes to proposals for harmonisation.

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[75] Bently and Sherman (n 68) 35–40; Tanya Frances Aplin and Jennifer Davis, *Intellectual Property Law : Text, Cases, and Materials* (Second edition, 2013) 3–15.
[76] Aplin and Davis (n 75) 50–53.
[77] Charter of Fundamental Rights of the European Union 2009 (Charter of Fundamental Rights of the European Union) s 17(2).
[78] Jonathan Griffiths, 'Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law'; *Luksan Case C-277/10* (n 67).
[79]

Lastly, the general principles of EU law are crucial when discussing possible harmonisation. Principles such as legal certainty and predictability occupy a significant position in the normative guidance. According to the legal certainty principle, a law must be predictable, stable, precise, and understandable.[80] This study utilises these characteristics in favour of easy-to-predict and easy-to-prove approaches in the courts. Other principles include proportionality, equality, subsidiarity and fundamental rights.[81]

This section will examine these rationales and charter a normative guideline to inform the proposals for harmonisation in this thesis. The section begins with supranational rationales, before turning to general principles of EU law. Then, copyright justifications and rationales behind the existence of co-authored works are going to be discussed in detail.

### 4.1. Supranational level justifications: internal market

#### *4.1.1. History of the relationship between the internal market and copyright*

In 1985, the Commission introduced a white paper titled 'Completing the Internal Market'.[82] According to the white paper, the difference between the Member States' intellectual property rights leads to a negative impact on the internal market's functioning.[83] The first green paper identified four fundamental problems in the copyright; a single common market for copyright-protected goods, the competitiveness of the economy in copyright goods and services, protection of intellectual creations and investment produced in the Community against unfair exploitation from outside the European Union and finally the need to constrain the restricting effects of copyright on competition, especially in technology-related areas.[84] In the follow-up document, the Commission started preparing directives on the rental right, lending, databases,

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[80] *Criminal proceedings against Marcello Costa and Ugo Cifone* [2012] ECR (CJEU) [74].
[81] Karen Davies, *Understanding European Union Law / Karen Davies* (5th ed, Routledge 2013) 63; John Tillotson and Nigel G Foster, *Text, Cases, and Materials on European Union Law* (4th ed, Cavendish Pub 2003) 223–226; Walter Cairns, *Introduction to European Union Law* (2. ed., repr, Cavendish 2004) 84–90; Margot Horspool and Matthew Humphreys, *European Union Law* (7. ed, Oxford Univ Press 2012) 123.
[82] European Commission, 'Completing the Internal Market. White Paper from the Commission to the European Council (Milan, 28-29 June 1985). COM (85) 310 Final, 14 June 1985' <http://aei.pitt.edu/1113/>.
[83] ibid 144.
[84] European Commission, 'Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action. COM (88) 172 Final, 7 June 1988' 3–5 <http://aei.pitt.edu/1209/>.

term of protection and satellite and cable broadcasting.[85] The Commission also identified the study of moral rights, resale rights, reprography, and collective management as areas of interest.[86] Abovementioned directives are prepared in response to the four concerns described in the first green paper.

The second green paper was initiated after the Bangemann Report of May 1994.[87] The Bangemann Report demonstrated a need for action in copyright for the new internet age (or information society era).[88] The report mainly focused on economic and internal market aspects. However, the protection of cultural heritage drew a limited degree of attention as well.

The Commission set out to respond to technological changes, new market structures and cross-border services. In the second green paper, the reproduction right, the communication to the public right, the legal protection of rights-management information and technological protection schemes, and the distribution right were identified as the harmonisation's next goals.[89] Like the first green paper, the Commission also singled out moral rights and management of rights as subjects for further study.[90] The broadcasting right, applicable law and enforcement were added to the issues requiring further evaluation.[91] The Information Society Directive emerged as an answer for these four acknowledged goals in the second green paper.[92]

From the earliest harmonisation effort, lack of apparent competence in the copyright area forced the Commission to justify its harmonisation efforts under non-copyright rationales. The

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[85] European Commission, 'Working Programme of the Commission in the Field of Copyright and Neighbouring Rights. Follow-up to the Green Paper. COM (90) 584 Final, 17 January 1991' <http://aei.pitt.edu/1210/>.
[86] ibid 39.
[87] European Commission, 'Report on Europe and the Global Information Society: Recommendations of the High-Level Group on the Information Society to the Corfu European Council. Bulletin of the European Union, Supplement No. 2/94.' <http://aei.pitt.edu/1199/>.
[88] Commission, 'Copyright and Related Rights in the Information Society - Green Paper. COM (95) 382 Final, 19 July 1995' (n 1).
[89] European Commission, 'Follow-up to the Green Paper on Copyright and Related Rights in the Information Society. COM (96) 586 Final, 20 November 1996' <http://aei.pitt.edu/939/>.
[90] ibid 24 and 27.
[91] ibid 20.
[92] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society 2001.

mentioned two green papers recognised the internal market and the need to adapt to the digital economy as main drivers behind copyright harmonisation. There were small indications of cultural concerns; however, the central target remained an economic one. The internal market reasoning is also evident from recitals in the established directives during this stage. In Directive 92/100/EEC (Rental Right Directive), recitals 1-3, 6 and 9 mentions the internal market, competition in the common market and other economic rationales. Recital 3 of the Database Directive, recitals 3-4 and 6-7 of the Information Society Directive[93] offer similar mentions, and these can also easily be found in other directives. The internal market's proper functioning and competition in the world market remained strong motives behind these directives.

The Green Paper on Copyright in the Knowledge Economy is the third green paper regarding copyright.[94] Its scope is relatively narrow compared with its predecessors. The purpose of the green paper is defined as 'to foster a debate on how knowledge for research, science and education can best be disseminated in the online environment'. The green paper recognised exceptions for libraries, archives, museums and people with disabilities as a fundamental issue. Furthermore, user-created content, orphan works and rights for publishers are identified as essential points. The green paper named knowledge as the fifth freedom in the European Union and emphasised its free movement in the internal market.

The Green Paper on the online distribution of audiovisual works is the latest green paper in copyright.[95] The green paper was published in 2011, after Digital Agenda for Europe[96] in 2010 and A Single Market for Intellectual Property Rights[97] in 2011. The green paper identified that

[93] DIRECTIVE (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 - on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC 2019 34.
[94] European Commission, 'Green Paper on Copyright in the Knowledge Economy, COM (2008) 466 Final, Brussels, 16 Jul. 2008'.
[95] European Commission, 'Green Paper on the Online Distribution of Audiovisual Works. COM (2011) 427 Final'.
[96] European Commission, 'A Digital Agenda for Europe. COM(2010)245 Final'.
[97] European Commission, 'A Single Market for Intellectual Property Rights Boosting Creativity and Innovation to Provide Economic Growth, High Quality Jobs and First Class Products and Services in Europe. COM(2011) 287 Final'.

multiple barriers still fragment online markets in the EU.[98] Therefore its primary purpose is to eliminate these barriers in the single market. Furthermore, the Recital 1 of the Digital Single Market Directive also emphasises establishing an internal market as a rationale for the directive.[99]

The companionship of the internal market to EU copyright law begins from the very start of copyright development in the European Union. There is no denying that the internal market, advantageous or disadvantageous, plays a crucial role while determining the normative considerations behind EU copyright law.

*4.1.2. Meaning of the internal market in the context of copyright*

Notwithstanding the emphasis on the internal market, any harmonisation effort requires an apparent competence from the European Union's constitutional texts. For copyright, competence to introduce harmonisation stems from Article 114 of the TFEU. The primary legal basis for harmonising in copyright places its competence on the internal market's establishment and functioning. The internal market and copyright, as concepts, are foreign to each other. Nevertheless, they are interlinked through the European Union's competence to harmonise and its copyright policy.

Article 3(3) TEU establishes the European Union's objective to enrich the internal market's functioning. Article 26(2) TEU explains the concept as 'the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'. According to the articles, harmonisation in copyright should exist where there is an impediment to the internal market. Differences between Member States' national law could be an example of this impediment. According to the CJEU, barriers to the internal market are not the only considerations for harmonising copyright. National laws that cause distortions of competition and impediments to the internal market that are likely to occur are valid legal bases for harmonisation under

[98] Commission, 'Green Paper on the Online Distribution of Audiovisual Works. COM (2011) 427 Final' (n 95) 3.
[99] Digital Single Market Directive.

Article 114 of the TFEU.[100] These provisions and the CJEU's jurisprudence explains when the European Union can act to harmonise in copyright.

The question of how the harmonisation should be implemented is not answered in the Treaties. The internal market competence is a functional competence. With a functional competence, the Treaties leave the substantive choices to the legislature.[101] Additionally, since internal market competence is a shared competence with the Member States, the European Union cannot rely solely on its competence. The European Union must justify its reasons to intervene, and this justification has to prove that objective of the intervention is better achieved by the European Union, rather than the Member States. This principle is called the subsidiarity principle, and it is stated in Article 5(1) TEU.

From the perspective of normative guidance, the internal market rationale does not provide substantive guidelines; however, it helps to refine an outer limit. Harmonisation should be proposed when there is, or is likely to occur, a hindrance to the internal market or national laws are distorting competition in the internal market. Additionally, intervention at the European Union level must be justifiable.

#### *4.1.3. The internal market and the highest possible level of protection*

Another recurring statement in the Directives and the Green Papers is the high level of copyright protection. For instance, Recital 4 of the Information Society Directive states that; 'a harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation …'.[102] Recital 11 of the Term Directive also states that 'the level of protection of copyright and related rights should be high, since those rights are fundamental to intellectual creation'.[103]

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[100] Case C-300/89 *Titanium Dioxide* [1991] ECR 2867 (CJEU) [15 and 23]. Case C-376/98 *Tobacco Advertising I* [2000] ECR (CJEU) [95 and 106]; Case C-301/06 *Data Retention* [2009] ECR (CJEU) [63].
[101] Ana Ramalho, 'Conceptualising the European Union's Competence in Copyright–What Can the EU Do?' (2014) 45 IIC-International Review of Intellectual Property and Competition Law 178, 183.
[102] Information Society Directive Recital 4.
[103] Term Directive.

These statements are not exclusive to the Directives. In the follow up to the first green paper, the Commission indicated that the highest level of protection is adequate.[104] Similar references exist in the other Green Papers as well.[105] By this logic, there is a danger of recognising copyright protection as an end in itself.[106] Such recognition would be against the scope of internal market competence. On the contrary, this trend could be explained by practicality. An upward harmonisation is less problematic than a downward harmonisation. While the Commission's tendency is understandable, achieving the highest possible protection is not a desirable guide for normative guidance.

The Commission identified and emphasised an internal market rationale throughout its policy papers and directives. Since there is no other viable competence and rationale, this inclination could be the result of necessity. According to Ramalho, while the Commission is arguing for the internal market, the policy goals are designed to protect particular interests of content industries rather than the internal market's needs.[107] Such tendencies suggest a hidden objective for the Commission. Even if there is a hidden objective, it is impossible to draw any normative guidance from something hidden.

On the other hand, Sganga argues that the European Union's internal market rationale cannot embed the philosophical inspirations that are historical rationales for copyright protection in the Member States.[108] According to her, this is why divergence between the European Union's copyright model and its Member States' model is expanding, and the European Union should leave the internal market rationale and focus on the historical justifications for copyright. [109]

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[104] Commission, 'Follow-up to the Green Paper. COM (90) 584 Final' (n 85).
[105] Commission, 'Copyright and Related Rights in the Information Society - Green Paper. COM (95) 382 Final, 19 July 1995' (n 1) 3–4; Commission, 'Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action. 1988' (n 84) 14.
[106] Alexander Peukert, 'Intellectual Property as an End in Itself?' (2011) 33 European Intellectual Property Review (EIPR) 67.
[107] Ana Ramalho, 'Copyright law-making in the EU: what lies under the 'internal market'mask?' 9 Journal of Intellectual Property Law & Practice 208
[108] Caterina Sganga, 'EU Copyright Law Between Property and Fundamental Rights: A Proposal to Connect the Dots', *Balancing Copyright Law in the Digital Age* (Springer 2015) 9.
[109] ibid 2.

To sum up, the internal market consideration, to achieve its purpose of a smooth functioning market, opted for a maximalist approach favouring copyright holders. The Commission may cite the internal market consideration out of necessity. The real objective could be the highest possible protection to copyright holders. Nonetheless, any harmonisation aiming for the lowest or the highest possible protection result in enabling a smooth functioning internal market.

*4.1.4. Summarising the internal market consideration*

Starting from 1985, the term 'internal market' became an essential viewpoint in the European copyright law. Throughout each green paper and each directive, the internal market is mentioned as a legislative consideration and an objective. Nevertheless, the internal market consideration is not contributed to a much needed normative perspective to copyright harmonisations. Its effect is limited to setting a broad outer limit to the Commission's proposals. Most of the time, the highest possible protection guided the internal market rhetoric and served as a normative framework. However, the internal market is not the only consideration that should be accounted for when legislative action is taken in European copyright law.

While it is evident that internal market considerations underpinned the majority of copyright effort by the Commission, the internal market is not an absolute justification. In other words, other considerations such as fundamental rights, general principles of EU law, and copyright justifications would always act as a check and balance mechanism. These justifications must counterbalance the internal market consideration.[110]

Unfortunately, there is no consistent approach to balancing these considerations against the internal market.[111] Barnard claims that the proportionality principle is the primary tool used by

[110] Justin Koo, *The Right of Communication to the Public in EU Copyright Law* (1st edn, Hart Publishing 2019) 15; Sybe A de Vries, 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon – An Endeavour for More Harmony' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (1st edn, Hart Publishing 2013).

[111] Sybe A De Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9 Utrecht L. Rev. 169, 191; Stephen Weatherill, 'From Economic Rights to Fundamental Rights' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (1st edn, Hart Publishing 2013) 22.

the CJEU when dealing with balancing two constitutional rights.[112] By virtue, the proportionality principle suggests a case-by-case basis approach by the CJEU. The issue of balancing the internal market against other considerations is discussed in more detail in the next subsection.

## 4.2. Supranational level justifications: Fundamental rights

### *4.2.1. Development of fundamental rights in the EU*

Fundamental rights are significant parts of the European legal systems. This importance can be observed in the European Union as well. On 7 December 2000, the European Union set out the Charter of Fundamental Rights of the European Union (the Charter). However, the legal binding of the Charter realised after the Treaty of Lisbon.

Following the commencement of the Lisbon Treaty, fundamental rights protection is essentially changed in the European Union. The Charter reached the same legal status of the founding treaties and accepted as one of the general principles of EU law. Moreover, according to the new version of TEU Article 6(2), the European Union will accede to the European Convention on Human Rights (ECHR). Consequently, there is now increasing constitutional pressure of fundamental rights in every European Union legislation aspect.

With the enablement of accession to the ECHR and the Charter's acceptance, the CJEU and European Court of Human Rights (ECtHR) relationship reached another level of complexity.[113] As a natural consequence of this complexity, sources of fundamental rights in the European Union started to resemble a 'crowded house'.[114] Currently, there is no possibility of direct action

[112] Catherine Barnard, 'The Protection of Fundamental Social Rights in Europe after Lisbon: A Question of Conflicts of Interests' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (1st edn, Hart Publishing 2013) 47.
[113] Sionaidh Douglas-Scott, 'The Court of Justice of the European Union and the European Court of Human Rights after Lisbon' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (1st edn, Hart Publishing 2013).
[114] Pedro Cruz Villalón, 'Rights in Europe: The Crowded House' 20.

against EU Institutions in the ECtHR.[115] It is problematic whether this is going to stay the same or not following the successful accession.

In a scenario of direct action in the ECtHR, there is going to be several problems. The important one is the relationship between the CJEU and the ECtHR.[116] In Opinion 1/91 and Opinion 1/00, the CJEU prevented the European Union into entering an international agreement which would permit a court other than the CJEU to make a binding decision regarding the EU law.[117] Furthermore, TEU Article 6(2) states that "accession shall not affect the Union's competences as defined in the Treaties". In 2014, the CJEU held an opinion on the draft agreement of accession to the ECHR. The CJEU found the agreement incompatible with the EU law.[118] The CJEU's concerns in its previous opinions were mentioned in the last opinion as well. This opinion halted the progress of accession.

At this time, the ECHR remains an unbinding document. However, according to the Charter Article 52(3); 'rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.' In other words, the ECHR and by virtue interpretation of the ECtHR will influence the understanding of the Charter. Nonetheless, the CJEU is the sole authority to interpret and apply the ECtHR's jurisprudence, if the court deems necessary. First of all, the Charter does not provide a list of rights which are assumed to correspond. The Official Explanations' of the Charter, on the other hand, delivers a detailed list of which article in the Charter corresponds to which article in the ECHR with attention to their scope.[119] According to the Charter Article 52(7), the Official Explanations 'shall be given due regard by the courts' when interpreting the Charter. In this point, Douglas-

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[115] Sionaidh Douglas-Scott, 'The Relationship between the EU and the ECHR Five Years on from the Treaty of Lisbon' [2015] Bernitz, de Vries, Weatherill eds, Five Years Legally Binding Charter of Fundamental Rights (Hart 2015).
[116] Presumption of equivalence is another significant issue of the possible accession. If the EU becomes a Member of the ECHR, then the CJEU is going to be regarded as a national supreme court and lose the status of presumption of equivalence.
[117] *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty* [1991] ECR (CJEU); *Opinion pursuant to Article 300(6) EC* [2002] ECR (CJEU).
[118] *Opinion pursuant to Article 218(11) TFEU* [2014] ECR (CJEU).
[119] 'Official Journal of the European Union' (2007) C 303/17-14.12.2007.

Scott argues that there is no obligation to follow the ECtHR's jurisprudence in the Charter. The Official Explanations mentions the ECtHR case-law and since the CJEU's duty to duly regard the Official Explanations means that the CJEU only needs to regard the jurisprudence of the ECtHR duly.[120]

This argument is backed up by de Búrca's investigation over the CJEU's case law after the Lisbon Treaty.[121] According to her results, in 122 cases, the CJEU mentioned the Charter; however, in 18 cases, the CJEU referred to the ECHR. Additionally, it is obvious that the CJEU's legal ground for fundamental rights shifted dramatically toward the Charter after it became legally binding.[122] Therefore, this research will use the CJEU's understanding of fundamental rights while using the ECtHR's jurisprudence as a comparison tool when needed.

*4.2.2. Fundamental rights and intellectual property rights: conflict or coexistence*

As a fundamental right, the right to intellectual property may provide a specific perspective for normative guidance. The ECtHR and national laws have long acknowledged the property right. Intellectual property is often deemed to be secured as a fundamental right under the right to property. Besides, Article 27(2) of the Universal Declaration of Human Rights states 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". However, the Declaration does not specify that copyright protection is the right protection.

Starting from the TRIPs Agreement, the relationship between fundamental/human rights and intellectual property rights emerged as a discussion subject.[123] There are two distinct approaches to the relationship; conflict and coexistence.[124] For the former view, UN's Sub-

[120] Douglas-Scott (n 115) 18.
[121] Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 168 <http://journals.sagepub.com/doi/10.1177/1023263X1302000202> accessed 24 January 2021.
[122] Martin Kuijer, 'The Challenging Relationship between the European Convention on Human Rights and the EU Legal Order: Consequences of a Delayed Accession' (2020) 24 The International Journal of Human Rights 998, 1005 <https://www.tandfonline.com/doi/full/10.1080/13642987.2018.1535433> accessed 24 January 2021.
[123] Peter K Yu, 'Ten Common Questions about Intellectual Property and Human Rights' (2006) 23 Ga. St. UL Rev. 709, 709.
[124] Laurence R Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence' (2003) 5 Minn. Intell. Prop. Rev. i, 47.

Commission on the Promotion and Protection of Human Rights declared that "there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other".[125] For the latter approach, WTO argues that in their interpretation of the TRIPs Agreement, fundamental/human rights coexist with intellectual property rights.[126]

The conflict approach requires intellectual property or human rights to prevail the other. In contrast, the coexistence view recognises their mutual objective of striking the right balance. The issue, then, begins on constituting the balance.[127] In their roots, the development of both human rights and copyright in Europe share similar intrinsic attributions.[128] Copyright can be understood as a natural extension of freedom to express oneself and can be balanced against the right to access information.[129]

The dilemma between conflict and coexistence is, however, not a problem for the European Union. With the introduction of the Lisbon Treaty, the Charter Article 17(2) gained legal binding with its provision of 'Intellectual property shall be protected'. The problem shifted from whether these two areas coexist with each other to what should be the balance between these rights.[130]

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[125] UN. Subcommission on the Promotion and Protection of Human Rights (52nd sess. : 2000 : Geneva), 'Intellectual property rights and human rights' [2000] E/CN.4/2001/2-E/CN.4/Sub.2/2000/46 27.
[126] World Trade Organisation, 'Protection of Intellectual Property under the TRIPs Agreement' [2000] E/C.12/2000/18 para 9 <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f18&Lang=en>.
[127] Estelle Derclaye, 'Intellectual Property Rights and Human Rights: Coinciding and Cooperating.' in Paul Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Second Edition, Kluwer Law International 2008) 133–134 <http://eprints.nottingham.ac.uk/id/eprint/3149>.
[128] Daniel J Gervais, 'Intellectual Property and Human Rights: Learning to Live Together' in Paul Torremans (ed), *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Second Edition, Kluwer Law International 2008) 1.
[129] ibid 20.
[130] Koo (n 110) 17.

There are three possible interfaces where fundamental rights interact with intellectual property rights; as justifications for legislative action, as an external interpretative tool and internal application of fundamental rights to copyright exceptions.

*4.2.3. Fundamental rights as justifications*

According to Geiger, fundamental rights as a framework is an ideal place to constitute a synthesis of copyright considerations; natural rights doctrine, utilitarian approach.[131] Throughout their development, fundamental rights and copyright seemed to be developed without any interactions with each other for a significantly long time.[132] Torremans defends that copyright can claim the fundamental right status, the critical point remains on balancing public and private interest.[133]

Although not specific to copyright, the Charter does express that intellectual property must be protected. The provision is an extension of the property right. The freedom of expression, on the other hand, plays the counterbalance against the right to property. Following Torremans' and Geiger's approach would require a successful balancing between these rights; however, in the end, the normative guidelines would be less crowded.

The interpretation of the Charter Article 17(2), however, proved to be problematic. This provision, in the beginning, understood as more substantial and absolute protection of intellectual property rights. However, this proved not to be the case by the CJEU in *Scarlet Extended* decision.[134] The CJEU held that nothing in the Charter or case law suggests absolute protection of intellectual property rights. The Charter cannot create a new competence, and thus Article17(2) cannot be seen as a reason for harmonisation, without justification for the internal market. Article 51(2) of the Charter states that the Charter 'does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the

[131] Christophe Geiger, 'Constitutionalising Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (2006) 37 International Review of Intellectual Property and Competition Law 382.
[132] Paul LC Torremans, 'Is Copyright a Human Right' [2007] Mich. St. L. Rev. 271, 272.
[133] ibid 290.
[134] *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECR (CJEU) [43].

Treaties'. However, this does not mean that Article 17(2) cannot supplement the rationale for the internal market.[135] In the end, Geiger argues that intellectual property rights would be better off without the introduction of this provision.[136]

Notwithstanding the CJEU's decisions, excessive reliance may not be an ideal position as a normative guideline. The right to property is one of the fundamental rights, and it needs to be balanced against other fundamental rights such as freedom of expression, freedom to conduct a business, right to access information. Excessive reliance would bring out an unwanted maximalist approach. The maximalist understanding of the Article refers to copyright protection as an end in itself.[137]

Considering the public interest portion of the copyright equation, copyright protection as an end protects the private interests of the right holders. Such an approach would fail against securing a fair balance between all interested fundamental rights. To sum up, the legislators can refer right to property as a source of justification; however, it should be a carefully limited reference.

*4.2.4. Fundamental rights as interpretative tools*

An internal account of fundamental rights takes place during the law-making stage. Moving from designating copyright protection as an end by itself, copyright protection is an exclusive right. The protection by virtue is an exception to a broader framework. This framework, Geiger and Izyumenko discuss, is the framework of freedoms. Copyright protection should not expand outside of its limits. The fact that fundamental rights, such as freedom of speech, freedom to information, right to access information, are the rule and copyright protection is the exception.[138]

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[135] Ana Ramalho, *The Competence of the European Union in Copyright Lawmaking: A Normative Perspective of EU Powers for Copyright Harmonization* (Springer 2016) 98.
[136] 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' (2009) 31 EIPR 113, 117.
[137] Ramalho (n 135) 99.
[138] Christophe Geiger and Elena Izyumenko, 'Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way' [2018] SSRN Electronic Journal 7 <https://www.ssrn.com/abstract=3293735> accessed 28 April 2020.

This discretion must be taken during the legislative step, in particularly by the Commission. The Commission, however, has a lousy record of omitting mentions to fundamental rights in the Green Papers. For instance, when commenting on the Green Paper[139], Hugenholtz criticises the Commission for lack of reference to freedom of expression.[140] By contrast, the Green Papers tend to mention higher protection for the right holders.[141] Moreover, Recital 9 of the Information Society Directive states that;

> Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

According to the Recital, the public's interest aligns with higher protection to the copyright holders. The CJEU, in contradiction, held that copyright protection must be balanced against fundamental rights.[142] Fundamental rights can provide meaningful feedback to avoid undesirable results. Such feedbacks often take place during the articulation of exceptions.[143] When fundamental rights are taken into account, an exception can provide a platform for a more balanced and flexible approach to copyright protection.

*4.2.5. Application of fundamental rights as external limitations*

In its third role, fundamental rights act as external limitations in the courts. While it is thought that fundamental rights have not any direct effect over intellectual property rights, their use in the court proceedings is increasing.[144] In fact, in Europe, the national courts use freedom of

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[139] Commission, 'Copyright and Related Rights in the Information Society - Green Paper. COM (95) 382 Final, 19 July 1995' (n 1).
[140] P Bernt Hugenholtz, 'Adapting Copyright to the Information Superhighway' [1996] The future of Copyright in a Digital Environment 99, 118.
[141] Commission, 'Follow-up to the Green Paper. COM (90) 584 Final' (n 85).
[142] *Scarlet Extended Case C-70/10* (n 134) para 44.
[143] Geiger, 'Constitutionalising Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (n 131) 398.
[144] Christophe Geiger, 'Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?' (2004) 35 IIC-international review of intellectual property and competition law 268, 275.

speech to restrict overreach of intellectual property rights.[145] This practice is becoming much more popular and desirable.[146] Fundamental rights are reducing unwanted consequences that were not warranted during the legislation process.

With the introduction of the Charter, the CJEU's references to the Charter are getting more attention. [147] In the CJEU's recent rulings in *Pelham*[148], *Funke Medien*[149] and *Spiegel Online*[150], fundamental rights played a crucial role. In these cases, freedom of speech and copyright protection needed to be balanced. Also, freedom of media, freedom of information and freedom of artistic creativity are involved as well. The *Funke Medien* case is about the unauthorised publication of German military secrets by a daily newspaper. The *Spiegel Online* case discussed freedom of media due to infringement claims by an author for hyperlinks in the Spiegel Online. From freedom of artistic creativity point of view, *Pelham* case was about two seconds of music sampling.

When dealing with fundamental rights, the CJEU stated that externally introduced flexibility could be harmful to copyright harmonisation and legal certainty.[151] The court, in general, followed the Advocate General's opinion on external limitations.[152] As a result, the CJEU thinks that EU copyright law already incorporates internal safety valves that provide sufficient protection of freedom of speech against copyright holders' right.[153] However, to balance fundamental rights against copyright, the CJEU called for a relatively liberal interpretation of copyright's own norms in light of the freedom of speech requirements.[154] On this point, Geiger

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[145] Laurence R Helfer, 'Toward a Human Rights Framework for Intellectual Property' (2006) 40 UC Davis L. Rev. 971, 1017.
[146] Geiger, 'Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?' (n 144) 275.
[147] de Búrca (n 121).
[148] Case C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] ECR (CJEU).
[149] Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] ECR (CJEU).
[150] Case C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] ECR (CJEU).
[151] *Funke Medien Case C-469/17* (n 149) para 64; *Spiegel Online Case C-516/17* (n 150) para 49; *Pelham Case C-476/17* (n 148) para 65.
[152] *Funke Medien Case C-469/17* (n 149) para 64; *Spiegel Online Case C-516/17* (n 150) para 49; *Pelham Case C-476/17* (n 148) para 65.
[153] *Funke Medien Case C-469/17* (n 149) paras 58, 70; *Spiegel Online Case C-516/17* (n 150) paras 43, 54; *Pelham Case C-476/17* (n 148) para 60.
[154] *Funke Medien Case C-469/17* (n 149) para 76; *Spiegel Online Case C-516/17* (n 150) para 59.

argues that difference exists between liberally interpreting an existing closed list of exceptions and allowing for external freedom of speech defence.[155] Moreover, according to Geiger, the CJEU's approach risks possible problems in the future, and additional freedom of speech safeguards must be introduced.[156]

Apart from freedom of speech, the CJEU states that certain fundamental rights akin to copyright such as the right to property must be viewed concerning their social function.[157] This decision indicates that the right to intellectual property is not absolute, and it may be limited in the name of public interest. The interesting case regarding the right to property is the *Luksan* case.[158] In this ruling, the CJEU decided that provision in Austrian law regarding the exploitation of audiovisual works violated the fundamental right to property. The provision proposed to vest exploitation rights in a cinematographic work in the producer rather than the director. Therefore, according to the Court, this provision damaged the director's right to intellectual property. It is an unprecedented decision. There is too little substantive guideline as well. According to Sganga, the CJEU's case law is limited and defining intellectual property as a fundamental right is in clear contrast with the historical aversion of extending property rights to intangible goods by civil law tradition.[159] On the other hand, while the decision is about cinematographic works, Griffiths thinks that it has considerable consequences. Any national legislation depriving the author of its exploitation rights will violate the European Union copyright law.[160]

While establishing the right to intellectual property as a fundamental right is a conflicted and developing issue in copyright, there is not much to offer for this research from the perspective of normative guidance. *Luksan* case as an exception is a reminder that loss of a title is a breach of the Charter.

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[155] Christophe Geiger, 'Constitutionalising Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (2019) 37 International Review of Intellectual Property and Competition Law 19.
[156] ibid 29.
[157] Case C-200/96 *Metronome Musik GmbH v Music Point Hokamp GmbH* [1998] ECR (CJEU) [21].
[158] *Luksan Case C-277/10* (n 67).
[159] Sganga (n 108) 4.
[160] Griffiths (n 78) 21.

To summarise, fundamental rights are potent in keeping excessive copyright protection, and the CJEU uses them to interpret copyright exceptions. This interpretation is welcome. However, the issue remains on how the balancing should be done when two or more rights conflict.

#### *4.2.6. Summarising fundamental rights*

With the Charter's introduction, fundamental rights began to take a more central significance within the copyright framework. It is safe to say that the CJEU bases its understanding of fundamental rights on its interpretation of the Charter rather than the ECtHR's jurisprudence.

From the early stages, discussions mention intellectual property rights and fundamental rights in the duality of conflict and coexistence. Some see the expansion of intellectual property right as a decline of fundamental rights. Others argued for a balanced position where two concepts thrive for the same goals.

While there was never a definitive answer to the duality, the Charter introduced a fundamental right to protect intellectual property rights. With this development, the discussion seems futile, since coexistence is the European Union's accepted path.

The coexistence has three distinct ways of interaction; legislative consideration, legislative interpretation, and limiting tool in the courts. As a justification, fundamental rights represent significant potential. Still, there is a worrying tendency of over-expansion, when the legislator zealously defends the right to property. Other fundamental rights must counterbalance such a trend. Interpretation of copyright exceptions with fundamental rights in mind can provide this balanced point. As a last resort, the courts can take up the task of curbing overexpansion of copyright by applying fundamental rights in case law.

For this research, the first two interactions of fundamental rights hold importance. During drafting the proposals, fundamental rights are going to be accounted for and balanced against copyright.

### 4.3. Balancing supranational level considerations

#### *4.3.1. Hierarchy between fundamental rights*

Balancing, by definition, refers to an act of giving equal significance to two or more items.[161] A fair balance, on the other hand, excludes favoritism while giving the same importance. Such an equilibrium between fundamental rights requires a balancing act without any bias or preference. Nonetheless, a tendency exists towards ranking some fundamental rights over the others.[162]

A hierarchy between fundamental rights can, potentially, solve problems attached to the fair balance. The CJEU's case law offers little on this subject. The CJEU does not subscribe to a ranking system, and the Court evaluates the balancing on a case-by-case basis.

The CJEU's approach offers flexibility on the hand and provides no framework on the other. It is hard to predict the outcome of a conflict between fundamental rights. The CJEU's standing is in contradiction with the legal certainty principle.[163]

The next subsections discuss the CJEU's balancing practice from the perspectives of copyright-fundamental rights conflict and the internal market-fundamental rights conflict.

#### *4.3.2. Balancing copyright protection against fundamental rights*

Copyright considerations such as natural law theories and utilitarian justifications are the backbone of copyright development in the Europe. As discussed above, with the announcement of the Charter, copyright interests are forced to coexist with fundamental right concerns. Due to this existence, there were and going to be conflicts between these two pressures in the field of copyright development.

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[161] Definition of balance in the Oxford Learner's Dictionary of Academic English

[162] Jakob Cornides, 'Human Rights and Intellectual Property: Conflict or Convergence' (2004) 7 J. World Intell. Prop. 135; Peggy Ducoulombier, 'Interaction between Human Rights: Are All Human Rights Equal?', *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015); Teraya Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights' (2001) 12 European Journal of International Law 917.

[163] Griffiths (n 78) 11–19.

In *Scarlet Extended* decision, the CJEU held that measures envisioned to tackle copyright infringement by internet service providers are adverse and unreasonably harmful to fundamental rights.[164] On the case of *UPC Telekabel*, a measure of preventing online infringements found to be reasonable and easy to be implemented by the CJEU.[165]

There is a flexibility in the CJEU's reasoning. Each action is evaluated against its consequences to fundamental rights. Unfortunately, the evaluation does not provide a guideline to implement outside of the CJEU's proceedings.[166]

*4.3.3. Balancing the internal market consideration against fundamental rights*

The internal market, as discussed above, is considered to be the most cited justification for copyright harmonization in the EU. The internal market is not, however, immune from conflict with fundamental rights. When there is a conflict, a balancing act must be applied to achieve a fair balance. Similar to fundamental right's conflict with copyright, possible conflicts with the internal market are not able to provide an usable guideline.

In the CJEU's decision of *Schmidberger v Austria*, the Court applied a balancing act based on the factual position of the conflict.[167] In this decision, fundamental rights allowed to trump over the internal market. In another decision, the CJEU favoured the internal market considerations over fundamental rights.[168]

Unfortunately, there is no clear guidance to balance the internal market and fundamental rights. The current position of the CJEU is based on case-by-case analysis and inconsistent.

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[164] *Scarlet Extended Case C-70/10* (n 134).
[165] *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014] ECR (CJEU).
[166] De Vries (n 111) 191.
[167] *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR (CJEU).
[168] Case C-265/95 *Commission of the European Communities v French Republic* [1997] ECR (CJEU).

*4.3.4. Summary*

With the introduction of the Charter and its Article 17(2), there are two different copyright specific supranational consideration in the EU; fundamental rights and the internal market. In addition, copyright considerations remain another copyright specific pressure point.

The boundaries of these rights are not apparent. There is a high possibility of conflict between them. While it is desirable to have a ranking system between fundamental rights, the CJEU does not recognize one. When there is a conflict, the courts must apply a balancing act to achieve a fair balance.

The CJEU, on both cases, achieves fair balance on the factual analysis of the conflicts. The methodology of the CJEU does not provide predictability. This approach results in inconsistent and unclear application of the balancing act.

**4.4. General principles of the EU law**

*4.4.1. Meaning of general pricinciples of the EU law*

At the supranational level, the relevant justifications are discussed until this point. A more extensive consideration, however, is reserved for last. General principles of EU law are a set of rules applicable to every EU law aspect, including copyright. This subsection will start with the scope of the principles then continue on their most promising aspects regarding normative guidance.

The term principles of law commonly used by politicians to support their ideas without defining one.[169] According to Morvan, the concept developed into a tool for setting aside written laws and introducing a novel way for subjecting the law to judicial review.[170] The principles are

[169] Patrick Morvan, 'What's a Principle?' [2012] European Review of Private Law 313, 314.
[170] ibid 319.

primarily unwritten and not well-defined.[171] There is little agreement regarding their function and definition.[172]

There is little known on the genesis of general principles of EU law. They are either invented or discovered.[173] While interpreting the EU law, the CJEU started mentioning general principles based upon the Member States' constitutions, international law, and ECHR.[174] TEU Article 19(1) states that the CJEU must observe the law during the Treaties' interpretation. According to one view, the term "law" in the article refers to a general understanding rather than a specific set of rules.[175] Application of general principles is the consequence of this obligation by the CJEU.

The principles in the EU remained unchanged over the years.[176] Nevertheless, they can be found in all areas of law.[177] In *Mangold v Helm*, the CJEU held that general principles are applicable in interpreting every area of law.[178] The general principles can be used to consider the validity of the secondary legislation.[179] The principles can also fill in gaps between rules, generate new rules, or derogate from existing rules.[180]

According to Horspool and Humpherys, the principles' extensive scope allows a dialogue between the CJEU and national courts.[181] By applying a principle in a particular case, the CJEU

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[171] Constanze Semmelmann, 'Legal Principles in EU Law as an Expression of a European Legal Culture between Unity and Diversity' [2013] TOWARDS A EUROPEAN LEGAL CULTURE, Geneviève Helleringer, Kai Purnhagen, eds., Beck, Hart, Nomos 11.
[172] Catherine Redgwell, 'General Principles of International Law' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law : European and Comparative Perspectives* (1st edn, Hart Publishing 2017) 5.
[173] Constanze Semmelmann, 'General Principles in EU Law between a Compensatory Role and an Intrinsic Value: General Principles of EU Law' (2013) 19 European Law Journal 457, 462–463.
[174] John Fairhurst, *Law of the European Union* (Eleventh edition, Pearson 2016) 74; Davies (n 81) 64.
[175] Davies (n 81) 64.
[176] Horspool and Humphreys (n 81) 124.
[177] Semmelmann (n 171) 3.
[178] *Werner Mangold v Rüdiger Helm* [2005] ECR (CJEU) [75].
[179] Davies (n 81) 63; *Alfred Toepfer and Getreide-Import Gesellschaft v Commission of the EEC* CJEU ECLI:EU:C:1965:65; Léon Dijkman and Sarah Van Kampen, 'The Changing Role of Principles in the European Multilayered Legal Order: Conference Report of the Symposium "Principles and the Law", Utrecht University, 25 May 2011' [2012] European Review of Private Law 425, 428–429.
[180] Dijkman and Kampen (n 179) 426–427.
[181] Horspool and Humphreys (n 81) 124.

also indicates the principle's broader use in all areas of law. On the other hand, Semmelmann claims that the principles act as an alternative instrument of harmonisation driven by the CJEU.[182]

Nonetheless, EU law's general principles are applied mainly at the court level, whether it is a national court or a supranational court. Two of them, however, offer normative consideration; legal certainty and proportionality. The principle of proportionality is well defined in TEU Article 5 and primarily accepted by the concerned parties. The principle of legal certainty is also referred frequently in the Green Papers[183] and the Recitals to the Directives[184], which indicates its relevance to normative guidance. The CJEU also looks out for the principle of legal certainty in the subject of copyright. In one copyright specific case, *UPC Telekabel*, the CJEU held that the principle of legal certainty requires measures to be known before applying any penalty by not implementing them.[185]

To sum up, the general principles of EU law is a controversial topic. The exact scope and content of the principles are not agreed upon. However, from a copyright perspective, two principles, namely proportionality and legal certainty can offer insights regarding this research's normative guideline. Following subsections are going to discuss these two principles in detail.

### *4.4.2. Proportionality principle*

The general principle of proportionality is a concept borrowed from national laws of the Member States, especially France and Germany.[186] The first appearance of this principle is at the *Internationale Handelsgesellschaft* decision of the CJEU.[187] In the decision, the CJEU did not name a proportionality principle. Nonetheless, elements of necessity and appropriateness

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[182] Semmelmann (n 171) 17.
[183] Commission, 'Copyright and Related Rights in the Information Society - Green Paper. COM (95) 382 Final, 19 July 1995' (n 1) para 88.
[184] Recitals 4, 21, 25, 48 and 58 in Information Society Directive.
[185] *UPC Telekabel Wien Case C-314/12* (n 165) para 54.
[186] Takis Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (1st edn, Hart Publishing 1999) 65.
[187] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 01125 (CJEU).

are used to evaluate a European Union measure.[188] In the aftermath of this decision, the application of this principle stretched to every policy decision taken by the European Union and their implementation by the Member States.[189] For instance, in *Fedesa* decision the CJEU held that;

> The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued[190]

Alongside the development of the proportionality principle by the CJEU, the principle also integrated into the Treaties. According to TEU Article 5; '[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. The CJEU is applying the proportionality principle both to the European Union legislation and the acts of the Member States.[191] The application to the Member States' legislation is outside the scope of this research. This research is aiming to shape its normative guideline in accordance to the principle's application to the EU legislation.

In *Marine Harvest* decision, the CJEU held that;

> that the principle of proportionality requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question;[192]

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[188] Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 Cambridge Yearbook of European Legal Studies 439, 446.
[189] Tridimas (n 186) 69.
[190] Case C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health ex parte Fedesa et al* [1990] ECR (CJEU) [13].
[191] Sauter (n 188) 445.
[192] Case T-704/14 *Marine Harvest ASA v European Commission* [2017] ECR (CJEU) [580].

The CJEU describes the principle with two elements; necessity and suitability. The measure taken by the legislation must be necessary to prevent unwanted consequences. Additionally, the measure must present a logical means to the provision's purpose. According to Tridimas, when EU policy is reviewed against the principle of proportionality, the actual review is based on manifestly inappropriate test.[193] In other words, unless the measure taken by the legislation is manifestly inappropriate to achieve its purpose, the legislation is not struck down. On the other hand, when proportionality is invoked to challenge a national measure, the review is stronger and the CJEU prefers the adaptation of the least restrictive alternative. According to Tridimas[194] and Harbo[195], this policy of the CJEU is purposeful and its purpose is to promote European integration.

In copyright jurisprudence, the CJEU cited the proportionality principle time to time with different circumstances. Much similar to abovementioned balancing act between fundamental rights, the proportionality principle is invoked when there is a potential harm to public's fundamental rights. For instance, in *Scarlet Extended* decision, the CJEU viewed an application of Article 3(1) of Directive 2004/48 in contradiction with the principle of proportionality. By misapplication, the measure introduced serious infringement to freedom to conduct business.[196] In another decision, the CJEU warned against an inconsistent transposition of a directive into the national laws. The inconsistency derived from conflict of fundamental rights and the proportionality principle during the interpretation of a directive.[197]

In 2005, Promusicae, a non-profit organization consist of producers and publishers, sued an internet service provider, asking for data that would eventually disclose the internet users who are violating the exploitation rights of the Promusicae's members. The Madrid Court referred the question whether EU law allows such disclosure to the CJEU. The CJEU explained that

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[193] Tridimas (n 186) 66.
[194] Takis Tridimas, *The General Principles of EU Law* (2nd edition, Oxford University Press 2007) 193.
[195] Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal 158, 172.
[196] *Scarlet Extended Case C-70/10* (n 134) para 48.
[197] *UPC Telekabel Wien Case C-314/12* (n 165) para 46.

directives do not oblige the Member State to require internet service providers to disclose personal data in order to ensure effective protection of copyright under civil proceedings. Additionally, the CJEU urged the Madrid Court to apply principle of proportionality when dealing with a conflict between two European Directives.[198] In another decision, the proportionality principle emphasized by the CJEU under similar circumstances. The national courts must balance enforcement of intellectual property rights with the protection of personal data.[199]

In the copyright directives, there are also mentions to the proportionality principle. For instance, regarding technological protection measures (TPMs), Recital 48 of the Information Society Directive articulates that the Member States should respect the proportionality principle;

> Such legal protection should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection.

This reference was also subject of a proceeding before the CJEU. In *Nintendo Co* decision, a circumvention of TPMs implemented on hardware devices is discussed. The CJEU held that measures taken to prevent circumvention of TPMs must not negatively affect devices that have commercially significant purpose other than circumventing TPMs.[200]

Digital Single Market (DSM) Directive have three distinct references to the principle of proportionality.[201] Among them Recital 83 of the DSM Directive reiterate and reconfirm the application of the proportionality principle within the Directive;

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[198] *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR (CJEU) [68–70].
[199] Case C-461/10 *Bonnier Audio AB and Others v Perfect Communication Sweden AB* [2012] ECR (CJEU) [58–60].
[200] Case C-355/12 *Nintendo Co Ltd and Others v PC Box Srl and 9Net Srl* [2014] ECR (CJEU) [30].
[201] Recitals 66, 83 and Article 17(5) in Digital Single Market Directive.

> Since the objective of this Directive, namely the modernisation of certain aspects of the Union copyright framework to take account of technological developments and new channels of distribution of protected content in the internal market, cannot be sufficiently achieved by Member States but can rather, by reason of their scale, effects and cross-border dimension, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

The principle of proportionality is an effective tool to curtail unwanted expansion or undesired consequences of both European and national measures. The principle contains two elements; necessity and suitability. These elements are significant indicators of a balanced provision. This research will apply the principle of proportionality while producing suggestions in its subject. The application of the principle is both necessary, due to TEU Article 5, and beneficial, due to its normative guidance to legislative thinking.

*4.4.3. Legal certainty principle*

Legal certainty and predictability are established principles in common law, civil law and European Union law. Actually, according to Ratio, the principles borrowed from the Member States are often related to either the principle of legal certainty or the principle of proportionality.[202] The principle of legal certainty is inherent in most of the Member States' legal system.[203] Legal certainty is an established concept in international laws as well. For instance, the European Court of Human Rights states that legal certainty 'requires that all law [must] be sufficiently precise to allow the person-if need be, with appropriate advice-to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[204]

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[202] Juha Raitio, *The Principle of Legal Certainty in EC Law*, vol 64 (Springer Science & Business Media 2003) 171.
[203] Jérémie Van Meerbeeck, 'The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust' (2016) 41 Eur Law Rev 275, 275.
[204] *Korchuganova v Russia* [2006] ECtHR 75039/01 [47].

The legal certainty principle is frequently described as an 'umbrella' principle. Numerous principles are often considered to be a part or a by-product of the legal certainty principle, such as principles of legitimate expectations, principle of non-retroactivity or principle of vested rights.[205] This research will examine the principle of legal certainty in context of drafting legislation.

In this context, the CJEU offers a description on how a provision should be in terms of the principle of legal certainty. In *Costa* decision, the CJEU held that 'The principle of legal certainty requires, moreover, that rules of law be clear, precise and predictable as regards their effects'.[206] This understanding is also visible in *VEMW and Others*[207], *Ireland v Commission*[208] and others.[209] The CJEU also includes the ability to be consistently applied by the national courts in the principle;

> "Similarly, in areas covered by EU law, the legal rules of the Member States must be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and to enable national courts to ensure that those rights and obligations are observed."[210]

The CJEU chooses predictability and clear, precise understanding as fundamental elements of the legal certainty principle. Even though the CJEU explains the principle of legal certainty in simple terms, it is a complex concept, and there is no consensus on the subject. For instance, Paunio mixes these two elements into one, claiming that predictability requires laws to be clear for those concerned that they can predict the legal outcome of the laws with relative accuracy.[211] Additionally, Paunio supplements the principle with another component; acceptance.

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[205] Van Meerbeeck (n 203) 280.
[206] *Joined Cases C-72/10 and C-77/10* (n 80) para 74.
[207] Case C-17/03 *Vereniging voor Energie, Milieu en Water and Others v Directeur van de Dienst uitvoering en toezicht energie* [2005] ECR (CJEU) [80].
[208] Case 325/85 *Ireland v Commission of the European Communities* [1987] ECR (CJEU) [18].
[209] Case C-183/14 *Radu Florin Salomie and Nicolae Vasile Oltean v Direcția Generală a Finanțelor Publice Cluj* [2015] ECR (CJEU) [31].
[210] ibid 32.
[211] Elina Paunio, 'Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order' (2009) 10 German Law Journal 1469, 1469.

According to her, acceptance means that the legal community accepts the laws in question.[212] Raitio disavows any attempt to define the principle, and argues that 'the principle of legal certainty cannot be expressed by definitions alone, because it is an underlying general principle of law'.[213] According to Raitio, the legal certainty principle reflects the requirement of clarity, simplicity and stability of the law.[214] To make it simpler, Raitio generalised different legal certainty components into three categories; precise norm formulation, judicial review and democratic control.[215]

No matter how the legal certainty principle is defined, the common component of clear, precise and predictable norm formulation remains the same. The legal certainty principle in the European Union applies equally to the EU institutions and the Member States. For this reason, the legal certainty principle is a sufficient reason for a national law to be changed. [216]

In copyright law, Information Society Directive contains several references to the principle of legal certainty can be observed. For instance, in Recitals 6 and 7 of the Information Society Directive, legislative differences among the Member States are considered to be a source of legal uncertainty. Similarly, Recital 4 of the Directive states that;

> A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors.

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[212] ibid.
[213] Juha Raitio, 'Legal Certainty, Non-Retroactivity and Periods of Limitation in EU Law' (2008) 2 Legisprudence 1, 1.
[214] Xavier Groussot and Timo Minssen, 'Res Judicata in the Court of Justice Case-Law: Balancing Legal Certainty with Legality' (2007) 3 European Constitutional Law Review 385, 388.
[215] Raitio (n 202) 127.
[216] Case C-313/99 *Gerard Mulligan and Others v Minister for Agriculture and Food, Ireland and Attorney General* [2002] ECR (CJEU).

A harmonised approach is therefore expected to increase legal certainty while attracting more investment and talent. These recitals point out the fractured state of the copyright law among the Member States and align the goals of the principle of legal certainty with the functioning of the internal market. More specifically, the Directive goes on and claim that there is a legal uncertainty regarding on-demand transmission and only a broad definition of reproduction right can ensure legal certainty.[217]

DSM Directive also refers to the Information Society Directive and states that there is a lack of clarity when the rights defined within the Information Society Directive applied to digital uses and introducing new provision in this scope will improve legal certainty.[218] Similar concerns also raised for text and data mining and the DSM Directive's introduction for an exception supported by establishing legal certainty.[219] There are also other references to the legal certainty principle in regards to collective management[220] and authors' compensation methods.[221]

For this reason, when proposing a better law in the substantive chapters, among concepts or components of a formulation, the most clear, precise and predictable option is going to be prioritised over the others for the sake of legal certainty.

#### *4.4.4. Summary*

While the general principles of EU law remains a controversial topic, principles like legal certainty and proportionality provides valuable normative insight into European legislative process. These two principles are accepted and often applied during judicial and legislative processes. The principles' function often regarded as external to copyright development. During articulation and interpretation of the law, the principles review the scope and effect of the provision with regard to other pressures such as fundamental rights, internal markets or other European legislations.

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[217] Recitals 21 and 25 in Information Society Directive.
[218] Recital 19 in Digital Single Market Directive.
[219] Recital 18 in ibid.
[220] Recitals 45 and 58 in ibid.
[221] Recital 60 in ibid.

Against this backdrop, this research is going to give significance to legal certainty while keeping proportionality as a benchmark for addressing thorny issue involving considerations other than copyrights' own.

### 4.5. Copyright justifications: natural rights, utilitarian rationale

Even though scholars define several different rationales, this section will analyse two most known of them; natural rights and economic rationale. They are also the most active justifications among the Member States. The Member States from *droit d'auteur* tradition usually follow natural rights justification and the other Member States from copyright tradition usually subscribe to an instrumentalist rationale.

Natural rights theory claims that copyright protection is granted because it is right to do so. Any copyright derived from the mind of an author is worth protecting. The copyrighted work is seen as a spiritual child of the author. By contrast, the economic rationale justifies copyright protection by granting them as incentives for creativity. Since it is a challenging and lengthy process to produce a movie, a piece of music or a book, there should be an incentive for the author to bear until the end of the process.

Unfortunately, natural rights rationale has little to offer when it comes to normative guidance. Garon accepts natural rights as a sound rationale but criticises it for the lack of additional guidance on future development.[222] As normative guidance, natural rights rationale offers a more author-centric view.

On the other hand, the utilitarian rationale advises that any development in copyright law should provide an incentive for the authors to produce while limiting copyright's adverse effects to the public. It is essential to mention the emphasis on utilitarian justifications in the recitals of Information Society Directive. Recital 9 expressly states copyright aims to protect and

[222] Jon M Garon, 'Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics' 88 Cornell L Rev 1278

promote creativity, a utilitarian rationale rather than an internal market justification. Recitals 2, 10 and 11 also mention utilitarian reasons for this harmonisation.[223] As normative guidance, the utilitarian rationale suggests focusing on the incentive.

### 4.6. Rationales behind the existence of co-authored works

Finding normative guidance for proposing a better law in co-authored works requires a solid understanding of the fundamentals. Authors in a co-authored work rely on the governing rules of authorship. Provisions about multiple-authored works do not define who the author is.

The question of why co-authored work exists is not answered in the literature. One can argue that co-authorship is a natural reflection of joint property rights in the copyright. It is natural to the law. The other argument can be that it is here because it incentivises and promotes creativity. This section is going to compare and define rationales for co-authored works. These rationales are fundamental when it comes to additional formulations such as secondary formulation and collective works.

The reasons for co-authorship to exist could be explained in two points. Firstly, co-authorship is defined because a law should resolve a situation where two or more people own single defined copyright. This reason is based on necessity and legal certainty. As also argued above, the legal certainty point can easily be explained by the natural reflection of common property argument. This point can also be supported by fundamental rights argument. National legislation must recognise and regulate co-authored works to protect the right to property in co-authored works.

The second reason is that collaboration is efficient, and defining formulations helps promote collaboration between authors, incentivising creativity. According to Livingston, co-authored works necessitate uncoerced and cooperative activity between authors.[224] This joint effort can save significant time, and other times collaboration can be a practical necessity to produce

[223] Digital Single Market Directive.
[224] Paisley Livingston, 'On Authorship and Collaboration' (2011) 69 The Journal of Aesthetics and Art Criticism 221.

specific results in a large-scale effort such as a movie. Osadebe lists eleven reasons for co-authorship, including more accuracy, personal development, and teamwork.[225] Similarly, Hart also examines the question of why authors collaborate to create work.[226] According to Hart, most of the time, collaboration leads to the improved overall quality of the work. In less often cases, collaboration helps establish a division of labour which eases the workload and encourages authors to undertake copyright-protected works.[227]

To demonstrate the rationales, the basic formulations in the United Kingdom and France are good examples. The first rationale has more influence than the second one in the United Kingdom's basic formulation. The United Kingdom's joint authorship narrows its focus to inseparable contributions. Without any regulating provision, such contributions would be impossible to exploit or would require an assignment from one party to the other. Even though the UK also focuses on other requirements, and its approach is not purely based on the first reason, the first rationale is easily observable. The French basic formulation is an example of the first and second approaches. The formulation is indifferent towards divisibility of the work. The focus is on the common goal and existence of collaboration. It sets out to define the governing rules of such collaboration to protect the interest of the parties. It is eliminating possible hesitation, therefore promoting collaboration.

The basic formulation is a must-have formulation for the sake of legal certainty. The first rationale is recognised as a genuine motive by every Member State, and as a result, the basic formulation can be found in every national regime. On the other hand, secondary formulation and collective works are facing the question of necessity. Since the first rationale is always met with the basic formulation, any additional formulations should be backed with the second rationale. If they exist, they ought to promote collaboration and increase efficiency. Therefore, their ability to fill a gap in practice. From the outlook, the second rationale resembles the

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[225] Ngozi E Osadebe, 'Authorship and Co-Authorship: Some Basic Facts Librarians Should Know'.
[226] Richard L Hart, 'Co-Authorship in the Academic Library Literature: A Survey of Attitudes and Behaviors' (2000) 26 The Journal of Academic Librarianship 339.
[227] The collaborative works especially utilized in the science to overcome the complexity of the subjects. See Jesús Zamora Bonilla, 'The Nature of Co-Authorship: A Note on Recognition Sharing and Scientific Argumentation' (2014) 191 Synthese 97.

utilitarian justification. The other formulations should exist if they add considerable incentives after the basic formulation.

Asking the question of why co-authored works exist resulted in two points. These explained points are vital and will be used as normative guidance when considering better law selections. In the basic formulation, satisfying legal certainty is the first question. Then, the advantages and disadvantages of having a utilitarian approach to expand its perspective will be discussed. It is essential to bear in mind that there are multiple scenarios, where a basic formulation can limit its reach, and the secondary formulation can fill the rest of the gap or the basic formulation can include the objective of the first and second rationale. It can eliminate the need for a secondary formulation.

Collective works are also going to be scrutinised concerning their economic value. The objective of collective works is somewhat different from the basic and the secondary formulation. The principal is an important actor. There are going to be two arguments for discussion. The first, is the collective works filling a gap in the practice and, second, are they effectively acting as an incentive for creativity? If the first question is answered positively, then the second question will investigate the principal's power in the collective works.

### 4.7. Conclusion

Different aspects of normative considerations for copyright law are discussed in this chapter. All of these must be taken into account when dealing with a normative framework. The European Union embraced the internal market and competitive edge arguments as rationales for harmonisation in copyright. However, the internal market is not the only supranational consideration for EU copyright law. Fundamental rights are significant and must be balanced against other supranational considerations. The recently developed right to property rationale is gaining importance through case law. It is evident that in the future of EU copyright, fundamental rights will play an important part. This research will use *Luksan* as guidance to look for any loss of title in the process.[228] Additionally, freedom of speech has started to gain

[228] *Luksan Case C-277/10* (n 67).

significance over copyright after *Pelham*[229], *Funke Medien*[230] and *Speigel Online*[231] decisions. The liberal interpretation of copyright exceptions by the CJEU is another normative guide to shape this research's normative evaluations.

Another source of normative guidance is coming from the rationales behind the existence of co-authored works. A formulation for co-authored work can be justified by its necessity or its ability to promote collaboration. These points are going to play critical roles for the normative guidance of this research. Each formulation will be scrutinised against these principles while finding out their necessity or their extent.

Finally, the principles of legal certainty and predictability are crucial when it comes to outweigh one option from another when constructing the proposed directive for this research. This research aims to select judicially developed and precise and predictable options over controversial and challenging options in the courts.

## 5. Summary and structure of the thesis

This chapter has highlighted the importance of this research and its contribution to the field, explained the comparative law method that it will use and the normative tools that it will draw upon to help inform the proposals for a model directive.

Neither the Berne Convention nor TRIPs nor the Universal Copyright Convention address multiple authorship in copyright other than principles regarding term of protection. Tunis Model Law on Copyright goes little further and follows a similar approach to copyright tradition while defining what is a joint authorship and what is the ownership structure should be. However, without representing various interest groups in the European Union, the model law can only be a limited suggestion.

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[229] *Pelham Case C-476/17* (n 148).
[230] *Funke Medien Case C-469/17* (n 149).
[231] *Spiegel Online Case C-516/17* (n 150).

The European Union attempted in several directives to resolve some of the issues surrounding multiple authorship. However, these efforts are ineffective or significantly limited to certain subject matters. Without any directive or treaty to regulate multiple authored works, copyright contracts are used to remedy plurality of regulations on multiple authorship. There are several European Union regulations on the issue of cross-border contracts. These regulations, unfortunately, are not effective for solving infringement or contract breaches pertaining to multiple authored works. Applicable laws and jurisdictions vary depending on several factors. This introduces uncertainties embedded in the unharmonized aspects of multiple authored works.

In addition to revealing the lack of harmonisation in multiple authored work, there is also advantages to harmonise this subject. Any unitary copyright code attempt in the European Union needs to clear these aforementioned issues. A code can provide enhanced legal certainty and transparency. Moreover, a harmonized copyright law is significantly beneficial to the freedom of movement in the internal market. A prominent proposal for the European Copyright Code came from the Wittem Group. This proposal, unfortunately, disregards multiple authored works and deals only with certain elements of copyright. In the literature, there are several books which cast a wide net around the globe. These books contain most the modern copyright system. However, they lack the comparative study or any proposal of a model law. The remaining literature consist of more advance comparison and study of multiple authored works. Their scope, unfortunately, remains too narrow in terms of jurisdictions or subject matters. A comprehensive study of multiple authored work in the European Union is the missing piece before legislating for multiple authored works.

For methodology, this research is going to use micro-level comparison among selected jurisdictions. After evaluating several grouping options, the study is divided into three sections and categories are formed based on the resemblances between jurisdictions inside each section. France, Germany and the United Kingdom are selected and later Ireland is added due to the United Kingdom’s exit from the European Union. The research is divided into three main sections; basic formulation, secondary formulations and collective works. Basic formulation represent the fundamental formulation that exist in the national legislations. Collective works

are one of the alternative multiple authorship formulation in the European Union. Collective works are recognized by the significant number of Member States. However, the meaning of the term differs from jurisdiction to jurisdiction. Secondary formulations contain remaining alternative formulations among the selected jurisdictions and specifically work of adaptations. Apart from these main sections, audiovisual works are treated as a special category and it is going to be analysed in an individual section.

The purpose of this research is twofold. The first is to examine and contrast various sets of rules inside the European Union. The second objective is to make a suggestion for achieving a harmonised solution. This study will employ a normative guideline derived from the European Union's own normative tools and constitutional issues to give a solution. At the supranational level, the bulk of harmonisation initiatives prioritise the internal market. However, since the Charter's introduction, fundamental rights have been viewed as a crucial factor in any harmonisation endeavour. It is accepted that fundamental rights and intellectual property rights can co-exist and they must be balanced against each other when in conflict. Fundamental rights can be used as a normative guide to justify harmonisation efforts or as an interpretive tool to be used during the law-making stage or an external constraint to rein in intellectual property rights overreach. The last factors to consider are the general principles of the EU law. These principles are developed through case law and later some of them are codified with treaties. Among these principles, legal certainty and proportionality are significant in this research. They both provide normative guidance and this research is going to utilize these principles when drafting the proposal. Lastly, the normative guidance is also supported by copyright specific traditions which affect national copyright legislations.

The remainder of the thesis is structured as follows: Chapter II focuses on critical aspects of the basic formulation; collaboration and common goal, significant and creative contribution, distinguishable or indistinguishable contribution and effects of genre or categories of works to the basic formulation.

Under the collaboration and common goal section, meaning, timing and method of collaboration is discussed. There are significant similarities among selected jurisdictions on these points. Certain elements such as division of labour and non-concurrent contributions are

discussed in detail. In the subsequent section, contractual declarations' effect on element of collaboration and posthumous collaboration found to be non-existent. Also, the element of intent is evaluated while bringing the United States into the comparison. This research argues that the element of intention is too complex to be a stable factor in co-authorship.

In the creative contribution section, the research analyses the scope and nature of creative contributions. The existence of creativity is accepted in all jurisdictions. However, the means of proving creativity varies from jurisdiction to jurisdiction. The research tries to find a common way to prove the existence of creativity. Commissioned works, immaterial contributions, ghostwriters and question of interviews are discussed as well.

Intellectual indivisibility, material indivisibility and non-requirement are compared against each other. The research opts out not to propose any form of indivisibility. With this choice, the basic formulation's scope becomes more extensive, and the predictability of the formulation improves. After this, the categorisation of contributions is examined, and the necessity of categorisation is questioned. The research finalises that a certain degree of categorisation is unavoidable, however, by virtue, any type of categorisation brings ambiguity. The research proposes to confine the categorisation into a small area of the basic formulation to limit the ambiguity. In the end, a legal partnership among co-authors is analysed with mentions of the distribution of income, exploitation and other aspects.

As a particular section, audiovisual works are also explained and compared against the basic formulation. Even though audiovisual works are not in the scope of this research, the proposals made throughout the chapters have effects on audiovisual works. This section considerers these effects and discusses the differences.

Chapter III begins with laying out the structure of the secondary formulation. The secondary formulation has two members; adaptations and connected works. The first section deals with adaptations. Around the concept of adaptation, the term adaptation is frequently used for different meanings. For instance, adaptation may mean the act of adapting a pre-existing work into a new work, or it can also mean the final adapted work. In the beginning, the ambiguity

among the different meaning of adaptations is cleared. The relationship between reproduction and adaptation is discussed in detail from the perspectives of selected jurisdictions and the European Union. Then, the research divides the topic into three categories; right to adaptation, adaptation as action and adaptation as a separate work. This categorisation is similar to the Berne Convention's formulation of adaptation. Article 2(3) of the Berne is about adaptation as a separate work, and Article 12 states that adaptation as an action is prohibited without clearing the right to adaptation. These three elements are observable in the most Member States. While discussing the scope of the right to adaptation, this research touches on authorisation and exploitation of the right. The authorisation has significance both during the development and the commercialisation phase of the work. This research opts to not require an authorisation during the development phase because it is hard to know the existence of an adaptation without its public disclosure. Without any potential commercial gain during this stage, it is hard to justify the restriction against the freedom of speech. The subsection further investigates the reach of the exploitation of the right. The question of whether any sub-adaptation still requires another authorisation from the original author is discussed. To protect the interest of the original author and subsequent authors, this research proposes to recognise a limited right to sub-adaptation. The principle of proportionality is essential in this case. The courts must protect the subsequent authors' economic interest from unduly denials from the original author.

While discussing the scope of adaptation as an action, this research examines the actions most frequently used in international treaties and national legislations; translation, adaptation, arrangements, transformation, collection of works, revisions and restorations. Each of these actions has different meanings. However, these meaning are evolving with the advancement of technology for adaptation. Therefore, a strict definition of these actions would harm their purpose of use. Therefore, this research will use the European Union's choice of formulation in its suggestions without defining them.

Under the scope of adaptation as a separate work, the analysis starts with the distinctions of adaptation from reproduction and basic formulation. The requirement of originality for adaptations and which category they belong to investigated subsequently. The element of originality has a European standard. By virtue of this standard, any categorisation effort in

copyright is not necessary. If an adaptation satisfies the European standard of originality, the adaptation is considered original in the European Union. Hence, there is no need for the adaptation to belong under a specific category to gain copyright protection. Consequently, this research accepts the European standard of originality and does not provide a categorisation for the adaptation as a separate work.

In the last subsection, the copyright exceptions related to the right to adaptation are discussed, emphasising the parody exception and concept of free use in Germany. The parody exception is especially relevant because of the *Deckmyn*. The selected jurisdictions revisited the interpretation of exceptions regarding reproduction and adaptation rights after the decision. The concept of free use is, on the other hand, is beneficial to illustrate the line between a legitimate adaptation and borrowing an idea or concept from another work. The idea-expression dichotomy has a tremendous effect on the creation of adaptation. Any unprotected idea can be borrowed without triggering the copyright protection. However, borrowing any expression requires clearance of the right. The concept of free use is built on this understanding, and examining the concept is beneficial for pointing out the outer limit of the right to adaptation.

The connected works are studied under the second section of Chapter III. Germany is the only example of connected work among the selected jurisdictions. Any accepted work of the German connected work also belongs basic formulation of this research. For this reason, this research does not suggest another concept called connected work. This section describes the connected works and compares the concept against the French basic formulation. The French basic formulation also includes any work accepted by the connected work. Therefore, it is important to analyse where connected work differs from French formulation and is there any need for such deviation. The section starts with examining the agreement between authors. Afterwards, the term of protection and exploitation of the work are analysed. Finally, the legal relationship between co-authors compared with the French formulation.

Chapter IV primarily deals with collective works and collections. There are two elements relevant to copyright in the act of collecting. The first one is the collector's actions. The choice

or preference while selecting contributions, when original, is copyright protected. The second one is the copyright in the collected works. These are called contributions to collections/collective works. The former element is not in the scope of this research. There is no inherent plurality of authorship in collecting works. There could be more than one collector. In that case, the basic formulation of this research would apply. For the latter element, the plurality of the contributions makes it impractical and difficult to apply basic formulation. Therefore, there is a need for regulation for work that contains a high amount of contributions.

Collections are widely accepted in the European Union, and the Database Directive directly regulates this subject matter. Collective works, on the other hand, are not generally accepted. France is where collective work first used, and the jurisprudence on the subject is the most developed. Before comparing collective work and collections, this research describes the French conception of collective work. After understanding collective work, the collection is analysed and compared against collective works. This chapter questions whether there is a need for a directive when basic formulation seems challenging to apply and, if that is the case, what is the best appropriate directive for such circumstances. The principle of proportionality is significant for this chapter as well. The necessity and the measure of directive are both questioned.

This research suggests a particular category of collection, rather than defining collective work. Collective work as a separate category of work seems disproportionate for its purposes. While defining certain circumstances where harmonisation is necessary, the issues presented with a high amount of contributions can be resolved. Germany is an example of this approach. Article 38 of UrhG defines a specific set of circumstances where collections exist and regulates these circumstances to avoid disadvantages of high amount contributions. This research follows this approach and suggests a similar solution.

After finishing the last substantive chapter, this research sets out its proposed directive. This proposal is a possible model for harmonisation. Such a model may act as a guide to the European Union legislators. Discussions and comparisons regarding several concepts are the

actual guidance, and the proposal is an example of an outcome derived from these substantive chapters.

# CHAPTER II: BASIC FORMULATION

Basic formulation is a pseudo-category that contains the fundamental understanding of co-authored works in the Member States. The features of the basic formulation for the purposes of comparative analysis were discussed and explained in Chapter I, section 3.1.

This chapter seeks to compare these understandings among the selected jurisdictions. The chapter consists of five comparative sections: section 1 collaboration and the common goal, section 2 significant and creative contribution, section 3 intellectual or material indivisibility, section 4 genre or categories of work and, finally, section 5 legal consequences. Following the main comparative sections, there is a section where audiovisual works are analysed in more detail.

This structure compartmentalizes significant aspects of the basic formulation. While dividing the sections jurisdiction by jurisdiction could be an option, selecting points of interest and discussing every jurisdiction under each topic is a better solution to draw out differences and similarities. The first three sections – collaboration and the common goal; significant and creative contribution; and intellectual or material indivisibility genre - are the main elements of the basic formulation. As was explained in section 3.1 of Chapter I, they are derived from the most apparent features of the basic formulation in the selected jurisdictions. Then these sections are detailed with multiple sub-sections and discussions. The reason for applying such structure in this chapter is to follow a systematic and clean approach emphasising the elements, similarities and differences of the selected jurisdictions.

A proposed solution is going to be embedded in each section. While comparing similarities and differences, the chapter will argue for or against the main points. Eventually, the proposed structure is going to be articulated at the end of the thesis.

The proposed structure for the basic formulation contains two articles. The first article deals with sections 1, 2 and 3. The subject of this article is the formation of co-authored works. The second article focuses on sections 4 and 5. In contrast to the first article, its concentration is on

the legal consequences of successful co-authored work. There are supporting recitals where an explicit provision did not seem to be necessary.

This chapter and the thesis in general prefer to use the terms 'co-authorship' and 'co-authored work' to refer the legal status between authors in a basic formulation and the subject work of a basic formulation. In the United Kingdom, the term co-authorship differ from the basic formulation and it refers to 'the collaboration of the author of a musical work and the author of a literary work where the two works are created in order to be used together' as defined in the CDPA s. 10A. While discussing the basic formulation in the United Kingdom and Ireland, the thesis is going to use joint authorship and joint authors. In contrast, when discussed in conjunction with other jurisdictions or in terms of research's proposal the terms co-authorship and co-authored work will be used. Unless otherwise specified, the phrase co-authorship under these circumstances will refer to joint authorship in the United Kingdom and Ireland.

## 1. Collaboration and common goal

Collaboration is the action of working with someone to produce something.[232] While its meaning is simple and plain, its application in co-authored works is complex. This complexity, in part, stems from the lack of definition in the relevant copyright provisions. In all selected jurisdictions, 'collaboration' is a clear requirement of a successful basic formulation.

Article 8(1) *Urheberrechtsgesetz*[233] (German Authors' Rights Law, UrhG), requires a 'jointly created work' in the *Code de la Propriété Intellectuelle*[234] (French Intellectual Property Law, CPI) titles the basic formulation as *œuvre de collaboration* (collaborative work). Moreover, while defining secondary formulation in CPI Article L.113-2(2), it emphasizes the lack of collaboration as a requirement. This points out collaboration as a condition for the basic

[232] Oxford University Press, 'Collaboration, Noun' (*the Oxford Advanced American Dictionary*, 2021) <https://www.oxfordlearnersdictionaries.com/definition/american_english/collaboration> accessed 19 July 2021.
[233] Gesetz über Urheberrecht und verwandte Schutzrechte 1965 (Urheberrecht).
[234] Code de la propriété intellectuelle 1992 (CPI).

formulation.[235] Additionally, according to the Court of Cassation basic formulation is a 'concerted and collaborative creative work'.[236] Irish Copyright and Related Rights Acts (CRRA) starts to define the basic formulation as 'a work produced by the collaboration of two or more authors…'.[237] As apparent from the relevant provisions, collaboration is not defined but nevertheless required. This puts the courts in a position to speculate regarding what is a collaboration.

It is obvious that there is a consensus on the requirement of collaboration. The consensus itself is a sign that there is no need for intervention from the perspective of the internal market rationale. The consensus also indicates that collaboration is a stable requirement which is one of the key elements of legal certainty. It is also crucial that by defining collaboration properly, authors are distinguished from non-authorial contributors and authors with small contributions are also protected against authors with a position of power over the work. This is also important to protect the intellectual property right of the every co-author.

This research is going to include this requirement in its proposed directive. The meaning, scope and whether it has a clear, predictable meaning is going to be discussed in the following sub-sections.

### 1.1. The meaning of collaboration in co-authored works

As argued above, copyright legislations require but not define the term collaboration. Case law and academic literature in the selected jurisdictions offers more insight into what constitutes collaboration. Little can be learned about collaboration from French author's right law and it

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[235] See regarding collaboration as a requirement in the basic formulation; André Lucas, Henri-Jacques Lucas and Agnès Lucas-Schloetter, *Traité de la propriété littéraire et artistique* (LexisNexis 2012) para 189; Henri Desbois, *Le droit d'auteur en France* (Dalloz 1978) para 133; André Lucas and others, *Traité de la propriété littéraire et artistique* (5e Edition, LexisNexis 2017) para 189.

[236] *Cour de Cassation, Chambre civile 1, du 18 octobre 1994, 92-17770, Publié au bulletin* 2/1995 RIDA; *Cour de Cassation, Chambre civile 1, du 2 décembre 1997, 95-16653, Publié au bulletin* 2/1998 RIDA 296; André Kerever, 'Chronique de Jurisprudence - Tribunal de Grande Instance de Nanterre, Chambre 1, Du 6 Mars 1991' RIDA 154.

[237] United Kingdom's Copyright Code (CDPA) shares exact wording with its Irish counterpart. This great similarity is an advantage. The jurisprudence is less developed in Ireland and the UK's leading decisions can be used to fill this gap.

is not clear from the case law what factors are significant while determining its existence. Nonetheless, Desbois considers common inspiration and mutual control as crucial elements of collaboration.[238] With a common inspiration, or a common goal, in mind, co-authors can be responsible from separate parts. Co-authors do not need to touch every part of the work. There must be, however, a collaboration. About this point, the Court of Cassation, in a case called *Verame*, decided that even though two related works, which are created concurrently and have interrelated subjects, are not considered collaborative works.[239] A director reached out to Mr. Verame to produce a documentary about his painting process. According to the court, the director did not collaborate on Mr. Verame's work and Mr. Verame did not contribute to the making of the documentary. Although, the painting and the documentary are closely interlinked, no collaboration have been found between the director and Mr. Verame.

In another case, the Court of Cassation confirmed the findings of the Paris Court of Appeal regarding an art gallery show.[240] The gallery published a catalogue of works with descriptions about their authors and the works in general. Each chapter prepared by different individuals and a coordinator was responsible of the overall organisation. The court found that without any actual collaboration in any of the chapters or in the coordination, the catalogue should be classified as a collective work not a collaborative work. The multitude of authors is not sufficient to classify a work collaborative. Actual collaboration must exist between authors.

In Germany, the *Bundesgerichtshof* (Federal Court of Justice, BGH) examined collaboration in several judgments. In the decision of *Fash 2000*, a computer program was brought before the courts regarding its exploitation in the fashion industry.[241] Whilst there were contributions spread over a long period with noticeable gaps, the BGH focused on the collaboration element with an emphasis on act of 'working towards a common goal'. In another case from the Dusseldorf Court of Appeal, the court assessed co-authorship between a student and its

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[238] Desbois (n 235) para 133.
[239] *Cour de Cassation, Chambre civile 1, du 3 novembre 1988, 87-13042, Publié au bulletin* 303 Bulletin 1988 207.
[240] *Cour de Cassation, Chambre civile 1, du 18 octobre 1994, 92-17.770, Publié au bulletin* (n 236).
[241] *Fash 2000* [2005] BGH I ZR 111/02, 2005 GRUR 860.

professor over a sculpture. According to the student, the professor from art college placed the student's finished head-shaped sculpture over a newly made sculpture. The student claimed co-authorship and the Dusseldorf Court of Appeal found that they did not collaborated on the final work.

The reasoning behind the court's decision was based on whether a common task or an overall idea shared by the student and the professor. The professor put together the larger sculpture without the knowledge of the student. Despite the court's efforts of searching for verbal or non-verbal communication between the professor and the student, the court did not able to confirm whether the student had knowledge of the final project. Failure to find such communication led to the negative assumption of collaboration between the interested parties.
Similarly, these two court decisions repeat the term 'common goal'. The commentators also subscribe to a similar definition when describing collaboration between authors.[242] From a German viewpoint, it is safe to assume that collaboration should be understood as contributors working towards a common goal. This viewpoint is similar to Desbois definition of French understanding of collaboration.[243]

Even though Ireland has somewhat limited case law regarding joint works, its shared understanding of law with other common law countries makes their case law relevant jurisprudence for Ireland. Joint works entered into English courts as early as 1871.[244] In *Levy v. Rutley,* the claimant made small additions to a theatre play with an intention to make the play more attractive to the viewers. The contributions added without any collaboration from the author and after the author submitted the work. The court decided that there must be a 'joint labouring in the furtherance of a common design'.[245] Lack of following such common design

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[242] Thomas Dreier and Gernot Schulze, *Urheberrechtsgesetz Urheberrechtswahrnehmungsgesetz, Kunsturhebergesetz* (Beck, C H 2015) s 8(2); Artur-Axel Wandtke and others, *Praxiskommentar zum Urheberrecht* (C H Beck 2014) s 8(16); Wilhelm Nordemann and Friedrich Karl Fromm, *Urheberrecht: Kommentar zum Urheberrechtsgesetz und zum Urheberrechtswahrnehmungsgesetz* (Kohlhammer 2008) s 8(3); Georg Erbs and Mark Kohlhaas, *Strafrechtliche Nebengesetze 215. Ergänzungslieferung: Rechtsstand: Juni 2017* (Beck C H 1 de setembro de 2017) s 8(1).
[243] Henri Desbois, *Le droit d'auteur en France* (Dalloz 1978) s 133.
[244] *Levy v Rutley* [1871] LR 6 CP 523.
[245] *ibid 44.*

prevented the claimant of joint authorship. In another key judgement, *Heptulla v. Orient Longman*, the court acknowledged that 'if two persons collaborate with each other and, with a common design, produce a literary work then they have to be regarded as joint authors'.[246] The term common design is similar to terms used in France and Germany.

Overall the analysis of the selected jurisdictions reveals a clear pattern of relationship between collaboration and common goal. Working towards a common goal is an observable criteria of an existing collaboration. The unanimity among the selected jurisdictions is a good indicator of this relationship as well. Collaboration, without involving common goal analysis, is easy to define but its existence is hard to prove. Given the fact that copyright protects intangible materials, it is wise to look for the most obvious material outcome of collaboration; working towards a common goal.

The proposed solution is going to address these findings and going to include a reference to common goal in addition to collaboration. It is best to start by defining a co-authored work with collaboration in mind and link the contributions to a common goal requirement. With this method, collaborative efforts are clearly designated as a requirement, whereas common goal reference helps the observation and finding the material outcome of collaborative efforts. Principle of legal certainty plays a key role in this recommendation. Using common goal as a reference opens the collaboration into a more predictable understanding. Judicial interpretation is going to be more stable and predictable as well.

Under these considerations, the proposed solution is going to be shaped as; 'A co-authored work is a work where collaborative efforts and contributions of more than one natural person towards a common goal are required to exist in the same work.'

### 1.2. The timing of collaboration in co-authored works

The term timing refers to the beginning point of collaboration. Co-operation between authors could start after one author already made some progress. It is highly probable that an author

[246] *Najma Heptulla v Orient Longman Ltd And Ors* [1989] AIR Delhi 63 [25].

could begin her research on a subject and later discover a willing and experienced partner to collaborate. This section discusses the question of whether these occurrences affect the legality of co-authorship.

On the one hand, selected legislations are silent. Jurisprudence, on the other hand, answers the question in a clear and precise manner. As mentioned in the first section, the BGH in the case *Fash 2000* accepted 'temporal staggering of the contributions'.[247] In other words, the time gap between contributions does not endanger the quality of collaboration. The BGH also offered a similar but more detailed reasoning on a case about an accounting program regarding presumption of authorship. In the judgement, the court drew attention to the time gaps between contributions and stated that, 'the creative contribution can be made in a step-by-step work - e.g. a computer program - even in a preliminary stage, if it is made as a dependent contribution to the unified creation process of the work completion'.[248]

In another case, the BGH acknowledged that a co-author's death before the work's completion does not affect the co-authorship status.[249] After confirming that co-authors followed a common goal, the BGH found that works created over a long time are eligible for co-authorship.[250] It is clear from the jurisprudence that timing of the collaboration is not important, with the condition that it occurs before the completion of the work. Wandtke and others, similarly argue that co-authorship is possible in the progressively emerging works.[251] A contribution can be inserted in preliminary, intermediate or the final stage of the work. Their examples of such works are complex architecture, computer programs, acts in a play, chapters in a book, scenes in a screenplay.

In France, there is a limited mention of non-concurrent contributions in the law. The doctrine, however, is clear on the subject, they refer to the issue as 'the successiveness of contributions'.

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[247] *Fash 2000* (n 241).
[248] *Buchhaltungsprogramm* [1993] BGH I ZR 47/91, 1994 GRUR 39, 40.
[249] *Staatsbibliothek* [2002] BGH I ZR 199/00, 2003 GRUR 231.
[250] ibid 234.
[251] Wandtke and others (n 242) s 8(17).

According to Lucas and others, although collaboration may not seem to be present, non-simultaneous contributions can be collaborative.[252] Furthermore, Desbois, while emphasizing the pursuit of a common goal, argues that simultaneous contributions are not required for a collaboration.[253] To this point, in *Cadet Rousselle* case, the Paris Court of Appeal found that contributions prepared in isolation by a director and authors of dialogues and music constitute collaboration in the film.[254]

*Cala Homes (South) v Alfred McAlpine Homes East* represents a key judgment regarding non-simultaneous contribution in the common law. In the judgment, the court acknowledged the collaboration between joint authors who communicated over long distances.[255] The communication over long distance ensured considerable temporal gaps between each author's contributions. In another case, *Brown v Mcasso Music*, a writer submitted lyrics to be used in a television show and, another writer amended the lyrics to be more effective and to match the rhythm. [256] The contributions from writers produced in isolation and emerged into the work at different times. Nevertheless, the court declared both writers as joint authors of the lyric.

It is unrealistic to expect that every co-authored work must initiate with a collaborative process. The collaboration can take place during various stages until completion of the work. The important element remains the existence of collaboration. There is a consensus on approaching this issue among the selected jurisdictions. Limiting collaboration to concurrent contributions would be against right to intellectual property.

Nevertheless, the proposed directive is going to include a recital to make the understanding clearer. This is going to ensure more legal certainty. Such a recital is going to underline the completion of the work. And it is going to be formed as; 'if collaboration exists before the completion of the work and towards a common goal, there is no need to test the substantiality

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[252] Lucas and others (n 235) s 191.
[253] Desbois (n 235) s 134.
[254] *Cour d'Appel de Paris, 1re Chambre, du 11 Décembre 1961* 01/1962 RIDA 122.
[255] *Cala Homes (South) Ltd & Ors v Alfred McAlpine Homes East Ltd* [1995] FSR 818,835.
[256] *Brown v Mcasso Music Productions Ltd* [2006] EMLR 26.

or timing of the contributions.' The recital conveys the underlying understanding that common goal is the significant indication, there is no need for any limitation by timing. In return, the relationship between common goal and collaboration is going to be clearer and more predictable.

### 1.3. The method of collaboration in co-authored works

The nature of relationship between collaborators can vary from one type to another. Two or more people can collaborate as equal partners or by selecting a leader or by dividing the labour. The question of compatibility of these methods is not addressed by the legal provisions. The courts and the doctrine, on the other hand, deal with the issue.

In France, according to Lucas and others, collaboration does not exclude hierarchy.[257] One of the co-authors could act as a coordinator to ensure smooth collaboration. The French author's right law also welcomes division of labour between co-authors.[258] Both Desbois and Pollaud-Dulian agrees with this argument, Pollaud-Dulian further argues that a hierarchy between the authors does not prevent the co-authorship.[259]

In 1971, the Paris First Instance Court decided that twenty-two co-authors collaborated on Handy Pocket Collection (books that teach practical knowledge on social and technical matters) published by Larousse as employees of the publishing company.[260] The contributions were merged at the final stage of production. There was a division of labour between contributors. In the end, the court relied on the collaboration and accepted that such division and coordination can occur during the production.

The scholars in Germany argues similarly to their French counterparts. Schulze, Splinder and Schuster suggest a simple categorization to division of labour; horizontal and vertical.[261] In a

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[257] Lucas and others (n 235) s 187.
[258] ibid 190.
[259] Frédéric Pollaud-Dulian, *Le droit d'auteur: propriété intellectuelle* (Economica 2014) s 450; Desbois (n 243) s 133.
[260] *Tribunal de Grande Instance de Paris, 3e Chambre - 1re Section, du 29 Juin 1971* 01/1972 RIDA 133.
[261] Dreier and Schulze (n 242) s 8(3); Gerald Spindler and Fabian Schuster, *Recht der elektronischen Medien. Kommentar. 3rd ed.* (CH Beck Verlag 2015) s 8(3).

vertical division, co-authors contribute successively, whereas horizontal division consists of simultaneous contributions. Section 1.2, the timing of collaboration, discusses the vertical division described by these scholars. The concept of horizontal division represents the method this section examines. The horizontal division is an accepted concept among law scholars in Germany. This type of division does not affect the existence of collaboration in a co-authored work. According to Wirtz, only effect of such division is the share calculation among co-authors.[262] In a similar fashion the BGH recognizes the horizontal division of labour in *Fash 2000* [263] and *Buchhaltungsprogramm* [264] decisions as a valid collaboration method.

From common law perspective, there is no mention of a division of labour or any method of collaboration in doctrine or in the case law. However, *Beckingham v Hodgens* presents a unique perspective on the issue.[265] The case is about a song named 'Young at Heart' by the Bluebells. The author of the violin part in the song sued for co-authorship in the entire work. The court decided that claimant should be considered a co-author. This case may represent a division of labour. One joint author is responsible for the violin part, the others are responsible for other parts of the song. Even though their contribution was mixed eventually, there is a division of labour in the production stage. This argument is not endorsed by the deciding court. In contrast, in *Hadley v Kemp* members of a pop band contributed to a song that was composed by one of the members. These contributions were found to be below the threshold of significant contribution. Therefore, the original composer remained the sole author.[266]

While, in the common law there is not a definitive answer for the division of labour in works of joint authorship, it is overwhelmingly established in France and Germany. There is a high possibility of an obstacle to the functioning of the internal market. There are two options; prohibiting the division of labour or allowing it. In the case of prohibition, the co-authors must prove concurrent collaboration and equal roles before the courts. These elements are hard to

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[262] Martin Wirtz, 'UrhG § 8 Miturheber' in Axel Nordemann, Jan Bernd Nordemann and Christian Czychowski (eds), *Fromm/Nordemann Urheberrecht: Kommentar* (12. Auflage, Kohlhammer Verlag 2018) s 8(8).
[263] *Fash 2000* (n 241).
[264] *Buchhaltungsprogramm* (n 248) 40.
[265] *Beckingham v Hodgens* [2003] EWCA Civ143.
[266] *Hadley v Kemp* [1999] EMLR 589.

prove, since they have to prove every single collaboration meets the criteria. In the end, the judicial review will be unpredictable.

From the perspective of legal certainty, this research proposes that a recital should be included in the proposed directive to establish an understanding that collaboration does not need to exist in every part of the work. A division of labour is permissible.

### 1.4. Collaboration and contracts

Determining the existence of collaboration is courts' responsibility. Authors cannot declare collaboration among them by a written contract or by a verbal agreement. Similarly, co-authors cannot denounce the collaboration between them.

In *Beckingham v Hodgens*, the court stated that the existence of collaboration cannot be determined by the parties, but it is the job of the courts.[267] Similarly, according to Wandtke and others, collaboration is decided by the courts in Germany. However, contractual agreement regarding collaboration is an important indication of a creative cooperation.[268] The opposite is true as well, according to the Hamburg Court of Appeal, the emergence of co-authorship cannot be prevented by co-authors.[269]

In France, the Court of Cassation refused to acknowledge a co-authorship, even though the interested party was named as a co-author in the work.[270] The existence of a contract between authors does not establish a co-authorship. Regarding a television series, the Court of Cassation found the director's contributions lacking in creativity.[271] In the end, the court decided that although all of the co-authors recognize the director as a co-author, it is the duty of the courts to decide which works are co-authored and who are the co-authors.

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[267] *Beckingham v Hodgens* (n 265).
[268] Wandtke and others (n 242) s 8(16).
[269] *Kranhäuser* [2006] OLG Hamburg 5 U 105/04, BauR 2007 1086.
[270] *Cour de Cassation, Chambre civile 1, du 3 juillet 1990, 89-11246, Publié au bulletin* Bulletin 1990 I N° 189 133.
[271] *Cour de cassation, Chambre civile 1, du 29 mars 1989, 87-14895, Inédit* Legifrance.gouv.fr.

This understanding is well-established and does not require any addition to the proposed directive. There is no obstacle for the functioning of the internal market.

### 1.5. The element of intent in collaboration

The relationship between collaboration and intention is a difficult one to solve. Is there an implied intention to collaborate in every instance where there is a collaboration between co-authors? Or are there some situations where there is intent to produce a collaborated work, in order to claim its advantages, and not collaborate with other co-authors in the sense that satisfies the collaboration requirement?

Some of these questions are already answered in the sections above. For instance, a mere existence of intention cannot presuppose or eliminate the need for collaboration between authors. This is similar to the logic behind the contractual agreement of collaboration without an actual collaboration. A contract stating that two authors are collaborated in a work does not have value without collaboration. Similarly, intent to be co-authors without actual collaboration in a work does not validate co-authorship. The intent is a larger concept which also contains written intent as known as contracts. None of the examined jurisdictions has reference to intention in the wording of their copyright codes. Nonetheless, this part is going to discuss the element of intention from the perspective of court decisions, jurisdictions outside the scope of examined countries but have the element of intent as a requirement (namely the United States) and academic journals.

Firstly, there is a clear reference to intention in *Beckingham v Hodgens*. The musical work in question received significant popularity after its debut on a commercial. This popularity convinced the claimant to sue for his share in the song as a joint author. The court found that the part played by the claimant was a significant part of the song such to make him a co-author of the musical work. During the proceedings, the defendants argued that, even though the court found a common design between the claimant and the defendant, the claimant lacked the intention of being a co-author of the final work. The court, in return, stated that the existence of an intention is not necessary and it is not a constituent element of common design. As a

result, the element of intention is strictly denied any significance regarding joint authorship by the UK Courts.[272]

However, it is difficult to imagine a scenario where there are inseparable parts of a work, contributed by different parties without intending to create a common work. Without this intention, the parties should have created separable and distinguishable parts and this would not result in joint authorship. In another leading case, *Maurel v Smith*, the court mentions the state of 'knowingly engage in production' by the collaborators.[273] This is an indirect reference to intention by the court. For this matter, Zemer argues that the intention is always present when authors follow a common design. Viewing the intention as a part of this process could help the courts to determine authorial collaboration more accurately.[274] It is hard to disregard his findings regarding the correlation between common design and intention.

While Zemer argues for implied intention in the common law, there are other scholars who support the element of intention as an open requirement of co-authorship. Biron and Cooper argue that theories of art of the latter twentieth century[275] can propose a better-suited formulation for joint authorship.[276] There are significant discontinuities between who is the legal co-author and who is seen as a co-author by the public.[277] Biron and Cooper set themselves the task to resolve this discontinuity by introducing the theories of art to the determination of co-authorship by the legal system. They applied these theories to the joint authorship rules of the United Kingdom and the United States. They were able to isolate three distinct components; role, authority and intention. As regards intention, the art theories indicate purposeful activity with an awareness that one is producing a work of art. After acknowledging the rejection by *Beckingham v Hodgens*, they conclude that introducing an element of intention would 'provide the courts with a means of aligning co-authorship status with wider social expectations'.[278]

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[272] *Beckingham v Hodgens* (n 265).
[273] *Maurel v Smith* [1915] 220 F 195, 199 (SDNY).
[274] Lior Zemer, 'Is Intention to Co-Author an Uncertain Realm of Policy' (2006) 30 Colum. JL & Arts 611.
[275] Especially theories of Arthur Danto and George Dickie
[276] Laura Biron and Elena Cooper, 'Authorship, Aesthetics and the Artworld: Reforming Copyright's Joint Authorship Doctrine' (2016) 35 Law and Philosophy 55.
[277] Bently and Biron (n 50).
[278] Biron and Cooper (n 276).

Their argument is based on closing the gap between authorship and skill. According to them, the test of right kind of skill and labour is used to determine the skill of the co-authors. However, with the introduction of intent this test would determine the joint author rather than the which parties have the skill to contribute in a meaningful way.

In Germany, the indivisibility requirement is dissimilar to the United Kingdom and Ireland. Zemer's argument is sensible in the United Kingdom's approach because collaborators must put an effort to combine their contributions into an inseparable part. However, German indivisibility evaluates the parts by their ability to be exploited outside the collaborated work. This circumstance is determined by the market and the availability of the exploitation tools of the time. Both are outside the effects of co-authors. While Zemer's implied intention element is useful, it is not effective in Germany. The exterior elements still need to be evaluated to confirm the co-authorship.

Germany and France, however, both require collaboration between co-authors. It could even be argued that the collaboration is the most significant element that differs basic formulation from the secondary formulations in these countries. Keeping this point in mind, a collaboration can contain an implied intention. Otherwise, the basic formulation would not be different from the secondary formulation. The intention of the parties to collaborate during the making of the work allows them to be co-authors. It is significant to differentiate intention to collaborate from intention to be joint authors. In this matter, the intention to collaborate should presume an intention to be joint authors. However, intention to be joint authors may fail to produce actual collaboration between parties. From a reverse perspective, while collaboration implies intention, intention does not imply collaboration. For instance, after finishing their work two authors cannot intend to produce a co-authored work. The collaboration must exist in the preparatory stage. To sum up, the action of collaboration is the only effective indicator of an implied intention to be joint authors. Any existing intentions, whether to collaborate or to be joint authors, cannot presume collaboration in every circumstance.

The intention is a prerequisite of joint authorship in the United States.[279] US Copyright Code defines joint authorship as a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole. The meaning of intention, however, defined by a leading case *Childress v Taylor.*[280] The case is regarding a dispute between Alice Childress and Clarice Taylor. Taylor came up with an idea for a play and then hired Childress to write this idea as a play. The court found that Taylor's contribution to the play was nothing more than ideas and suggestions. During the evaluation, the court used a two-pronged approach. First, the court decided that Taylor's contributions were not copyrightable. Secondly, according to the court, there was no mutual intent to be joint authors of the play. In other words, each author must be seen as a joint author of the work by the other co-authors even though co-authors do not fully understand the legal consequences of co-authorship. Subsequently, in *Thomas v Larsen*, the court decided between two parties in a disagreement where the intentions to create co-authored work are contradictory.[281] The court found that Larsen listed in the credits as a sole author and that is an intention to represent its contribution alone. By pointing out this argument, the court denied joint authorship due to lack of intention to be joint authors.

The United States' approach to require intention relates to intention to be joint authors rather than an intention to collaborate. Looking for intention from both sides confirming the status of co-authorship from each other can potentially invite dominant parts to suppress any minor contributors by simply rejecting the intention to co-authorship.[282]

However, there are other theories of collaboration that facilitate intention in a different style. These theories come from scholars in philosophy or art, and their discussion regarding who should be the co-author of a work. According to Livingston, there must be a shared intention between co-authors involving plans and sub-plans and common understanding of the work[283].

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[279] 17 U.S. Code § 101 - Definitions.
[280] *Childress v Taylor* (1991) 945 F.2d 500, 504 (2d Cir).
[281] *Thomson v Larson* (1998) 147 F.3d 195 (2nd Cir).
[282] Zemer (n 274).
[283] Paisley Livingston, 'On Authorship and Collaboration' (2011) 69 The Journal of Aesthetics and Art Criticism 221.

Intentional actions resulting in collaboration is a prerequisite for co-authorship in his/her view. On the contrary, Sellors argues that intention among collaborators (we-intention) is enough for co-authorship.[284] Actual collaboration is not required. The understanding and acknowledgment of intent to co-author the final work is sufficient.

These two approaches are criticized by Bacharach and Tollefsen. According to them, Livingston's idea of linking collaborative actions with intention is only practical for small groups.[285] It would be too complex to prove and look for coordination in a large group. Sellors' formulation, on the other hand, allows even the least qualified participant to be a co-author.[286] For instance, caterers in a film production who believed themselves as a part of the production, hence share the we-intention, could result in co-authorship according to Sellors formulation. Bacharach and Tollefsen offer a middle ground between these two approaches. According to them, on top of intention, a joint commitment, which does not require coordinated collaboration between co-authors, is sufficient for co-authorship. However, Bacharach's and Tollefsen's model require joint commitments to produce the work as a body.[287] By 'as a body', reference to the material indivisibility can be inferred. The authors accept that their model is still under development, therefore the implication of this reference may not reflect their true intention.

Bacharach's and Tollefsen's approach to the relationship between intention and collaboration resembles Ireland and the United Kingdom's approach. Even though, courts denied the existence of intention as a requirement, Zemer's argument of implied intention is sensible. Similar to them, producing an inseparable unity require coordinated collaboration from each co-author with an intention to act in accordance with a common goal. This collaboration is stricter in Livingston's model because it requires them to be coordinated. Such strong emphasis on collaboration can be observed in France and Germany. A less strict uniform representation with intentions to collaborate is also a better representation of the United States' model.

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[284] C Sellors, 'Collective Authorship in Film' (2007) 65 The Journal of Aesthetics and Art Criticism 263.
[285] Sondra Bacharach and Deborah Tollefsen, 'We Did It: From Mere Contributors to Coauthors' (2010) 68 The Journal of Aesthetics and Art Criticism 23.
[286] ibid 28.
[287] ibid.

The existence of implied intention in three jurisdictions has some advantages. The intention is a difficult subject to measure. Apart from an *ex ante* contractual agreement between co-authors, the courts would be forced to look for an assumption of intent. This in return would open the several difficult questions. First of all, what is the nature of intent in the co-authorship? Is it similar to contractual intent or is it resemblances more to criminal intent? Moreover, the legal consequences of co-authorship are heavy. In all three jurisdictions, the co-authors' ability to exploit the work is limited by the other co-authors. Without any contractual indication of intent, could the courts assume an author, whose participation represent 70% of the final work, has implied intent to collaborate? Because, in the case of a successful collaboration author of the majority part would be limited by the author(s) of the minority part. These questions are difficult to answer. Thanks to not counting intention as a requirement allow the courts to avoid these questions. In the meantime, it also denies the court to look for intention and to better judge and decide who is a co-author.

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Moreover, the legal consequences of co-authorship are serious. In all three jurisdictions, the co-authors' ability to exploit the work is limited by the other co-authors. Without any contractual indication of intent, could the courts assume an author, whose participation represents 70% of the final work, has implied intent to collaborate? Because, in the case of a successful collaboration author of the majority part would be limited by the author(s) of the minority part. These questions are difficult to answer.

Thanks to not counting intention as a requirement this will allow the courts to avoid these questions. It improves legal certainty, without element of intent, the formulation will be more stable, predictable and precise. Additionally, it will also improve judicial review and allow the

courts to avoid getting into the complexity of intention. It is also possible that with a hard to prove concept like intention, there is going to be loss of rights. These are the reason for the proposed directive to avoid any reference to intention. To prevent linking established jurisprudence with the proposed model, this research plan to introduce a recital to avoid any doubt. Such recital would follow as;

> Intention is not necessary for co-authored works. While concerted effort in a collaborative manner is a good indicator of intention, requiring intention to exist in every co-authored work would limit the scope of co-authorship.

### 1.6. Posthumous collaboration

It is unfortunate that sometimes authors die before finishing some of their work. There are several instances where these incomplete works are finished by others and published as a complete work. For instance, The Silmarillion was an unfinished book by J.R.R Tolkien later finished by his son Christopher Tolkien and published posthumously. In these cases, an issue arises on the existence of collaboration between deceased author and author who helped published afterwards. There is not an established practice to name the author(s) of the published work. Sometimes, they are introduced as co-authors. Other times, only the former or the latter author are presented as the sole author.

Before getting into details, these instances should not be mistaken with an author passing away during a collaboration with another author. There is established collaboration and the final work is going to be a co-authored work, whether the author survived to see it is irrelevant. The proposed directive already addresses such issues of timing. However, in these cases, the deceased author had no intention to collaborate during production.

Lacking collaboration denies the subsequent author from co-authorship. Assuming the latter author cleared the proper rights from the heirs, the later completed work would be an adaptation.[288] Wirtz also argues a similar point from German perspective.[289] French CPI

[288] See Chapter III for in depth analysis of adaptation
[289] Martin Wirtz, 'UrhG § 7 Urheber' in Axel Nordemann, Jan Bernd Nordemann and Christian Czychowski (eds), *Fromm/Nordemann Urheberrecht: Kommentar* (12. Auflage, Kohlhammer Verlag 2018).

classifies posthumously supplemented works under secondary formulation. Without collaboration and common design, Irish CRRA would not classify this type of work under basic formulation. These arguments are also in line with the proposed directive's emphasis on collaboration.

Bacharach and Tollefsen suggest a solution keep co-authorship alive. In their article, they introduce an institution called 'secondary agency'.[290] The secondary agency allows the author's wish to be fulfilled after death. The executor of a will acts as a secondary agency and hires an author to finish the incomplete work. This assumes that every author wants to finish his/her work. Unable to do so does not change his/her wishes. The secondary agency should fulfil this wish. The hired author, however, is going to act similar to a ghostwriter. Bacharach and Tollefsen give an example of a lawyer to illustrate the actions of the hired author. A lawyer can file a charge against X by Y's name, in the end, it will the Y who filed the charges, not the lawyer. Similarly, the hired author is going to act like a representative while finishing the work.

This suggestion by Bacharach and Tollefsen is in contrast with the principle of original contribution. The hired author's original contributions cannot be considered as the deceased author's. This suggestion by Bacharach and Tollefsen is in contrast with the principle of original contribution. The hired author's original contributions cannot be considered as the deceased author's. This resemblances to ghostwriting or made-for-hire doctrine in the United States. However, as the scope is the European Union, the proposed directive is not going to include such posthumous collaborations into its perspective. It is in direct contrast with the jurisprudence of the CJEU.

## 2. Creative contribution

### 2.1. The scope of creative contribution

Creativity and material contribution are two essential elements to determine the initial scope of creative contribution. Every contribution in a co-authored work should be a creative

[290] Sondra Bacharach and Deborah Tollefsen, 'You Complete Me: Posthumous Works and Secondary Agency' (2015) 49 The Journal of Aesthetic Education 71.

contribution. This requirement is not special for co-authored works. It is necessary for copyright protection. Secondly, creativity is not sufficient if there is not a material contribution to the work. It is the consequence of idea and expression dichotomy. An idea, which could constitute a creative nature, cannot be a subject of copyright without its transfer to expression. Therefore, without a material contribution, creativity is not sufficient. Without materialized creativity, a contribution cannot not attract copyright protection. It is safe to say that any contribution to a co-authored work, first must meet the requirement for copyright protection. It is the same for Ireland, France and Germany.[291] The proposed directive is also follows this principle.

In France, co-authors should contribute to *mise en forme* (formatting) of the work.[292] The famous Renoir case is a suitable example to further detail the concept of *mise en forme*.[293] The renowned painter Renoir, weakened by age and paralysis, was not able to apply his art to sculptures. As a solution, Renoir hired Guino as his assistant. Guino helped Renoir in making sculpture. Most of the time, Guino simply followed Renoir's directives. However, it was later discovered that Guino also made several creative choices due to missing directives by Renoir.[294] Guino's contribution to the formatting of the sculptures merited him co-authorship. In other words, Guino exercised personal touches which are observable from the material form of the sculptures. Failure to contribute to the formatting would have prevented Guino from earning co-authorship status. This is why *mise en forme* is a key concept in French basic formulation. However, this standard should not be understood as a consideration of quality. CPI Article L. 112-1 explicitly prohibits consideration of merit in copyright. Moreover, according to the Court of Cassation, contributing just a chapter into a large book is sufficient to be a co-author.[295] The importance or the merit of the contributions are not relevant. The Paris Court of Appeal also stated in a case that contributions can be on an unequal importance.[296] Formatting of a work is

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[291] Dreier and Schulze (n 242) s 8(6); Wandtke and others (n 242) s 8(3); Lucas and others (n 235) s 187.
[292] Lucas and others (n 235) s 186.
[293] *Cour de Cassation, Chambre civile 1, du 13 novembre 1973, 71-14469, Publié au bulletin* (1973) 04/1974 RIDA 62.
[294] Nicolas Bouche, *Intellectual Property Law in France* (Kluwer law international 2011) s 130.
[295] *Cour de Cassation, Chambre civile 1, du 2 avril 1996, 94-14203, Publié au bulletin* Bulletin 1996 I N° 165 196.
[296] *Cour d'Appel de Paris, 4e Chambre A, du 15 Avril 1992* JurisData No 1992-021079.

a good indicator of a creative contribution. Similar to using common goal as a material outcome of a collaboration, contribution to formatting is a material outcome of a creative contribution.

In Germany, the extend required for contribution is equal to minimum sufficient to attract copyright protection.[297] The contribution could be a minimal contribution which should suffice in acquiring copyright protection according to UrhG Article 2(2). This is also called small coin principle (*kleine Münze*). According to Spindler and Schuster, it does not matter whether this minimal contribution is apparent in the final work.[298] The creative contribution could be minor as long as it fulfils the requirement of UrhG Article 2(2). Jurisprudence from the BGH also confirms this approach.[299] There is no threshold for the relative importance of the contribution to the overall work. However, contribution to the formatting of the work is a prerequisite. Otherwise, it would not be possible to differentiate proper contribution from supplying ideas and suggestions. In another BGH decision, the court decided that the extent of the creative involvement is not an indicator of better co-authorship, it's only relevance is for the calculation of respective shares.[300] This small coin principle does not conflict with the European understanding of author's own intellectual contribution.

In common law, the scope of a contribution evaluated by a test called 'significant contribution'. According to this test, improvements or alterations are not enough. There must be a non-trivial contribution to the creation of the work.[301] According to the judgment of *Kendrick v Laurence*, mere suggestion is not sufficient. There should be a contribution to the final work.[302] In another case law, after quitting the band a drummer sued the band's member for joint authorship in a song.[303] None of the contributors took any musical note in the writing session of the song. The song was the fruit of collective improvising. The court evaluated the drummer's contribution in the improvising session and decided that the contribution in question had a significant

[297] Wandtke and others (n 242) s 8(3).
[298] Spindler and Schuster (n 261) s 8(2).
[299] *Kranhäuser* [2009] BGH I ZR 142/06 (1), GRUR 2009 1046 1050.
[300] *Ratgeber für Tierheilkunde* [1977] BGH I ZR 56/75, 244 GRUR 1978 246.
[301] Tanya Frances Aplin and Jennifer Davis, *Intellectual Property Law : Text, Cases, and Materials* (Second edition, 2013).
[302] *Kendrick v Laurence* [1890] 25 QDB 99 [106].
[303] *Stuart v Barrett* [1994] EMLR 448.

importance in the work. Therefore, the drummer was held to be a joint author. In *Brighton v Jones*, the defendant Miss Jones was commissioned by the production company to write a play named 'Stones in His Pockets'.[304] A few years later, Miss Jones rewrote some parts of the play and the play became quite popular. During this time, Miss Brighton directed the play. Afterwards, Miss Brighton claimed joint authorship on the play due to her contributions to its staging. The court rejected the joint authorship claim of Miss Brighton because her contributions were not significant towards the making of the work.

The significant contribution test puts another layer of requirement over collaboration. Collaboration towards a common goal is a more relaxed requirement for co-authored works. Also, it is difficult for the courts to interpret significant contribution in every situation. For these reasons, the proposed directive plans to introduce a recital to establish a general rule of understanding. Such principle should be followed as; 'every contribution in a co-authored work must be eligible for copyright protection according to the test of author's own intellectual creation.' With this way, courts should be able to determine creative contributions easily and European originality standard must remain the sole indicator of originality.

However, it is also possible that such a test could not be applied when contributions are inseparable. This is going to present itself as an issue of evidence before the courts. Element of collaboration should come into focus in a bigger role in order to compensate the test.

### 2.2. Co-authorship with ghostwriter

A ghostwriter is a person whose job it is to write material for someone else who is the named author.[305] Even though there is usually a close relationship between the writer and the one would be named author, most of the time there is no co-authorship between them.

There are three scenarios regarding the writer; works independently; uses ideas and concepts from the hirer; and writes the book with the hirer. In the first scenario, the writer is the natural

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[304] *Brighton v Jones* [2004] EWHC 1157 (Ch).
[305] Oxford University Press, 'Ghostwriter, Noun' (*the Oxford Advanced American Dictionary*, 2021) <https://www.oxfordlearnersdictionaries.com/definition/english/ghostwriter> accessed 19 July 2021.

author. In the second, the hirer lacks material minimal contribution. It is a requirement for the selected jurisdictions. Therefore, the writer becomes the sole author. In the third option, the hirer and the other one work towards a common goal. In this scenario, they are co-authors of the work. This is also in line with the proposed directive's strict attachment to author's own intellectual creation doctrine.

However, in practice, the third option rarely happens. The other two options, according to Wirtz, result in sole authorship in Germany.[306] In France, the Paris Court of Appeal prevented a publisher to publish several books that are written by a ghostwriter without mentioning his name.[307] In another judgment of the Paris Court of Appeal, the court did not allow a ghostwriter agreement made in the United States to enforce its moral right waiver clause.[308] In a similar manner, *Evans v E Hulton and Co Ltd* did not find the act of passing memoirs, a sufficient contribution for joint authorship in the United Kingdom.[309] Therefore, in the selected jurisdictions agreements with ghostwriters do not prevent them becoming sole or co-author of the work. These jurisdictions require another party to make material contribution in order to claim co-authorship.

There is no addition required to the directive. It obvious that this principle follows other rules that are discussed before.

### 2.3. Immaterial contributions

Supplying ideas, themes, outline or plans do not meet the requirements of creative contribution. From the outset, it is easy to count these examples. However, borderline cases are difficult for the courts to differentiate creative contribution from mere suggestions.

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[306] Wirtz (n 262) s 8(9).
[307] *Cour d'Appel de Paris, 1re Chambre, du 10 Juin 1986* 7/1987 RIDA 193.
[308] *Cour d'Appel de Paris, 1re Chambre, du 1 février 1989* 10/1989 RIDA 301.
[309] *Evans v E Hulton and Co Ltd* [1923-8] MCC 51, (1924) 131 LT 534.

In France, the courts have denied co-authorship to; a client of a painter who gives general instructions on the subject,[310] a client of a photographer who gives general instructions on the photograph,[311] a scientist whose contributions to the work is limited to scientific discoveries,[312] a person who simply ordered a décor on a Russian theme.[313]

In Germany, the courts denied co-authorship to; a person who only reports actual historical events,[314] a person who gives an idea regarding how to sing the chorus,[315] an architect whose contribution is limited to a discussion in a workgroup.[316]

In case law relevant to Ireland and the United Kingdom, the courts denied joint authorship to; members of a pop band who do not contribute more than what is expected,[317] a person whose only contribution is devising the stage of a play,[318] a person who categorizes a classical music repertoire,[319] a person who simply supplies settings and parameters to a software.[320]

All these jurisdictions follow the same principle in the proposed directive. According to a recital; every contribution in a co-authored work must be eligible for copyright protection. Since an immaterial contribution is not eligible for copyright protection, it also does not promote its contributor to co-authorship.

### 2.4. Commissioned and assisted works

Another important topic is the classification of commissioned works. Commission, by nature, means hiring another person to produce something that commissioner wants. Ghost writing is

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[310] *Cour de Cassation, Chambre civile 1, du 25 mai 2004, 01-17805, Publié au bulletin* Bulletin 2004 I N° 154 126.
[311] André Kerever, 'Chronique de Jurisprudence - Cour d'Appel de Paris (4ème Chambre) - 26 Mars 1992' 04/1993 RIDA 218.
[312] *Cour de Cassation, Chambre civile 1, du 8 novembre 1983, 82-13547, Publié au bulletin* [1983] Bulletin des arrêts Cour de Cassation Chambre civile 1 N 260.
[313] *Cour d'Appel de Paris, 4e Chambre, du 8 Juin 1898* 01/1990 Cahiers du droit d'auteur 20.
[314] *Solange Du da bist* [1955] OLG München 6 U 916/55, 432 GRUR 1956 434.
[315] *Modernisierung einer Liedaufnahme* [2003] KG 5 U 350/02, GRUR-RR 2004 129 130.
[316] *Kranhäuser* (n 299) 1050.
[317] *Hadley v Kemp* (n 266).
[318] *Tate v Fullbrook* [1908] 1 KB 921.
[319] *Robin Ray v Classic FM plc* [1998] FSR 622.
[320] *Fydle Microsystems Ltd v Key Radio Systems* [1998] FSR 449.

a form of commission as well. A commissioned work, in addition to written material, could be an art project or a building or any other subject of copyright. The medium, however, is irrelevant when it comes to determine authorship in this case.

When a client does not produce any original contribution, the commissioner is going to be the author. This also includes ideas, themes and plans. Without an original contribution to the expression, the client cannot receive co-authorship. This understanding is in line with the European understanding of author's own intellectual creation. This assumption, however, may change. The client can contribute original expressions along with the commissioner's contributions. In this equation, both the commissioner and the client would receive co-authorship.

Another form of commission is assistance. An assistant's primary goal is to implement the will of the client or the employer. Without a creative choice, an assistant cannot produce original contributions. This in effect denies the assistant from the co-authorship title. Nonetheless, there are examples where an assistant actually made original contribution to the final work.[321] Such original contribution sufficient to establish the assistant as a co-author. For instance, in *Tate v Thomas*, an assistant contributed to a play by providing scenic effects and stage business.[322] The court stated that these contributions are not subject to copyright, thus the assistant failed to contribute an original contribution to the final work. The court's reasoning is similar to the proposed directive's approach to creative contributions. Each contribution must be protectable by copyright and contribution must be original.

On the issue of commissioned and assisted works, Bantinaki argues that creatorship and authorship are treated as same in terms of copyright. This synonymous understanding does not correspond to the truth when it comes to assisted works.[323] The creator doctrine presumes that a work is created by a natural person which is titled as the author and the first owner of the

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[321] *Cour de Cassation, Chambre civile 1, du 13 novembre 1973, 71-14.469, Publié au bulletin* (n 293).
[322] *Tate v Thomas* [1921] 1 Ch 503.
[323] Katerina Bantinaki, 'Commissioning the (Art) Work: From Singular Authorship to Collective Creatorship' (2016) 50 The Journal of Aesthetic Education 16.

work. This doctrine is widely accepted by the copyright systems and influenced the European Union in numerous harmonisations.[324] Bantinaki argues from the perspective of art making, according to him an artist usually employs assistants to transfer the creative expressions to the medium. While the assistant is stopped from making any original contribution of its own, the skill, sensitivity and intellect to transform the artist's plan into the medium with impeccable precision give the assistant the title of creatorship.[325] The idea is that the artist remains as the author, whereas the assistant is the creator of the work. According to him, as a result of its title, the assistant should also be attributed to the work alongside with the author. Even though, the argument is compelling, it is difficult to provide copyright protection to such contributions. It is hard to prove them with impeccable precision and the result can be opiniated. For this reason, this research plan to leave this argument out of its proposal.

### 2.5. Question of interviews

When it comes to borderline creative contribution cases, the interview is treated as a special case by this research. In an interview, the structure of conversation is a key to gaining copyright protection. An interviewer can attract copyright protection to the questions if they are original. On the other hand, the interviewee can also attract copyright protection if the answers are original. It is a hard task to achieve such originality in a medium like interview. There is also a possibility of co-authorship between journalist and interviewee in a case where a journalist stimulates the interviewee with following questions and detailed comments.

For instance, the BGH, in a case regarding television program called '*Quizmaster'*, evaluated copyright infringement of the program and decided among other things that the questions asked in the interview were original and protected by copyright.[326] After this decision, the Berlin District Court in a case about an interview by an actress, stated that there is a copyright protection for the answer to interview questions.[327] Nordemann and Fromm argue a fine point, drawing importance to the exchange between interviewee and interviewer, stating that without

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[324] Antoon Quaedvlieg, *Authorship and Ownership: Authors, Entrepreneurs and Rights* (na 2012) 230–231.
[325] Bantinaki (n 323) 21.
[326] *Quizmaster* [1980] BGH I ZR 73/78, GRUR 1981 419 420.
[327] *Interviews* [2011] LG Berlin 16 O 134/11, openJur 2011 117441.

changing the planned structure (for example spontaneous/follow-up questions) the collaboration element of the co-authorship would not be satisfied.[328]

In France, the Paris Court of Appeal also decided a case regarding an interview over television program.[329] The type of the program is different from the *Quizmaster* decision of the BGH. In this case, it is not a competition but simply a news program with an interview. The claimant gave an interview but disliked the fact that it was shown side by side with President François Mitterrand's statement. The claimant sued the television program claiming co-authorship and demanding the removal of the interview. The court accepted that he is the author of his answers, however, he is not the co-author of the audiovisual work and he also gave implied consent to use of his words and image.

In the United Kingdom, case about a newspaper called the News of the World involved an issue of interview.[330] The claimant supplied materials regarding his racing career to the employee of the newspaper to be published in a column. A disagreement occurred between the employee and the claimant at the publishing stage and the claimant sued the newspaper in order to stop the publishing. The court decided that the interview was not a work of joint authorship. It was held a work of the employee because the interviewee did not make any original contribution to the expression of the work. In another similar judgment, a freelance detective Zeitun gave series of interview to a writer.[331] The writer then pieced all of them together and created a narrative which Zeitun did not contribute. The court decided that the work belongs to the writer, Zeitun produced materials and did not make an original contribution.

On the subject of interviews, the key discussions revolve around originality. It is a borderline example because questions most of the time are generic and answers consist of facts or memories. Copyright protection does not extend over facts and unoriginal expressions. Even

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[328] Nordemann and Fromm (n 242) s 10.
[329] *Cour d'Appel de Paris, 1re Chambre, du 1 juin 1988* [1989] ECC 361.
[330] *Donoghue v Allied Newspaper Ltd* [1938] Ch 106, [1937] 3 All ER 503.
[331] *Evans v E Hulton and Co Ltd* (n 309).

though there are two sides to every interview (interviewer and interviewee), only in rare occurrences will the interview be considered a co-authored work.

## 3. Intellectual or material indivisibility

Indivisibility is an outcome of a successful collaboration. In other words, intellectual with or without material indivisibility must be present in a co-authored work. Intellectual indivisibility represents the intellectual agreement over a common design by the co-authors. By agreeing on a common design, the co-authors produce a work that intellectually represents all of the authors. The proposed directive also touches this issue by emphasizing common goal while mentioning collaboration.

It is safe to state that selected jurisdictions require intellectual indivisibility. Germany, the United Kingdom and Ireland, however, seek further indivisibility in their respective basic formulation. This indivisibility is called material indivisibility. There are two types of material indivisibility; strict material indivisibility, limited (marketable) material indivisibility. Strict material indivisibility requires contributions to be indistinguishable from each other in the final form. Limited indivisibility, however, does not insist on indistinguishable contributions. The focus of this indivisibility is contribution's ability to be exploited in isolation. In other words, the limited indivisibility is formed when all of the parts cannot possibly be exploitable in the market on their own. By contrast, intellectual indivisibility is not affected by such elements. In a true intellectual indivisibility, contributions could be distinguishable and marketable in isolation or could be the opposite.

According to Desbois, a liberal conception of French law does not require material indivisibility in any form whatsoever.[332] The sole prerequisite of collaborative work is collaboration and the associated intellectual indivisibility. As a result of this circumstance, two types of collaborative works emerge: collaboration with and without material indivisibility.

[332] Desbois (n 235) s 136.

In France, the utilisation of authors' contributions is significantly influenced by material divisibility. Material divisibility determines whether distinct exploitation is feasible. Contributions that are appropriate for separate exploitation can be used outside of the co-authored work if one criterion is met. According to CPI Article L. 113-3, if contributions are from a different genre, contributors may exploit their own participation without jeopardising the collaborative effort. This article assures that individual contributions would not have the ability to damage the co-authored work.

A character out of a comic strip is an example of this type of exploitation. Even though a strip cartoon is a collaborative effort, a character can be exploited separately, according to the Court of Cassation.[333] Another decision acknowledges that a character in a narrative is from a distinct genre and can be used separately.[334] The Court of Cassation easily distinguished the character from a tale or a strip comic. However, categorising every copyright-capable work into a single genre is challenging.[335] While the notion of genre solves the problem of distinct exploitation, categorising works into genres remains difficult.

In Germany, UrhG seeks a limited kind of material indivisibility in addition to intellectual indivisibility. This type of material indivisibility is recognised in a number of critical decisions. The BGH in the case of *Wenn wir alle Engel wären* assessed an audiovisual work and decided that if elements of a co-authored work are objectively detachable, they must be dependent components of a whole.[336] This is a viewpoint from the entire work. Whether they are separable or not, each component of the work is critical to the work. A perspective from the contributions is offered by another decision. In a BGH decision involving architectural works, the court assumed that when elements of a co-authored work were removed from the original work, they would become incomplete or require supplementing.[337] When taken outside of a co-authored work, a contribution should be regarded as partial. A synthesis of these two perspectives

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[333] André Kerever, 'Chronique de Jurisprudence - Cour de Cassation, Chambre Civile 1, 6 Mars 1997' 10/1997 RIDA 184.
[334] *Cour de Cassation, Chambre civile 1, du 2 décembre 1997, 95-16.653, Publié au bulletin* (n 236).
[335] Lucas and others (n 235) s 202.
[336] *Wenn wir alle Engel wären* (n 74).
[337] *Kranhäuser* (n 299) para 39.

suggests that a contribution in a co-authored work is critical to the overall work and should be considered as partial by the market when examined separately. This state of indivisibly is called limited or marketable indivisibility.

The co-authors' collaborative process ensures that their contributions are important to the final product. The requirement for non-marketability, on the other hand, must be evaluated contribution by contribution. As a result, it is critical to concentrate on independent marketability.[338] According to Wandtke and others, the rationale to select marketable indivisibility over material indivisibility is that material indivisibility is excessively limiting.[339] It is inefficient to prevent contributions, which are materially divisible but cannot be commercialized without each other, from co-authorship.

Marketable indivisibility, or limited indivisibility, presupposes that works from distinct genres may be exploited independently. Simply put, the categorical distinction between contributions makes them easily recognisable and marketable separately. According to Wandtke and others, marketable indivisibility can only exist among contributions from the same genre.[340] The BGH did not acknowledge musical composition with lyrics as a basic formulation for the same reason. The court classed them as secondary formulation in *Musikverleger III* decision.[341] Even though they were produced exclusively for each other, lyrics with composition and text with images are technically detachable and thus cannot be considered co-authorship.[342] Dreier and others, as a minority viewpoint, suggest that creative contributions from different genres can be combined into a single element even if they are not independently marketable.[343]

In a previous judgement, the BGH determined that a secondary formulation work composed of contributions from various genres might eventually evolve into a basic formulation.[344] This is

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[338] Spindler and Schuster (n 261) s 8(4).
[339] Wandtke and others (n 242) s 8(12).
[340] ibid 8(10).
[341] *Musikverleger III* [1981] BGH I ZR 81/79, GRUR 1982 41.
[342] Nordemann and Fromm (n 242) s 8 (12).
[343] Dreier and Schulze (n 242) s 8(4).
[344] *Subverleger* [1963] BGH Ib ZR 75/62, GRUR 1964 326 330.

achievable under the condition that the public perceives the work as a single unit. According to this criterion, a song that has gained widespread recognition and renown can be treated as a single entity. However, one drawback of this designation is that such renown and recognition may fade in the future, and public perception may alter as a result. This unfavourable circumstance would put the music in an undesirable dilemma. Wirtz, in a similar fashion, critiqued this decision.[345] Marketable indivisibility is a complicated criterion that varies depending on how marketable the contributions appear. It is difficult for courts to apply this concept in complex circumstances.

In Germany, audiovisual works occupy a unique position within the basic formulation. They are the result of the fusion of numerous works. Screenplays, film music, pictures, creative contributions from the cameraman, director, or performers, and so forth are good examples of these works. The creative contributions in an audiovisual work, according to the BGH, establish an unbreakable bond. The audiovisual work would be altered if any of them were removed or replaced. As a result, they must be considered co-authored works.[346]

However, the question of whether or not audiovisual contributions are potentially marketable remains unresolved. The courts have not addressed this matter. The doctrine, on the other hand, referred to them as having a dual nature. Some contributions, according to Dreier and others, may have dual personality. On the one hand, as part of a larger project. As a distinct exploitable work, on the other hand.[347] Even the smallest components of an audiovisual work can be utilised individually for various purposes thanks to technological advancements. This is especially true for components in multimedia work. The important caveat is that such technical capabilities must not be available at the time the previous work was created.[348] Creation of deep fake videos are great examples of dual character concept. An important factor why marketable indivisibility

[345] Wirtz (n 262) s 8(12).
[346] *Goldrausch* [1972] BGH I ZR 42/71, GRUR 1973 88 [7]; *Edgar Wallace Filme* [1997] OLG Hamburg 3 U 153/95, 822 GRUR 1997.
[347] Dreier and Schulze (n 242) s 8(5).
[348] Wirtz (n 262) s 8(12).

should not be preferred as a viable solution for this research is the dual character of a contribution. It is not conclusive, and it is difficult for courts to apply.

CRRA Section 22(1) and CDPA Section 10(1) state that joint authorship is 'a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors'. The phrase 'not distinct' refers to material indivisibility. The contributions should blend in together and should be presented as one uniform body. In other words, a third person could not identify authors' respective contribution in the final work.

In the case of Chappell Co Ltd v Redwood Music Ltd., for example, the court determined that music and lyric in a song are independent and should not be deemed a joint work of authorship.[349] In another judgment, the court concluded that a contribution to a newspaper piece was a distinguishable component.[350] Despite the fact that contributions are part of a single piece, the distinctiveness of each section led to individual copyright protection. However, there are a few instances when the requirement of indistinguishable contribution can be overridden by the element of considerable contribution.

The violin part of the composition in *Beckingham v. Hodgens* and the musical introduction to the organ solo in White Shade of Pale are distinct from other elements in their respective works.[351] In both cases, the courts determined that these contributions are essential to the final work and it would have been incomplete without them. As a result, the authors of these sections are credited as joint authors on the final work. These examples seem to be the exceptions to the general rule. Material indivisibility is the main approach in Ireland and the United Kingdom.

Material indivisibility limits the scope of co-authored work in a significant sense. This research aims to provide a wider acceptable scope for co-authored works. Also, the Term Directive

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[349] *Chappell Co Ltd v Redwood Music Ltd* [1981] RPC 337.
[350] *Express Newspaper plc v News (UK) Ltd* [1990] FSR 539 Ch D.
[351] *Fisher v Brooker* [2006] EWHC 3239 (Ch); *Beckingham v Hodgens* (n 265) para 46.

accepted a co-authorship like term of protection to musical works with lyrics. Such works normally would not be classified as co-authored work in Germany, or work of joint authorship in the United Kingdom and Ireland. With that in mind, the proposed directive is going to follow intellectual indivisibility as a main requirement. There would be no need for material or marketable indivisibility.

Another main reason for choosing this option is the principle of legal certainty. Material and market indivisibilities are difficult to prove. They can be unpredictable with the advancement of technologies. Abandoning any indivisibility requirement will bring precision and clarity to the basic formulation.

## 4. Genre or categories of works

One of the distinctions of Ireland and the United Kingdom from France and Germany is the use of the genres to categorise works. When it comes to co-authored works, however, the classification by genre is also evident in France and Germany. This classification has the advantage of allowing authors to be distinguished from one another. When evaluating individual exploitation of contributions, the proposed directive will focus on this element of classification.

As previously noted, since music and lyrics belong to different genres, the court in the United Kingdom did not hesitate to reject joint authorship in *Chappell Co Ltd v Redwood Music Ltd*. Music is a type of musical work, whereas lyric is a type of literary work.[352] Both the CRRA and the CDPA specify these categories. They are defined widely on purpose, yet they are categorizable according to their own nature.

France and Germany subscribe to the open list system. Works are not classified in an open list system; instead, they are judged solely on their originality. When it comes to co-authorship, however, CPI Article L. 113-3 says that contributors can utilise their individual contributions

[352] *Chappell Co Ltd v Redwood Music Ltd.* (n 349).

without jeopardising the collaborative work. To apply this criterion, judges must classify works and determine whether they belong to a separate genre.

In Germany, the BGH in *Musikverleger III* determined that because music and lyrics are from distinct genres, they cannot be combined to constitute a co-authored work.[353] If they belong to distinct genres, they might be used individually. Audiovisual works are the only exception to this criterion. An audiovisual work is always regarded a co-authored work, even if it contains contributions from several categories. Ultimately, German courts look for genres among the contributions and see whether the work may be classified as co-authored.

The issue then manifests itself in several ways: Is every court's perception of work the same? Are there any works that escape categorization, such as multimedia works? The courts in Germany and France would only have to deal with a small number of classification issues. On the other hand, the courts in Ireland and the United Kingdom have resolved a large number of cases involving genres. In the case of Bauman v Fussell, for example, a photograph of two birds fighting triggered a classification problem.[354] The plaintiff claimed that the photographic design was artistic in nature. The court ruled that if it had been a painting instead of a photograph, it would have been more artistic, and rejected its plea for copyright protection. In a different court, the court's impression of the photograph may simply be different. While the judge who presided over the case did not perceive any aesthetic value in the photo, a judge from a different court could disagree.

The current categories should be the beginning point for understanding the factors that influence classification. There are four types of works in the United Kingdom and Ireland: literary, dramatic, musical, and artistic. These classifications aren't ubiquitous. In fact, the Berne Convention's choice of terms has an impact on their source.[355] The French courts, for example, determined that a character in a strip cartoon belongs to a distinct genre than the

[353] *Musikverleger III* (n 341).
[354] *Bauman v Fussell* [1978] RPC 485 (CA).
[355] J Pila, 'Copyright and Its Categories of Original Works' (2010) 30 Oxford Journal of Legal Studies 229.

remainder of the work.[356] Both the character and the strip cartoon would fall under the literary works category if LDMA classification had been used.[357] The use of expert witnesses to establish the category of complicated works is an option. Art experts, on the other hand, are unlikely to reach an agreement. Objectivity in art perception is a tough goal to achieve. Nonetheless, classification like this is a good predictor of whether a contribution may be used outside of the co-authored work.

There is a likely chance that a multimedia work would be subjected to basic formulation in these selected jurisdictions. In this case, the problem of categorization poses another problem. Multimedia works simply do not have a proper classification. For instance, in the United Kingdom, according to Aplin, categories of work are futile against the problem of classifying multimedia works under one classification.[358] The outcome is similar in other jurisdictions.

Issues with genre classification can be seen at many phases of the basic formulation process. It is nearly difficult to avoid having to deal with categories. In Germany, the essential distinction between basic and secondary formulations is based on genre classification. In a French basic formulation, it is the basic criteria for independent utilisation of separate contributions. One of the decisive elements of basic formulation in Ireland and the United Kingdom is not belonging to separate categories. For the sake of legal clarity, it is critical to limit such concerns to minor areas of fundamental formulation and to specify a more acceptable method of classifying works. As a result, this study will reduce genre categorization by making it solely relevant to the independent exploitation of contributions. This approach will offer greater clarity and predictability to the situation.

## 5. Legal consequences

The basic formulation forms a civil partnership between co-authors. This partnership is a result of a collaborative action by operation of law. Some rules are negotiable amongst co-authors,

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[356] Kerever, 'Chronique de Jurisprudence - Cour de Cassation, Chambre Civile 1, 6 Mars 1997' (n 333).
[357] A strip cartoon may also have artistic properties. However, predominately, it is a literary work.
[358] Tanya Frances Aplin, *Copyright Law in the Digital Society: The Challenges of Multimedia* (Hart Publishing 2005) 95.

while others are unchangeable. Each of the selected jurisdictions sought out certain requirements for basic formulation.

Legal approaches to managing the partnership in the basic formulation differ on various points. While the proposed directive focuses on partnership rules in the basic formulation, it allows the Member States to fill up the gaps with national laws. Because the proposal's key elements have been decided, these minor details should not cause confusion in the proposal's national implementation. It is preferable to refer to national legislation to ensure that the proposed partnership is consistent with the existing property rights in that Member State.

### 5.1. Legal status and applicable law to the partnership

In Germany, the civil partnership formed under the basic formulation is called community partnership. It is defined in the article 742 and the following provisions in the BGB (German Civil Code). According to Wirtz, this partnership is a natural outcome of a close collaboration.[359] This partnership also arises without the necessity for co-authors to take any action, according to the Frankfurt Court of Appeal.[360] It is prohibited for co-authors to terminate their collaboration without destroying the work.[361] It is, also, not possible to transfer the respective share of a co-author to a third party.[362] A co-author can only transfer future monetary claims and already collected distribution of income to a third party.[363] A waiver of exploitation rights, however, is only permissible if it benefits other co-authors.[364]

In France, according to CPI Article L113-3, a collaborative work is the joint property of its co-authors. The Court of Cassation defines joint ownership as total co-ownership over the entirety of the work.[365] According to court's definition, a co-author who has written only a single chapter in a book can assert his right over the totality of the work.[366] This is a special partnership

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[359] Wirtz (n 262) s 8(15).
[360] *GEMA Doppel-CD* [2005] OLG Frankfurt 11 U 26/05, 332 ZUM 2006 334.
[361] Dreier and Schulze (n 242) s 8(14); Wirtz (n 262) s 8(26).
[362] *Wenn wir alle Engel wären* (n 74).
[363] Wirtz (n 262) s 8(16).
[364] UrhG Section 8(4)
[365] *Cour de Cassation, Chambre civile 1, du 19 février 1991, 89-14402, Publié au bulletin* Bulletin 1991 I N° 67 43.
[366] *Cour de Cassation, Chambre civile 1, du 2 avril 1996, 94-14.203, Publié au bulletin* (n 295).

that is original to the collaborative works.[367] However, according to the Court of Cassation, undefined circumstances in this partnership can be supplemented by the article 835 et seq. in *Code Civil* of France.[368] The common law of indivision in France is a supplementary source for the partnership in the collaborative works.

In Ireland and the United Kingdom, according to *Lauri v. Renad* joint authors are 'tenants in common'.[369] Unlike joint tenants, tenancy in common is a shared ownership, which is similar to French common law of indivision.[370] Joint authors are the owners of their share. Their ownership is not an indivisible part of each other. Under tenancy in common rules, each share is eligible for inheritance.

These three examples are similar to each other in respects of ownership. There are references to partnership rules in property rights. Nevertheless, selected jurisdictions unanimously agree that a co-authored work is common property of its authors. The proposed directive assumes this approach as well.

### 5.2. Exploitation

Exploitation is the primary aim of a work. A co-authored work is going to be utilized by its co-authors for monetary or other interests. A sole author may apply his/her discretion concerning the work's exploitation without any problem, whereas co-authors must seek to find a mutual ground or ask for court's help to reach a decision. While there is a consensus on significant points, some jurisdictions have extra provisions that separate from others. The proposed directive plans to focus on the mutually agreed grounds and allow the Member States to apply their own additional provisions alongside with the main principles. With this way, legal certainty will be improved on important points and the functioning of the internal market is not going to be negatively affected.

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[367] Lucas and others (n 235) s 195; Pollaud-Dulian, *Le droit d'auteur* (n 259) s 453.
[368] *Cour de Cassation, Chambre civile 1, du 4 Avril 1991* 4/1991 RIDA 127.
[369] *Lauri v Renad* [1892] 3 Ch 402.
[370] Henry Dyson, *French Property and Inheritance Law : A Practical Guide* (Oxford University Press 2003) 147.

While certain outliers may exist, it is reasonable to infer that the primary purpose of a work is exploitation. A co-authored work could be used for monetary or other purposes by its co-authors. A single author may use his or her discretion about the exploitation of the work without issue, but co-authors must seek a mutual ground or seek the assistance of the court to make a judgement. While there is agreement on key aspects, certain jurisdictions have additional rules that set them apart from others. The proposed directive intends to concentrate on the mutually agreed-upon principles while allowing Member States to implement their own supplementary provisions in addition to the basic principles. On this approach, legal certainty will be increased in key areas while the operation of the internal market will be safeguarded.

A civil partnership, according to the UrhG (Sec. 11 para. 2), requires unanimity in all actions, including exploitation, modification, and publishing. In a decision before the Frankfurt Court of Appeal, the court determined that the creation of a modified work required unanimous support.[371] Actions affecting the moral rights of co-authors, on the other hand, are not constrained by unanimous permission.[372] Co-authors, for example, have the right to be recognised for their entire contribution. If an individual author argues that a specific aspect of a work was mistakenly attributed to one of the other authors, the author must sue the other co-authors in order to get the work corrected. [373]

This rule does have one exception. Per Article 744(2) of the BGB, co-authors have the right to cancel an agreement without notice if there is a clear indication that the contractual party has failed to meet its obligations. Otherwise, a co-author cannot make a choice on his or her own and must obtain the permission of the other co-authors.[374] The emergency administrative measure is intended to safeguard the economic worth of the work. It allows co-authors to sue for infringements without the need for agreement from others. However, if a co-author demands a compensation, the others should be included in the demand as well.[375] In any event,

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[371] *GEMA Doppel-CD* (n 360) 334.
[372] Wirtz (n 262) s 8(17); Dreier and Schulze (n 242) s 8(13).
[373] *Egerlandbuch* [1984] OLG Karlsruhe 6 U 301/83, GRUR 1984 812 813.
[374] *Musikverleger III* (n 341) 43.
[375] UrhG Sec. 8 para 3

it makes no difference if the co-author signed a separate contract with the third party, as long as the co-author was approved unanimously. In this scenario, the co-author has the option of suing the other party without involving the remaining authors.[376]

The principle of good faith particularly constrain the use of consent under the UrhG. If a co-author declines to consent to an exploitation for no good reason, the others may sue him for consent. A cameraman, for example, would be acting in bad faith if he refused to publish the cinematographic work after providing the material.[377] It would also be a breach of trust if a co-author prohibits a new edition of the work with minor changes.[378] Changes that effect more than a minor adjustment, on the other hand, might be a valid basis to refuse permission.[379]

Co-authors must adopt a common agreement while exercising their rights, according to CPI Article L. 113-2 paragraph 2. Except for the right to paternity, Lucas and others believe that the unanimous consent should be sought for the exercise of moral rights.[380] In most cases, co-authors can file a claim for infringement of their moral rights without engaging other authors. [381] However, any use of the right of disclosure requires agreement among the co-authors.[382] This is also true for the right to integrity, more precisely the approve changes to the work.[383]

Under Article L. 113-3 of the CPI, civil courts have jurisdiction over any disagreements between co-authors. Disagreements on moral rights are also included. For example, the Paris Court of Appeal ruled that co-authors cannot abuse their moral rights to force their will on the entire work, causing it to be destroyed. [384] Moral rights cannot be used in an excessive or unwarranted manner. This is analogous to Germany's good faith principle.

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[376] *Das Boot* [2011] BGH I ZR 127/10, GRUR 2012 496 [19–21].
[377] *Dokumentarfilm Massaker* [2005] OLG Köln 6 U 12/05, GRUR-RR 2005 337.
[378] *Taschenbuch für Wehrfragen* [1970] OLG Frankfurt 6 U 55/67, Schulze OLGZ 107 [16].
[379] Dreier and Schulze (n 242) s 8(18); Wirtz (n 262) s 8(17).
[380] Lucas and others (n 235) s 198.
[381] *Cour de Cassation, Chambre civile 1, du 10 mai 1995, 93-10945* 10/1995 RIDA 285.
[382] *Cour de Cassation, Chambre civile 1, du 19 mai 1976, 74-15025, Publié au bulletin* Bulletin des arrêts Cour de Cassation Chambre civile 1 N 185 148.
[383] *Cour de Cassation, Chambre civile 1, du 15 février 2005, 01-16297 01-16500 01-17255, Publié au bulletin* Bulletin 2005 I N° 83 72.
[384] *Cour d'Appel de Paris, 1re Chambre, du 18 Avril 1956* 2/1957 Droit D'auteur (WIPO) 30.

Section 173(2) of the CRRA and the CDPA says that '…any requirement of the licence of the copyright owner requires the licence of all of them'. A joint owner in Ireland and the United Kingdom cannot use the work without obtaining a permission from the other owners.[385] Obviously, a third party wishing to exploit the work would need the authors' uninomus agreement.[386] The use of consent makes no reference to good faith principles.

However, there is a precedent for an implied license by a joint author to other authors. In *Godfrey v Lees*, Godfrey as a classically trained pianist contributed significant and creative contributions to six songs of a pop band while he was living with the members of the group.[387] Godfrey finally decided to claim co-authorship and rescind his permission to the use of these works after a long period. Godfrey held to be estopped from revoking his implied license by the court. It would be unjust to withdraw the licence because he did not establish his joint authorship for such a long period.[388]

In *Fisher v Brooker and others*, Mr. Fisher waited thirty eight years to claim his portion of the copyright to the musical work 'A Whiter Shade of Pale'.[389] Despite the fact that the song was recorded in 1967, it immediately became well-known and loved. At the start of the song, Mr. Fisher played a solo. In contrast to Godfrey v Lees, the court ruled that copyright claims in English law are unrestricted.[390] Furthermore, because the respondents were unable to demonstrate any disadvantage as a result of the claim's delay, the passage of time was deemed immaterial.[391]

The chosen jurisdictions agree on unanimous agreement to the exploitation of economic rights. This is also the approach that the proposed directive will take. France and Germany, on the

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[385] *Cescinsky v George Routledge & Sons Ltd* [1916] 2 KB 325.
[386] *Powell v Head* [1879] 12 ChD 686.
[387] *Godfrey v Less* [1995] EMLR 307.
[388] ibid.
[389] *Fisher v. Brooker* (n 351).
[390] ibid 3.
[391] ibid 4–5.

other hand, contain stipulations that limit the independence of co-authors in terms of permission. One of these is the principle of good faith. There are also emergency administration clauses in Germany. Because there is no agreement in the European Union on what a 'good faith' concept entails, these restrictions should not be included in the proposed directive.

Nonetheless, a recital will be included that will allow Member States to include good faith or estoppel clauses in their domestic legislation. Such abuse of right clauses are necessary but their limits are not agreed upon. Because there is no harmonisation of moral rights in the European Union and this research does not intend to create a harmonised concept of moral rights, it is also beyond the scope of the proposed directive.

### 5.3. Distribution of income

On the subject of income distribution, there is little consensus. The optimum scenario is to calculate each co-author's shares are based on their participation. When this is impossible to ascertain, the chosen jurisdictions default to equal shares for each co-author. In any event, if there is a contract between co-authors defining their part of the work, the agreed-upon shares apply.

In Germany, revenue sharing amongst co-authors is based on their relative involvement in the work, according to UrhG Section 8(3). If shares cannot be determined precisely, the courts can approximate them, according to the Hamburg Court of Appeal. If there are any doubts about an estimate, the co-authors are entitled to equal shares.[392] There is no need for analysis or estimation if the co-authors are in agreement.[393]

There are two sorts of share division agreements: those reached among co-authors and those reached with a third party. Typically, this third party is a producer or a publisher. According to the BGH, an agreement between co-author's and a producer or a publisher is not a binding agreement between co-authors themselves. It is a corporate law agreement between the parties

[392] *Der Ratgeber* [1978] OLG Hamburg 3 U 84/78, 207 Schulze OLGZ 6.
[393] UrhG Section 8 para 3

and cannot be utilised as a basis for calculating shares.[394] Otherwise, a decision reached by co-authors is final.

According *to Lauri v. Renad*, joint authors are typically assumed to have equal interests in Ireland and the United Kingdom. The courts, on the other hand, can assess their involvement (if possible) in order to determine respective portions.[395] In *Bamgboye v Reed*, for example, the court found joint authorship by pointing to their contribution to the musical composition.[396] Authors were given uneven shares in the end.

An agreement amongst co-authors is the preferred stance in France. The courts have two points of view. An egalitarian split should be recognised as a default, according to the Paris First Instance Court.[397] However, on some cases, the Paris Court of Appeal used a proportionate split based on the authors' individual contributions.[398]

The CPI's only clause addresses the potential of co-author share dispute.[399] In the event of a disagreement, the clause states that the courts have the authority to decide on the partition. The Court of Cassation sees this article as a safeguard against one of the co-authors abusing his or her rights.[400] In a case involving Article L113-3, Pollaud-Dulian argues that the courts should seek the parties' desire, if that fails, the courts should divide the rights according to the respective contributions, and if that is not feasible, the shares should be presumed to be equal.[401] The proposed directive also adopts the agreed approach on the major topics relating the distribution of income by the chosen countries. This research plans to adopt following article to provide a provision regarding this subject;

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[394] *Popmusikproduzenten* [1998] BGH I ZR 250/95, GRUR 1998 673 677.
[395] *Lauri v. Renad* (n 369) (Tenants in common – not joint tenants).
[396] *Bamgboye v Reed & Others* [2002] EWHC 2922 (QB); [2004] EMLR 61.
[397] *Tribunal de Grande Instance de Paris, 3e Chambre, du 27 février 1968* 1968 Dalloz 375.
[398] *Cour d'Appel de Paris, 4o Chambre, du 3 Novembre 1956* 2/1956 Gazette du Palais 324.
[399] Article L113-3 para 3
[400] *Cour de Cassation, Chambre civile 1, du 24 novembre 1993, 91-18881, Publié au bulletin*.
[401] Pollaud-Dulian, *Le droit d'auteur* (n 259) s 455.

> Unless otherwise agreed, co-authors' shares are divided according to their respective contribution. If such distribution is not possible, then co-authors have equal shares.

This article is consistent with the European Union's overarching strategy. When determining the co-authors' shares, the current jurisprudence will be important.

### 5.4. Representation before the court

There are three separate acts with particular provisions for co-authored works in the jurisdictions concerned. These include filing a lawsuit against a third party for infringement, suing another co-author of the work for infringement, and defending individual contributions or moral rights against third parties. In addition to these three actions, there is a small act of seeking interim/injunctive relief, which can be counted as a companion to these three. Minor variations exist between the selected jurisdictions. A similar position will be taken by the proposed directive. There is no divergence that would cause the internal market to malfunction.

The same laws that apply to the exploitation of economic rights apply to the defence of economic rights in France. According to the Court of Cassation, a co-author cannot sue for infringement without the involvement of others.[402] It makes no difference whether the authors concerned participate in the proceedings or not.[403] They are not need to be present in court, but they must be formally participating. However, the Court of Cassation did suggest in one example that individuals may sue for separate contributions.[404]

The authors are under no duty to include others in their defence of moral rights. This is the case because of the personal nature of moral rights in French law.[405] It makes no difference whether the moral right reflects the entire work or simply the contribution of one author.[406] It is critical

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[402] *Cour de Cassation, Chambre civile 1, du 4 octobre 1988, 86-19272, Publié au bulletin* Bulletin 1988 I N° 268 184.
[403] *Cour de Cassation, Chambre civile 1, du 5 décembre 1995, 93-13559, Publié au bulletin* Bulletin 1995 I N° 450 314.
[404] *Cour de Cassation, Chambre civile 1, du 10 mai 1995, 93-10.945* (n 381).
[405] Article L121-1
[406] *Cour de cassation, civile, Chambre civile 1, 11 décembre 2013, 12-25974, Publié au bulletin* [2013] Cour de cassation 12-25.974, Bulletin 2013, I, n° 241.

to emphasise that this is a passive representation; otherwise, any processes initiated by co-authors should be considered active representation.

In Germany, UrhG Section 8(2) states that 'Each joint author shall be entitled to assert claims arising from violations of the joint copyright; he may, however, demand performance only to all of the joint authors'. A violation can be sued by a single co-author. Nevertheless, the co-author must also seek damages for the other co-authors. Only information and accounting, as well as the assessment of culpability for damages (without particular benefit), can be asserted individually as long as there is no tangible recompense.[407]

To put it another way, if one of the authors wants to discover the purchase volume of a co-authored work from an unwilling licensee, the author can sue the licensee without engaging the other co-authors. However, if it is determined that compensation is required owing to misrepresentation, the suing author must enlist the help of other co-authors to pursue the claim. This action does not include any obligations to other co-authors, allowing each co-author to pursue their claims independently.

In some ways, this is comparable to the French viewpoint. In Germany, there is no need to include the co-author in the procedure if the remedy is requested for the benefit of all co-authors, but in France, co-authors must be formally involved but not active in the process. The main goal remains the same: to seek recompense for other co-authors without subjecting them to the risk of being involved in every court action.

So, for example, claims for equitable payment[408], fairness compensation[409] and if the co-author has established his own exploitation agreement with the publisher[410], he can in principle claim

[407] *Der Frosch mit der Maske* [2010] BGH I ZR 18/09, GRUR 2011 714 [46]; *Das Boot* (n 376) para 17.
[408] UrhG Section 32
[409] UrhG Section 32a
[410] *Das Boot* (n 376) para 19.

it alone. To get an injunction remedy under Section 8(2), the BGH determined that one of the co-authors does not need to involve others.[411]

Likewise, if a co-author commits a breach, any other co-author has the right to sue that co-author. If there is an agreement, such as a joint-venture partnership, between the co-authors, the claimant co-author is entitled to contractual remuneration as well.[412]

There is no way for co-authors to sue an infringement individually in Ireland or the United Kingdom. There must be a trial that includes all of the authors.[413] As long as it isn't against another joint author.[414] Copyright owners and exclusive licensees with concurrent rights of action cannot launch a lawsuit against infringement in court without the other.[415] While both parties can seek a temporary injunction, one of them can do so without the other.[416] To keep in mind, this condition applies to both owners and joint authors. The work cannot be exploited by one of the joint authors if the other does not have a licence to do so.[417]

Ireland and the United Kingdom took a firmer stance. While the basic concept remains the same, there is no way to absolve other joint authors of their responsibilities when one of them begins the procedures. The proposed directive also adheres to German and French reasoning. The solution, on the other hand, took a German approach. Since the goal is to safeguard other co-authors' financial interests, there is no need to drag them into the procedures against their will.

## 6. Special case: Audiovisual Works

Across the European Union, countries have taken on the job of regulating audiovisual works. The large number of collaborators and considerable financial commitment in these activities

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[411] *Videozweitauswertung III* [1995] BGH I ZR 63/93, GRUR 1995 212.
[412] Dreier and Schulze (n 242) s 8(22).
[413] *Lauri v. Renad* (n 369); *Prior v Lansdowne Press Pty Ltd* [1977] RPC 511.
[414] CRRA Section 37(2)
[415] CRRA Section 136(1)
[416] CRRA 137(3)
[417] *Robin Ray v Classic FM plc* (n 319).

necessitate some further guidance. This is done in order to bring the profitable film business to national markets. It's also critical to provide authors with appropriate protection against strong producers. As a result, audiovisual works vary from other collaborative works in two ways: the element of attracting financial investment, and the introduction of sufficient identity and protection for a large number of participants.

Before delving into European-specific national or supranational laws, it's crucial to consider what the Berne Convention has to offer in terms of audiovisual works. The Berne Convention's absence of a meaningful definition of authorship is explored in Chapter 1. Moreover, the Convention avoids identifying anybody as the audiovisual work's author. The owner of an audiovisual work is deemed to have the same rights as the creator under Article 14*bis*. National legislations are in charge of determining ownership regulations. As a result of this liberty, the European Union hosts a range of laws governing audiovisual works.

Following the examination of the above-mentioned distinctive features, this part will explain the applicable European Union directives. The Term Extension Directive[418] and the Rental Rights Directive[419] are two important directives in terms of authorship in audiovisual works. Furthermore, national legislations have their own authorship rules for audiovisual works. These clauses will be contrasted and discussed in this section. Finally, the consequences of audiovisual co-authorship on moral and economic rights are discussed in depth.

This structure has been modified to highlight the key distinctions between audiovisual co-authorship and normal co-authorship. The purpose of this study is not to illuminate every detail of the complicated ownership and authorship regulations that apply to audiovisual works. This study will not offer a solution for harmonising multiple author audiovisual works in the European Union.

[418] Term Extension Directive.
[419] Rental Right Directive.

### 6.1. Distinctive aspects of audiovisual works

In the copyright field, audiovisual works are one of the most complicated examples of co-authorship. There are various contributions from a variety of authors. Furthermore, the cost of completing a professional audiovisual job is exceptionally high. These exceptional conditions create two separate challenges: coordinating a large number of contributors and pleasing the party in charge of the finances.

Another issue is brought to light by the large number of contributors. It might be difficult to tell the difference between a genuine contribution that deserves co-authorship and a non-original or non-collaborated contribution that does not qualify the author as a co-author of the final work. This issue, on the other hand, will be considered under the heading 'authors of audiovisual works'.

All national authorities in the European Union, according to Kamina, have been indecisive between safeguarding individuals and encouraging broader producer rights.[420] On the one hand, proponents argue that the default creator theory of co-authorship should be applied to all audiovisual works without exception. The utilitarian side, on the other hand, defends the concept of safeguarding capital investment and restricting creative rights.

Finally, in order to participate in the lucrative audiovisual works market, national and supranational legislators are attempting to resolve these disparate issues. The primary reason for deviating from the standard basic formulation for audiovisual works is to safeguard the vulnerable developmental period. As detailed in the following sections, each provision tries to address one or more of these issues.

### 6.2. European Union directives

There has been no attempt at standardisation in this sector prior to the European Parliament's Committee on Culture's proposal to include the director as one of the authors of audiovisual

[420] Kamina (n 14) 141–142.ibid.

works.[421] Following the European Parliament's suggestion and pressure, the Rental Directive included the director as a co-author.[422] However, the directive limited the area of applicability of this clause. According to the Directive, the director must be regarded an author exclusively in terms of the work's rental rights.

The debates intensified throughout the Term Directive's preparation stage. While the Commission suggested a rewrite of the laws governing authorship in audiovisual works, the plan is met with vocal opposition by the UK Representatives.[423] The Commission was attempting to demonstrate that audiovisual works can only be authored by intellectual creators.[424] However, the directive weakened and broadened the scope of the Rental Directive's amendment. The director is recognised as an author of audiovisual works in the European Union under Article 2(1) of the Term Directive.

The value of the director does not derive from the director's function in the audiovisual works or from his or her contribution to the creative process. The reason why the director was chosen as a compromise by the European Parliament is that he or she has the broadest level of acceptance within the European Community.[425] This acceptance enabled the proposal to garner a majority of the votes.

The CJEU reinforced this newly acquired role of director in the Luksan ruling.[426] According to Austria's Author's Rights Act, the producer was the original and direct recipient of economic rights to audiovisual works. The lawmaker omitted the director. Without relying on presumptions, this classification was determined to be in violation of the directives. According

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[421] European Commission, 'Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Question of Authorship of Cinematographic or Audiovisual Works in the Community - COM 2002/0691'.
[422] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.
[423] Gerald Dworkin, 'Authorship of Films and the European Commission Proposals for Harmonising the Term of Copyright' (1993) 15 European Intellectual Property Review 151, 152.
[424] Dworkin (n 423).
[425] Kamina (n 14) 146.
[426] *Luksan Case C-277/10* (n 67).

to the court, the director must retain the rights to exploit audiovisual works. There could be additional co-authors, but excluding the director violates the directives.

As discussed in the Luksan case, rebuttable presumptions are a frequently employed legal technique for resolving the producer problem. For example, under Article 14bis(2)(b) of the Berne Convention, authors' economic rights are restricted in favour of non-author owners unless a specific agreement declares otherwise. In other words, authors are believed to transfer the use of their rights to the owner of the work under normal circumstances and cannot object to this transfer unless an agreement to the contrary exists. Article 3(6) of the Rental Directive provides a comparable mechanism for Member States to establish transfer presumptions for rental, fixing, distribution, broadcasting, and communication to the public rights. While national legislators retain the option, this legal tool is widely accepted. The specific application of these rules will be discussed in detail under the section ‘exploitation of moral and economic rights’.

### 6.3. Classification of the audiovisual work

Prior to establishing who is regarded a co-author, it is necessary to classify audiovisual works. Due to the large number of participants, audiovisual works might be deemed collaborative works or, if there is insufficient collaboration, a jurisdiction may categorise them as secondary formulation. However, the chosen jurisdictions universally recognise audiovisual works under the basic formulation.

France was unprepared for the rise of audiovisual works as a profitable venture. According to Debbasch, the early stages of the creation of legal regulations governing audiovisual works were significantly improvised and lacked a comprehensive grasp of their particular characteristics.[427] Courts attempted to define audiovisual works as collective works. However, on 10 November 1947, the Court of Cassation reversed the Paris Court of Appeal's *Mascarade* judgement and declined to classify audiovisual works as collective works.[428]

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[427] Charles Debbasch, *Droit de l’audiovisuel* (Dalloz 1995) 11.
[428] *Cour d’Appel de Paris, 1re chambre, du 16 mars 1939* 07/1939 Droit D’auteur (WIPO) 78; *Cour de Cassation, Chambre civile 1, du 10 Novembre 1947* 06/1948 Droit D’auteur (WIPO) 72.

Article L 113-7 of the statute of 11 March 1957 established a legislative list of presumed co-authors of audiovisual works. According to Kamina, this provision's primary role is to preclude any assumption of communal works.[429] Whereas the basic formulation confers ownership on co-authors, the collective work identifies a principal and confers initial ownership on that principal. Similar to the producer in audiovisual works, this principal is accountable for the organisation. Under a collective work regime, the producer would receive first ownership as a principal. However, once it refers to basic formulation, the producer must deal with co-authors.

According to Pollaud-Dulian, there are two primary grounds for collective work: it is lucrative for the producer and is more appropriate for the films' industrial character.[430] By contrast, the basic formulation is more suited to author protection.[431] In the end, the current arrangement is better suited for France as one of the most ardent advocates of the creator doctrine. Article L. 121-5 made it very obvious that the purpose was to prohibit the producer.[432]

In Germany, there is no legislative list of authors for audiovisual works to consult. The length of protection is determined by Section 65(2) of the UrhG. According to the Article, the duration of protection is determined by the director, author of the script, and composer of the film's soundtrack. However, this provision does not represent the real co-authors recognised in Germany. The protection clause is incorporated in the code as a result of the Term Directive's Article 2(2).

To comprehend the nature of audiovisual works in Germany, it is critical to compare and contrast Sections 88 and 89 of the UrhG. Their purpose is comparable to the assumption of transfer of rights to the producer in that they serve to simplify. Section 88 deals with pre-existing material on which the audiovisual production is based. The latter article regulates

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[429] Kamina (n 14) 172.
[430] Frédéric Pollaud-Dulian, 'Les auteurs de l'oeuvre audiovisuelle' [1996] Revue Internationale du Droit d'auteur 50, 78.
[431] Pierre-Yves Gautier, *Propriété Littéraire et Artistique* (Presses Universitaires de France-PUF 2001) s 699.
[432] Pollaud-Dulian, 'Les auteurs de l'oeuvre audiovisuelle' (n 430) 68.

contributions made after to the start of the audiovisual production. In other words, the legislator acknowledges that the final work has certain pre-existing elements, but the work also contains co-authored contributions that required to be separated from the pre-existing works.

By definition, classifying contributions according to marketable indivisibility entails classifying audiovisual works under the basic formulation. Dreier and others make a similar argument; having both sections 88 and 89 indicates that the audiovisual works are collaboratively created.[433] Apart from the implicit provision, the audiovisual work falls squarely inside the German basic formulation category.

In Ireland and the United Kingdom, audiovisual works were previously protected as series of photographs or dramatic works.[434] In 1956, with the passage of the Copyright Act, a new category of related work was created. The newly created category of related right is named 'film'. The film serves as a representation of the recording rather than the recording itself. It is essentially an entrepreneurial right to safeguard the producer's interests (or to be more precise to protect who made the investment). In comparison to audiovisual works, the film right does not confer authorship. However, the European Union compelled Ireland and the United Kingdom to acknowledge the director as joint author of the audiovisual work. In the United Kingdom and Ireland, this duty is met by granting the director joint authorship rights to the film. While lawmakers were unconcerned about the distinction between recorded and recording, the Term Directive distinguishes between recorded (audiovisual work) and recording (film).[435] The recording is only a preservation of the audiovisual work, whereas the audiovisual work is a more expansive notion.

A judgement in the United Kingdom significantly rectified this misrepresentation of audiovisual works. The Norowzian case established the film right's erroneous classification. Mehdi Norowzian created a video called *Joy* utilising jump-cutting methods. The clip depicts

[433] Dreier and Schulze (n 242) s 89(7).
[434] Kamina (n 14) ch 2.
[435] Article 3(3) of the Term Directive.

a guy dancing on a roof. The main actor appears to dance in an unusual and unnatural manner as a result of these film methods. This similar approach was employed in a commercial named *Anticipation* on such a dancing man while he waited for his Guinness drink. The background, performers, film set, and storyline are all unmistakably different. Norowzian said that his film rights had been violated. However, the first instance refused his plea due to the lack of an accurate replica of the film.[436] Norowzian made a different issue in his appeal.[437] Rather than the film right (recording), Norowzian appealed on the grounds of content violation (recorded). Even though Norowzian's appeal was denied owing to a lack of proof of a duplication, the court recognised that the content is distinct from the recording and should be protected separately.[438] The ruling states that;

> 'Where a film is both a recording of a dramatic work and a dramatic work in itself they do not exclude an overlap. In other cases, there will be no overlap. Sometimes a film will simply be a recording of something which is not a dramatic work. At other times it will not be a recording of a dramatic work but a dramatic work in itself'.[439]

Creative films are classified as authorial works when they are evaluated as dramatic works. Additionally, because audiovisual works are dramatic works, they qualify for the basic formulation in the United Kingdom. It is worth noting, however, that this ruling has not yet been recognised by Irish courts. Ireland, notwithstanding the widespread understanding of the law, might go a different course.

From the straightforward categorization in France to the more complicated situation in the United Kingdom, audiovisual works are regarded to be subjects of basic formulation principles in each jurisdiction in which they are produced.

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[436] *Norowzian v Arks Ltd & Ors* [1998] EWHC 315 (Ch).
[437] *Norowzian v Arks Ltd & Anor (No. 2) [1999] EWCA Civ 3014* (n 66).
[438] Estelle Derclaye, 'Debunking Some of UK Copyright Law's Longstanding Myths and Misunderstandings' [2013] Intellectual Property Quarterly 1.
[439] *Norowzian v Arks Ltd & Anor (No. 2) [1999] EWCA Civ 3014* (n 66) para 367.

### 6.4. Authors of the audiovisual work

The focus of this study is the selection of co-authors in a broader sense. This part, on the other hand, will focus on significant but isolated contrasts across audiovisual works. Presumptions and/or statutory lists are to blame for these discrepancies. Otherwise, like with other co-authored works, co-authorship in audiovisual works is simply decided by basic formulation rules.

When it comes to audiovisual works, France has by far the most regulated jurisprudence. Article L. 113-7 identifies five potential authors and provides a conditional co-authorship at the conclusion. The script's author, the adaptation's author, the dialogue's author, the musical composition's author, and the director are the five authors. Until proven contrary, these are assumed to be the co-authors. The director, for example, was refused co-authorship by the Paris Court of Appeal since he participated as a technical support.[440] The usual norm is the intellectual creation by natural person(s).[441] Each contribution and co-authorship must meet the same standard for originality as any other co-authored work.[442] The primary purpose of this list, according to Kamina[443] and Pollaud-Dulian[444], is to underline the desire for basic formulation and prevent the producer from becoming an initial owner.

The author of a previously published work is the target of the conditional authorship. When an audiovisual work is based on a copyrighted work, the pre-existing work's author(s) obtain co-authorship status in the finished work. However, the adapted work cannot be an audiovisual work.[445] Otherwise, either the subsequent work becomes unoriginal, or the subsequent work absorbs the formal work, resulting in a collaboration. Recognizing co-authorship of adapted works is simply challenging and goes against the co-authorship standards. It allows anyone to become a co-author in a multi-authored work without having contributed. The virtue of the last

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[440] *Cour d'Appel de Paris, 4e chambre, du 4 mars 1987* 04/1987 RIDA 71.
[441] CPI Article L. 113-7
[442] Desbois (n 235) s 146; Pollaud-Dulian, *Le droit d'auteur* (n 259) s 468,469,472,473; Lucas and others (n 235) s 208.
[443] Kamina (n 14) 172.
[444] Pollaud-Dulian, 'Les auteurs de l'oeuvre audiovisuelle' (n 430) 68.
[445] ibid 98.

surviving author approach is that it can prolong the protection even after the term of protection for the pre-existing work has expired.

For these reasons, the case law adopted a variety of safeguards. For example, the Court of Cassation held that the author of a pre-existing work cannot preclude contributors from freely utilising the work.[446] Nevertheless, because these authors are regarded co-authors of the audiovisual work under applicable law, other authors cannot initiate an infringement action against third parties without first enlisting the author of the pre-existing work.[447] According to Desbois, this provision is intended to provide the creator of the pre-existing work with a lengthy compensation, and so should be viewed in that light.[448]

Save for the legislator's stated aim, author of the pre-existing work should not be regarded as equivalent to that of others from co-authorship perspective. Pollaud-Dulian argues in favour of this interpretation of the legislator's meaning.[449] Additionally, Pollaud-Dulian notes that this co-authorship arrangement has no effect on the author's rights derived from the composite work (secondary formulation). The author of the pre-existing work has two distinct rights in the audiovisual production: co-authorship over the entire work and adaptation rights. Additionally, because the pre-existing work is divisible from the remainder of the work, the author may utilise the adapted work under the condition of not jeopardising the original work.[450]

As noted previously, there is no presumptive or non-presumptive list in Germany that identifies the co-authors of an audiovisual work. Section 65(2)'s solitary mention does not accurately reflect the real authors. On the other side, the BGH provides a list of assumed co-authors. The BGH contends in the *Frog with a mask* case that, together with the director, the director of photography, and the editor are co-authors of an audiovisual production.[451]

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[446] *Cour de Cassation, Chambre civile 1, du 14 janvier 2003, 00-19086, Publié au bulletin* Bulletin 2003 I N° 10 6.
[447] *Cour d'Appel de Paris, 4e chambre Section A, du 18 décembre 2002* JurisData 2002-203810.
[448] Desbois (n 235) s 152.
[449] Pollaud-Dulian, *Le droit d'auteur* (n 259) s 471.
[450] CPI Article L. 132-29
[451] *Der Frosch mit der Maske* (n 407).

When evaluating co-authors of an audiovisual work, the Federal Parliament debated and suggested to exclude independently marketable contributions (such as the musical composer) and non-creative contributions (such as performers and producers).[452] Similarly to the BGH, the director, director of photography, and editor are chosen.[453] The debates did not preclude additional participants from co-authorship. Even the producer may be a co-author if the film's design is co-determined. Accepting the producer as an author without creative participation, on the other hand, is debated and disputed. Regardless of the denial of co-authorship, the producer retains sole licencing rights to the audiovisual work.[454] As Kamina points out, marketable indivisibility disqualifies the majority of contributions from co-authorship.[455]

In Germany, pre-existing works have a vital significance. By and large, German law supports the need that all audiovisual works be inspired by or derived from pre-existing works. Whether it's a professionally written screenplay or a fictitious novel. After the subject matter for the film is decided, the creative contributions materialise.

When it comes to co-authorship, the simplest and most basic method is to deny it to the authors of previously published work. For the simple reason that the work existed prior to the audiovisual work. As a result, it does not fulfil the criterion of marketable indivisibility. Nonetheless, lines might blur and during constant filming, the screenplay's author can modify and augment the work with other contributions. The outcome may be thought of as a synthesis of previous works and fresh additions. This may provide co-authorship for the author of the previously published work. To resolve this, Nordemann and others argue that it is necessary to determine if the work is self-contained or intimately tied to the audiovisual work.[456] Which is true is a matter for the courts to decide.

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[452] BT-Drucks. IV/270 S. 100
[453] BT-Drucks. IV/270 S. 100
[454] Nordemann and Fromm (n 242) s 93(10).
[455] Kamina (n 14) 170.
[456] Nordemann and Fromm (n 242) s 93(16).

In certain instances, the author of an adapted work may provide too detailed guidelines for filming and so qualify as a co-author. Dreier and others refer to these contributions as having a dual nature.[457] The author retains ownership of the previous work and becomes a co-author of the audiovisual work. According to Getting and others, this reveals a slew of practical difficulties.[458] In theory, it is straightforward to classify the author as a co-author. In practise, determining whether the author's contribution is sufficient is quite difficult. The time period between the start of shooting and the completion of the pre-existing work may indicate that the work does not have a double nature.[459] In these conditions, it would seem reasonable to classify any contribution made as pre-existing.

Apart from the more popular examples of a film script or fictional literature, various forms of pre-existing works exist. For instance, the BGH classified a movie character as a pre-existing work in a judgment.[460] Another example is the adaptation of musical works. Additionally, if the music is a substantial component of the audiovisual work's exploitation, the composer of the film music may be regarded a co-author of the entire work.[461]

The joint authors of a film cannot be altered in Ireland or the United Kingdom. Due to the nature of the related right, the authors are fixed. Unmentioned authors are not eligible for joint authorship. However, the potential of several directors remains an open topic. The producer and the principal director are joint authors under CRRA 22(2) and CDPA 10(1A). While the producer remains singular, a film may have many directors. As previously indicated, it is not feasible to identify all of them as joint authors. On this point, as Kamina rightly notes, selecting the primary director may be challenging.[462]

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[457] Dreier and Schulze (n 242) s 88(9).
[458] Hartwig Ahlberg and Horst-Peter Götting, *Urheberrecht* (Verlag CH Beck 2017) s 88(9) <https://beck-online.beck.de/?vpath=bibdata/komm/beckok_15_BandUrhR/cont/beckok.htm>.
[459] ibid 88(10).
[460] *Pippi Langstrumpf* [2013] BGH I ZR 52/12, GRUR 2014 258.
[461] Ahlberg and Götting (n 458) s 88(15).
[462] Kamina (n 14).

If Ireland adopts the approach taken in the United Kingdom in the Norowzian case for the recorded portion of the audiovisual work, then the basic formulation applies to dramatic works.[463] Ireland's basic formulation principles prohibit joint authorship of a dramatic work by the authors of pre-existing scripts[464] or film soundtracks.[465] The director is the most obvious joint author candidate.[466] In a similar fashion to the German position, the director of photography and editor are also eligible and are frequently regarded as joint authors of the audiovisual work.

### 6.5. Exploitation of moral rights

Due to the huge amount of contributors, the process of selecting co-authors for audiovisual work is precarious. It is a challenging task to execute such an attempt without encountering difficulties. Given the magnitude of the investment, legislators included various safeguards to assure the film projects' success. From this vantage point, moral rights might represent a significant threat to the work's health. Moral rights may be invoked to obstruct disclosures or unrestricted exploitation. As a result, countries have chosen to limit its discretion over audiovisual works.

In France, Article L.121-5 prevents co-authors from using their right of integrity prior to the work's completion. The goal is to reassure the producer that broad author protection does not conflict with the preservation of industrial investments. This constraint assures that issues will be addressed upon completion.

Article L. 121-5's restriction dissolves with the final version of the audiovisual production. The mutually agreed-upon final version serves as an indicator of completion. This is a contract between co-authors and the producer; the producer cannot proclaim the work complete on his or her own.[467] Following then, co-authors may exercise their rights to the work's finalised

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[463] ibid 149.
[464] ibid 159 and 164.
[465] ibid 160.
[466] ibid 157.
[467] *Cour de cassation, civile, Chambre civile 1, 24 septembre 2009, 07-17107, Publié au bulletin* Bulletin 2009, I, n° 183.

version. According to Pollaud-Dulian, the director is considered to represent all other co-authors under usual circumstances.[468] This is critical in the finishing process. The director can speak for all authors and work with the producer to finalise the script.

During the development stage, disagreements amongst co-authors are possible. These issues can be resolved or they can become insurmountable. According to the Paris Court of Appeal, a publishing agreement implies a trouble-free preparation stage. Otherwise, the co-author is responsible for informing others of any moral right claim and abstaining from consenting to further development.[469] However, such conduct impedes the development of the work. Article L. 121-6 resolves the issue by allowing the producer to employ others to complete the unfinished segment. This action confers co-authorship to the latter contributor, while the previous author retains co-authorship and authorship of its own section. However, the producer cannot abuse the circumstance and jeopardise the integrity of the unfinished section. If the co-author did not consent to the publishing of the work in the first place, a moral rights claim about prior versions of the work may be made subsequently.[470]

In a larger sense, every moral right claim made in prior editions is inextricably linked to the right to integrity. The right to integrity serves as a springboard for other moral rights. As a result of the right of integrity, subsequently the right to disclose, the right to withdraw, and the right of attribution may be invoked. They do, however, show their effect in the final form of the work. The right to withdraw, in particular, is ineffective during the preparation period. Article L. 121-6 prohibits the author from withdrawing an unfinished contribution. The only relevant action would be to refrain from approving the publication by using the right to disclosure. Lucas, Desbois, and others agree that when the author consents to the final version, the right to disclosure is implied.[471] Otherwise, the co-authors can enforce the publication with the help of the courts. At this point, the dissident co-author's prevention is revoked.

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[468] Pollaud-Dulian, *Le droit d'auteur* (n 259) s 482.
[469] *Cour d'Appel de Paris, 4e chambre Section B, du 9 septembre 2005* JurisData 2005-297513.
[470] Pollaud-Dulian, *Le droit d'auteur* (n 259) ss 486–489.
[471] Desbois (n 235) s 669; Lucas and others (n 235) s 213.

If a problem had arisen in a previous version, the author should have been contacted at that time. After agreeing on a completion date, it is irrational to prohibit the work from being exploited. The author may attempt to use the right to disclosure as a leverage, but resolving the issue should be a simple matter for the courts. Nonetheless, the Court of Cassation held that co-authors cannot claim a violation of their right to disclosure if the work's development was interrupted before it was finished.[472] The right to disclosure becomes significant when the task is nearing completion. These restrictions on the right to integrity serve the goal of reducing financial investment risk. However, the lawmaker is afraid that such restrictions may lead to emotional reactions from the authors. The legislature forbade the destruction of the master copy in Article L121-5.

In Germany, the use of the right of integrity in audiovisual works is limited to severe distortion or other severe derogatory treatment under UrhG Section 93. The distinction between regular distortion and severe distortion is a legal question for the courts to resolve. For example, the Munich Court of Appeal recently ruled that altering the conclusion of a book on a screen does not constitute severe distortion.[473]

Section 93 applies to co-writers as well as authors of pre-existing works and holders of associated rights, such as performers. On the other hand, the producer can prevent any distortion, whether large or little.[474] In France, the prohibition on the right of integrity is lifted upon completion of the work, whereas in Germany, the prohibition begins with the production and continues until the conclusion of the film production agreement.

Regardless of the higher standard for severe distortion, any moral right claim in an audiovisual production must balance various interests. The interests of other parties must be considered, not just the authors, but also the producer and performers. In a first instance court ruling, it is determined that the remedy for the director's claim of distortion would effect half of the work.[475]

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[472] *Cour de cassation, civile, Chambre civile 1, 24 septembre 2009, 07-17.107, Publié au bulletin* (n 467).
[473] *Die unendliche Geschichte* [1985] OLG München 29 U 2114/85, GRUR 1986 460..
[474] UrhG Section 94(1)
[475] *Schlacht um Berlin* [2004] KG 5 U 278/03, 497 GRUR 2004 498.

To safeguard the producer's and other authors' legitimate interests, the court dismissed the director's claim of moral right infringement. According to Dreier and others, a deformity for someone may preclude the work from being used by others.[476] This is the issue that the balance of interest addresses.

The remaining two moral rights (the right of attribution and the right of disclosure) are unaffected. By utilising the right to disclosure, the director can exert control over how the work is completed.[477] The right to attribution is restricted under Section 93 for performers, but not for the authors of the work.

There are no specific restrictions on the exercise of moral rights in Ireland and the United Kingdom. The director may assert moral rights on the film, and joint authors of the dramatic work may impose their moral rights without limitation on the dramatic work. There is one potential constraint. When the producer and other joint authors enter into a contract that has a waiver clause, the authors forfeit their moral rights. In Ireland and the United Kingdom, moral rights can be waived by a formal agreement.[478]

### 6.6. Exploitation of economic rights

Similar to moral rights, the large number of contributors may impose certain constraints for economic rights. Regulations governing film production contracts, the assumption of transfer, and temporary restrictions are only a few of the measures used to mitigate possible difficulties.

In addition to a comprehensive clause governing the terms of a film production contract, France has an assumption of transfer of economic rights clause. However, Polloud-Dulian[479], Lucas, and others[480] conclude that this clause is inadequate. The legislator aimed to introduce legal certainty with this assumption. For instance, when the producer begins to exploit the work, all parties concerned assume that the producer possesses the necessary rights for exploitation.

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[476] Dreier and Schulze (n 242) s 93(10).
[477] ibid 93–3.
[478] CRRA section 116
[479] Pollaud-Dulian, *Le droit d'auteur* (n 259) s 491.
[480] Lucas and others (n 235).

With the transfer, the producer can pursue legal action against infringements without wasting time searching down each contributor.

Except for the composer of a musical composition, co-authors of an audiovisual work are assumed to transfer their exclusive exploitation rights to the producer under Article L. 132-24. Article L. 131-6 provides an exemption from the assignment for unanticipated and unforeseen exploitation forms. As a result, the producer must expressly state in the contract how the undiscovered uses would be exploited. This assignment expressly excludes any graphical and theatrical rights. Co-authors are allowed to exploit their individual contributions without jeopardising the integrity of the overall work.[481] Additionally, the Court of Cassation determined that the assumption is valid until the rights to the audiovisual works expire.[482]

Germany's legislators strive to attain similar outcomes to those in France. However, the procedure is significantly different as a result of the restriction of assignment. As noted briefly in earlier parts, there are two sections concerning economic rights directed at various contributors: Sections 88 and 89. According to Section 88, giving the right to film a work confers on the producer the exclusive right to use, and pursuant to Section 89, everyone who acquires co-authorship in the audiovisual work confers on the producer the exclusive right to exploit their contribution.

This grant of an authorization to use is reinforced further by restrictions on the economic rights' use. Section 90 prevents authors who gave a licence under Section 88 or 89 from withholding their permission to the work's retransmission and re-granting of the right to use, as well as revoking the grant made to the producer. These limitations, however, do not begin with the contract. The production's beginning point serves as an activator for these constraints. This chronological reference is significant for the authors of the pre-existing work. Other co-authors naturally contribute after the work's inception; otherwise, they will not qualify as co-authors.

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[481] CPI Article L. 132-29
[482] *Cour de Cassation, Chambre civile 1, du 5 novembre 1991, 90-15298, Publié au bulletin* 191 Bulletin 1991 I N° 291.

According to Nordemann and others, the work begins when cameras begin filming it.[483] A halt or prolonged gaps suggest that the work has not yet begun in full.[484] According to Wandtke and others, simple pauses without malice do not alter the commencement date.[485] Nonetheless, given the significant risk and expense associated with producing an audiovisual work, it is anticipated that filming will be completed as quickly as feasible.[486] According to the legislative debates, this is a reasonable constraint, as the producer need this protection only once filming begins.[487] It would be unjust to the authors otherwise.

This restriction does not apply to non-audiovisual exploitations of the works, such as publishing a book about the film or publishing a soundtrack.[488] Furthermore, while their economic rights are restricted, the authors' claim for damages from this time period is unaffected.[489] Despite major restrictions, Nordemann and others say that this provision is fair since it includes safeguards against producer exploitation, such as equitable remuneration and a best-seller clause.[490] The producer is required under Section 32a to appropriately pay both the co-authors of the work and the authors of the pre-existing works.[491] When the earnings from the work are significantly disproportionate to the pay, the best-seller clause allows the authors to obtain equitable recompense. [492]

These restrictions are eliminated after the work is completed. Further exploitations require the authors' permission. The authors can also claim revocation of their right if they do not exercise

[483] Nordemann and Fromm (n 242) s 90(12).
[484] Dreier and Schulze (n 242) s 90(10).
[485] Wandtke and others (n 242) s 90(10).
[486] Dreier and Schulze (n 242) s 90(10); Ahlberg and Götting (n 458) s 90(18).
[487] BT-Drucks IV/270 p.101
[488] Dreier and Schulze (n 242) s 90(7); Nordemann and Fromm (n 242) s 90(10); Wandtke and others (n 242) s 90(12).
[489] Nordemann and Fromm (n 242) s 90(9).
[490] ibid 93(7).
[491] *Das Boot* (n 376).
[492] *Pumuckl* [2011] OLG München 29 U 2629/10, ZUM 2011 665 672.

it within five years of the commencement date.[493] In contrast to France, the transfer of rights in Germany includes unforeseeable types of uses.[494]

There is no particular mechanism for the issue of licences or transfer of rights in audiovisual works in Ireland and the United Kingdom. However, there are two instances in which rights may be assigned: employment (with automatic vesting) and commission (with implied vesting). Unless otherwise agreed, every work generated while employment is first held by the employee.[495] Even if there is no formal assignment in the case of commissioned work, there is an implied responsibility to assign the work's rights.[496] In *Griggs Group Ltd & Others v Evans & Others,* the court relied on the Robin Ray judgement and determined that the commissioner, not the author, has the right to use and exclude others from utilising a copyright protected work.[497] Apart from these two often encountered instances, joint authors retain ownership of the finished work, with the exception of rental rights. According to CRRA Sections 124 and 125 and CDPA Sections 93A and 93B, authors are expected to surrender their rental rights to the producer when signing a film production contract, and the authors are entitled to equitable payment in exchange.

## 7. Conclusion

This chapter analysed characteristics of basic formulation in selected jurisdictions. Especially elements of collaboration, creativity, genres and indivisibility among contributions are compared in each selected jurisdiction. These jurisdictions represents three distinct categories. Common law countries such as Malta, Ireland and Cyprus are leading the first one. Germany leads the other one, and France is the arch example of the final one. Even though the United Kingdom left the European Union, its jurisprudence has a significant effect on other common law countries. Moreover, its jurisprudence remains the most developed one among common law countries. Therefore, the United Kingdom and Ireland, the Member States with the second

[493] UrhG Section 90(1)
[494] Dreier and Schulze (n 242) s 90(13).
[495] CRRA 23(1)(a); CDPA 11(2).
[496] *Robin Ray v Classic FM plc* (n 319).
[497] *Griggs Group Ltd & Others v Evans & Others* [2003] EWHC 2914 (Ch).

most developed jurisprudence, are selected as representatives for the first category. Germany and France respectively represent the other categories. The first category focuses on factual indivisibility between contributions. The second category, on the other hand, has economic indivisibility. Its focus is on the non-marketable nature of an individual contribution outside of the co-authored work. The final category does not require any factual or economic indivisibility.

Throughout the discussions, collaboration and a common goal were identified as critical components for establishing and forming a co-authored work under fundamental formulation. According to the thesis, the technique and timing of collaboration are not constrained; rather, contributors are required to work toward a common goal. The thesis omits the factor of intention due to its unreliability and susceptibility to influence by the power dynamic within the co-authored work. Simultaneously, the thesis opted to expand the scope of the fundamental formulation by assuming divisibility. While factual and marketable indivisibilities have their advantages, their application is inconsistent, and they may require a supplementary formulation to govern residual works. Genres proved useful when it comes to decide which contributions can be exploited outside of the co-authored work. The dynamics between co-authors solved by relying on equitable practices and courts to solve problems. As a special case, audiovisual works are examined. Their nature are distinct and they require set of specific regulations.

# CHAPTER III: SECONDARY FORMULATIONS

Along with the basic formulation, there are other types of works with several authors. This chapter will cover the remaining concepts. In the European Union, there are two representations of secondary formulation: adaptation and connected work. These are not alternative to each other and they have very little in common.

While there is an argument for implicit harmonisation with regards to adaptations, adaptation as a right or as a distinct work is not formally harmonised in the European Union at the moment. The word adaptation is used in the majority of the chosen jurisdictions. France uses derivative works and *oeuvre de composite* for adaptation as a distinct work (composite work). In the beginning, this chapter is going to examine the composite work of France with adaptations in the United Kingdom, Ireland and Germany.

After discussing adaptation as a whole, this chapter will examine connected works and basic formulations from France and Germany. Germany is the only example of a connected work among the selected countries. The connected work has some similarities to the French basic formulation. For example, neither of them has any condition for indivisibility. From this vantage point, the French basic formulation and the German connected work have a same underlying structure but also display separate traits.

A connected work is defined in Germany as collaboration between writers whose relationship does not meet the basic formulation conditions. This chapter will define a connected work and compare its properties to those of the French basic formulation. It will conclude that, when used in practise, the German connected work has a greater scope than the French basic formulation. Additionally, it implies that contractual agreements have a greater influence on German connected work than legislative requirements do. This is because, unlike in France or Germany, where the basic formulation is determined by law, in Germany, a connected work is recognised when two parties agree to jointly exploit their work.

Each section will conclude with a suggested solution. The chapter will provide a case for or against the primary arguments by comparing and contrasting them. This research argues for a more comprehensive explanation of adaptation work and its associated concepts. Additionally, this research believes that there is no need for harmonisation in terms of connected works and that Member States should refrain from adopting concepts that would undermine the proposed basic formulation.

## 1. Composite and adapted works

'Adaptation' is a phrase that is frequently used in modern copyright regimes. However, its meaning requires clarifying. Additionally, there are a variety of ambiguous meanings associated with the term 'adaptation'. For instance, two of them are the words processing and derivative works. This proliferation of ambiguous language makes it more difficult to define the word 'adaptation'.

For these reasons, the terminology will be covered first in the introductory section. After providing a definition of adaptation terminology, the next section will look at instances of it being mentioned in international and supranational treaties. Finally, as substantive sections, the scope of adaptation, and the right of adaptation will be discussed and compared among selected jurisdictions with normative suggestions.

### 1.1. Introduction

#### *1.1.1. Terminology*

Copyright-protected works can be classified into two categories: primary works and derivative works. On the one hand, primary works are independent of any previous work. However, they may expand upon unprotected concepts or topics. On the other hand, derivative works are those that are derived from another work. They appropriate recognisable components that represent legally protected concepts or ideas.

Translation is the quintessential example of derivative works. The term 'translation' refers to the process of translating a verbal utterance from one language to another. While adhering to the original work, the translator makes innovative word and structural choices in the translation.

Musical arrangements are another well-known example of derivative work.[498] A change in the composition is represented by a change in musical arrangements. Jazz improvisation is a great illustration of this.

After establishing what constitutes a derivative work, the term 'adaptation as a separate work' becomes self-explanatory. To begin with, it has a smaller scope than derivative works. Adaptation as a separate work is the result of modifying an existing work to fulfil a new purpose. Examples include adapting a literature for the stage or creating a scarf from a painting. Second, adaptation as a separate work needs the adapter to make a unique contribution. Without an original contribution deserving of copyright protection, the adaptation is not considered a separate work. Consequently, in the derivative work there is room left outside of adaptation as a separate work; that is, imitations of the original work without copyright protection.

When it comes to terminology, France has its own names for secondary formulations. Germany, on the other hand, use generic terminology. The United Kingdom and Ireland use the term adaptation exclusively in reference to prohibited actions.

In France, two articles address adaptation as a separate work. Article L112-3 CPI is the first. The article acknowledges that adaptation as a separate work is protected by copyright without affecting the rights of the original author. Second, there is another idea that is intimately connected with adaptation as a separate work: composite work. It is described in Article L. 113-2(2) CPI as 'a new work into which an existing work is merged without the author of the latter work's cooperation.' On this point, Gautier claims that certain composite works are not necessarily adaptations as separate works.[499] These are straightforward combinations of two or more works. For instance, reading a poetry while listening to music. He points out that if a first work is integrated into a second work, it may not be an adaptation as a separate work. Without

[498] Ricketson and Ginsburg (n 8) s 8.75.
[499] Pierre-Yves Gautier, *Propriété Littéraire et Artistique* (Presses Universitaires de France-PUF 2001) 585.

addressing composite works, Lucas and others believe that the simple insertion of a work into another work does not always constitute an adaptation as a separate work. [500]

In certain legislation, the term adaptation is also used to refer to an action. Adaptation as an action is occasionally referred to as 'processing' as well. It encompasses acts of adaptation such as alteration, modification, dramatisation, and arrangement. This distinction between adaptation as an action and adaptation as a separate work becomes considerably more relevant when it comes to the adapter's rights and connection with the author of the derived work. However, in reality, it is difficult to distinguish between adaptation as an action and adaptation as a separate work. The scope of adaptation as an action is explored in Section 3.1.1.3; the scope of adaptation as a separate work is discussed in Section 3.1.1.4.

Finally, there is the concept of the ‘right to adaptation’. It is used to represent the author's exclusive right to authorise the adaptation of his or her work. This right is divided into two halves. Allowing another author to process (adaptation as an action) his/her work is the first. The second component is permitting the adapter to exploit or publish the adaptation if the processed work is classified as a separate work. This difference is critical for determining whether a processed work is deserving of standalone protection. In such instance, the processed work is a derivative work, but it falls under the first portion of the right to adaptation, not the second.

This is the three-pronged definition of adaptation. This chapter will utilise them in their lengthier forms, such as adaptation as an action or adaptation as a separate work, to make them more recognisable. Otherwise, it would be impossible to tell the difference between the object and the action.

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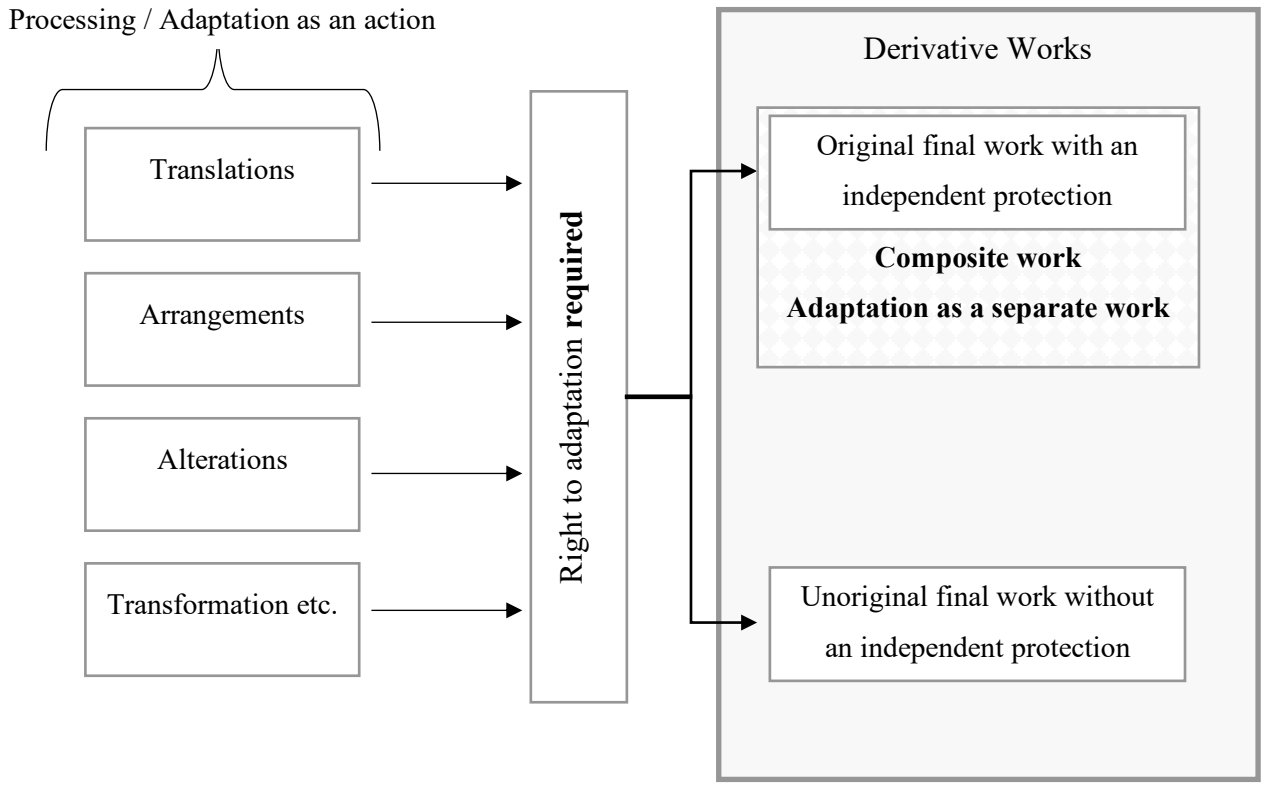
[500] Lucas, Lucas and Lucas-Schloetter (n 235) s 130.




*1.1.2. International Treaties*

The first appearance of adaptation in international treaties is the 1884 Franco-Italian Convention.[501] According to the Article 5 of this Convention;

> Adaptation is the disguising of a work, either by subtractions or changes in the text or its intention, or by developments that the original author had not foreseen, with the sole aim of appropriating the work, without appearing to translate or infringe.

The term adaptation refers to adaptation as an action under this clause. The definition encompasses several critical components. For example, adapting the work to a mode of exploitation that the original creator did not intend. Additionally, it distinguishes translation from other adaptations as actions. At that time, that was the method pursued. The translation right was considered to be a distinct right from the right to adaptation. This provision does have

[501] Ricketson and Ginsburg (n 8) s 11.29.

certain downsides, though. The definition is ambiguous. For instance, what are the requirements to change the intention or to paraphrase and adapt a work without infringing? These are open-ended questions that can be answered in a variety of ways.

When the French delegate offered this definition at the 1884 Conference of the Berne Convention, the general commission came to the same understanding and concluded that; 'it is impossible to lay down a definitive rule on this matter'.[502] Although the Berne Convention was reluctant to offer a definition of adaptation as an action, it did resolve the question of who should authorize translation of the works into other languages. Three provisions of the Berne Convention addressed the subject: Article 2(3), Article 8, and Article 12. While Article 2(3) acknowledges adaptation as a separate work, Articles 8 and 12 address the author's right to approve translations or adaptations.

Article 12 of the Berne Convention counts 'adaptations, arrangements and other alterations' as adaptations as actions. The author has an exclusive right to authorize these actions (right to adaptation). There is no definitive definition of adaptation, arrangement, or other alterations. While Ricketson and Ginsburg attempt to describe these expressions, they conclude that the term 'other alterations' acts as a catch all phrase to include all changes to the work.[503] In addition, there is a degree of flexibility in determining the range of these measures, which is left to national legislatures.[504]

Similarly to the Franco-Italian Convention, the Berne Convention views the translation right as a separate exclusive right distinct from the right to adaptation. The Berne Convention's Article2(2) combines the phrases from Article 12 with the term translation. According to the article, translations, adaptations, arrangements of music and other alterations are protected. Additionally, Article 14 of the Berne Convention addresses adaptations in relation to cinematographic works. In this article, the first paragraph recognizes the exclusive right to

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[502] ibid.
[503] ibid 11.34.
[504] Annette Kur and Thomas Dreier, *European Intellectual Property Law: Text, Cases and Materials* (Edward Elgar 2013) 60.

allow adaptation of an existing non-cinematographic work into a cinematographic work. The second paragraph acknowledges that any adaptation of existing cinematographic works also requires the authorization of the original authors.

Articles 2(3), 8, 12, and 14 of Berne are also integrated into the TRIPS Agreement through the application of Article 9 of the TRIPS Agreement. There is no mention of the right to adaptation or adaptation as a separate work in the WIPO Copyright Treaty.

*1.1.3. Right to adaptation in the European Union acquis*

There are two mentions of adaptation in the European Directives. The Directive on the legal protection of computer programs (the Software Directive)[505] and the Directive on the legal protection of databases (the Database Directive)[506] both recognize adaptation as a restricted act. Both directives, however, are subject-specific. Due to their restricted reach, the right to adaptation is not explicitly applied throughout Europe.

Article 4(1)(b) of the Software Directive restricts translation, adaptation and any other alteration to computer programs;

> (b) the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program;

Article 5(b) of the Database Directive also has a similar provision that restricts actions of;

> (b) translation, adaptation, arrangement and any other alteration;

When these directives were transposed into national legislation, several countries included unique provisions relating to the Software Directive. For example, while Article L122-4 of the CPI defines the right to adaptation in France, the legislature added Article L122-6(2) to emphasise that adaptation in software is a restricted act.[507] The same banned actions apply to

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[505] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.
[506] Database Directive 9.
[507] Act No. 94-361 of 10 May 1994 art. 5I Official Journal of 11 May 1994

computer programmes under UrhG Section 69c(2). This sort of strategy is par for the course in Ireland and the United Kingdom. Due to their closed list approach to subject matter, the legislation must make it very clear which activities are prohibited in each category. Germany and France, on the other hand, are rare in repeating the limitations. Additionally, the Database Directive's lack of equivalent treatment may indicate that translation, adaptation, or any other change to computer programmes is treated differently than other subject materials.

However, the German Federal Parliament asserts in its reasoning that computer programmes are qualitatively distinct from other types of works.[508] While they're using it, their code is off limits. Meanwhile, the content of a book is easily available while reading. Additionally, computer programmes are industrial goods that are intended to work in conjunction with other electronic devices. Rather than amending numerous copyright rules, they conclude that establishing a computer program-specific clause that is a precise duplicate of the Software Directive is more pragmatic. It is their goal that their actions would encourage other countries to follow suit and that jurisprudence in this area will affect other countries.[509]

The German Federal Parliament, in their reasoning to the UrhG Section 69c(2), cites a change in the language of the Software Directive from the English version. The phrase 'adaptation' is replaced with *Bearbeitung*, which translates as 'editing', and the term 'other modification' is replaced with *andere Umarbeitungen*, which translates as 'other reworkings'. These modifications were made to ensure that the wording used in UrhG Section 3 is used in Section 69c as well. This demonstrates a similar comprehension of conventional adaptation for computer programmes.[510] Nonetheless, the rationale indicates that adaptation for computer programmes departs from the conventional interpretation of UrhG Section 23. While authors of other works, except cinematographic works, are not need to clear the right to adaptation until they are published, creators of computer programmes must do so upon creation.[511]

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[508] 'BR-Drs 629/92 (Gesetzentwurf)' 7 <http://dipbt.bundestag.de/extrakt/ba/WP12/1544/154483.html>.
[509] ibid 13.
[510] ibid 26.
[511] ibid.

In France, establishing a distinct right to adapt computer programmes avoids the debate over whether the right to reproduction encompasses the right to adapt in this context. While these directives have a limited reach, a discussion of the right to adaptation in the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive) has garnered considerable interest.[512] With the assistance of case law from the CJEU, it is claimed that the right to reproduction outlined in the Information Society Directive might include the right to adaptation as well. Unlike the Software and Database Directives, the Information Society Directive covers the whole of the copyright subject matter. If the right to adaptation is included in the Directive's scope, it will result in an autonomous interpretation of the right to adaptation. This could be accomplished by accepting that the Information Society Directive contains an implicit right to adaptation, as inferred from CJEU case law, or by expanding the scope of the right to reproduction and arguing that a right to adaptation exists within the Directive's interpretation of the right to reproduction. These points will be discussed in further detail in the subsequent sections.

*1.1.4. Approaches to relationship between right to reproduction and adaptation*

There are two perspectives on the link between the right to reproduction and the right to adaptation. The first approach distinguishes the right to reproduction and the right to adaptation as distinct exclusive rights. Germany, the United Kingdom, and Ireland are among the jurisdictions that have adopted this two-pronged strategy. It is also recommended by the Berne Convention, although its members are not compelled to take the same approach. The second view subordinates the right to adaptation to the right to reproduction. This versatility has resulted in a number of distinct approaches to the problem.[513]

France, on the other hand, neglects to mention the term right to approve adaptation or translation from its list of exclusive economic rights. Article L122-4 defines the right to allow reproduction, as well as the right to authorise adaptation, translation, transformation,

[512] Information Society Directive.
[513] E Rosati, 'Copyright in the EU: In Search of (in)Flexibilities' (2014) 9 Journal of Intellectual Property Law & Practice 585 <https://academic.oup.com/jiplp/article-lookup/doi/10.1093/jiplp/jpu034> accessed 3 April 2019.

arrangement, or any other kind of reproduction. This may be interpreted as significant evidence that the right to adaptation is a subset of the right to reproduction.
Various aspects of whether or not the right to reproduction encompasses the right to adaptation are being addressed on both national and supranational levels. For the first time, the Berne Convention's 1948 Brussels Conference recognised the right to adaptation formulation as a separate exclusive right. Previously, all kinds of adaptation were considered reproduction.[514]

Nonetheless, Ricketson and Ginsburg argue that, while Article 2(3) of the Berne Convention refers to adaptations as separate works, Article 12 encompasses a much broader range of activities, including adaptation as a separate work and processed or modified works containing unoriginal contributions that are not protected as distinct works but rather fall under the right to reproduction. It is unclear if the reproduction or adaptation rights are required for adaptations with unoriginal contributions.[515]

From another angle, Article 12 of the Berne Convention focuses on the initiation of an adaptation process. If the future author intends to make an adaptation from the start, the author must comply with Article 12. Regardless of the future author's aim, the final work will be rated according to the amount of originality in their contribution. Section 1.4.1 continues the examination of this subject in further detail.

According to Afori, the link between the right to reproduction and the right to adaptation is ambiguous. The Berne Convention does not define the words adaptation right or adaptation as a separate work.[516] However, Afori argues that after a century of debate, a clearer grasp of the distinction between reproduction and adaptation rights has developed. While a wide interpretation of the right to adaptation is preferred in order to balance competing interests on a case by case basis. If reproduction is defined narrowly and analogous to copying, then

[514] ibid.
[515] Ricketson and Ginsburg (n 8) ss 11–37.
[516] Orit Fischman Afori, 'Copyright Infringement without Copying-Reflections on the Theberge Case' (2007) 39 Ottawa L. Rev. 23.

infringements occurring without the act of copying are left to the right of adaptation.[517] There is no overlap between the right to reproduction and the right to adaptation in this manner. This specifies where reproduction rights begin and end, although the bounds for adaptation rights are still disputed. Afori acknowledges that there is no conclusive way to determine whether activities violate the right to adaptation. It continues to be a policy concern for the courts and legislators.

The Information Society Directive does not specify the right to reproduction in the European Union. As a result, it is unclear whether the right to adaptation is included or excluded from the right to reproduction.[518] Additionally, in the *Infopaq* judgement, the CJEU emphasised the importance of the Information Society Directive including a wide definition of the right to reproduction.[519] According to Jongsma, the *Infopaq* ruling significantly reduced the member states' room for manoeuvre.[520] There are three alternative arguments to consider: the right to reproduction includes all adaptations of adaptations, the right to reproduction is limited to literal reproductions, and the right to adaptation is distinct from the right to reproduction.

When establishing the right to reproduction in the 1995 Green Paper that launched the initiative for the Information Society Directive, reference is made to Article 9 of the Berne Convention. This is a strong indicator that the right to reproduction's intended scope does not include the right to adaptation. Otherwise, the Green Paper would have made reference to additional pertinent provisions, such as Article 12.

However, as Ricketson and Ginsburg contend, the Berne Convention covers ‘colorable imitations’, or non-original adaptations, within the right to reproduction.[521] This may likewise be said of the reproduction right under the Information Society Directive. The CJEU's *Deckmyn*

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[517] ibid 25.
[518] Rosati, ‘Copyright in the EU’ (n 513).
[519] *Infopaq International A/S v Danske Dagblades Forening* [2009] ECJ Case C-5/08 [41–42].
[520] Daniël Jongsma, ‘Parody After Deckmyn – A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany and The Netherlands’ (2017) 48 IIC - International Review of Intellectual Property and Competition Law 652 <http://link.springer.com/10.1007/s40319-017-0619-5> accessed 3 April 2019.
[521] Ricketson and Ginsburg (n 8) ss 11–37.

judgement offers a powerful support for this viewpoint.[522] The CJEU did not support the use of an originality standard for parodies in this ruling. Even contributions that lack originality are admissible under the parody exemption. Prior to this evolution, national legislations needed original inputs in order to qualify the work as parody.[523]

This is crucial since the parody exemption is stated in Article 5(3)(f) of the Information Society Directive and is a limitation on the right to reproduction. It is, nevertheless, considered an act of adaptation. Therefore, if the Directive's definition of parody encompasses the extent of the right to adaptation under national law, the rule governing that exemption must also encompass that notion. By rejecting the criterion of originality, the CJEU restricted the right to adaptation to original contributions.

From another angle, Jongsma argues that because the European Union is required to comply with Berne Convention Articles 1-21 pursuant to WIPO Copyright Treaty Article 4(1), the European Union must include right to adaptation at the supranational level.[524] The Berne Convention provides for a broad right of reproduction that includes the right of adaptation, and the *Infopaq* judgement holds that exclusive rights must be construed liberally. Thus, one may argue that the right to reproduction encompasses the right to adaptation. Derclaye and Leistner argue that this approach would be consistent with the CJEU's overall trend.[525]

The European Commission also recognises the Information Society Directive's broad definition of the right to reproduction. According to a leaked draft Impact Assessment;

> Contrary to the reproduction right and the communication to the public/making available right, there is no express rule with respect to adaptations in the InfoSoc Directive (unlike the Software and in the Database Directive). However, the broad manner in which the reproduction right in Article 2 of that Directive is formulated and the CJEU's jurisprudence on the scope of the

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[522] *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* [2014] ECJ Case C-201/13.
[523] Jongsma (n 520).
[524] ibid.
[525] Estelle Derclaye, 'The Court of Justice Copyright Case Law: Quo Vadis' (2014) 36 EIPR 716; Matthias Leistner, 'Europe's Copyright Law Decade: Recent Case Law of the European Court of Justice and Policy Perspectives' (2014) 51 Common Market L. Rev. 559.

> reproduction right notably in Infopaq and Eva-Marie Painer seem to cover adaptations which give rise to a further reproduction within the meaning of Article 2.[526]

This excerpt implies a degree of judicial harmonisation on the part of the CJEU. However, the alleged harmonisation is ambiguous at best. The CJEU's *Allposters* ruling exemplifies this interpretation of the reproduction right.[527] In this example, Allposters purchased artistic works on paper posters and then transferred them to canvases using a plastic covering. Allposters was sued by one of the rights holders for infringement. The CJEU recognised three separate activities in its judgement: modifications that constituted reproductions, alterations that also resulted in the formation of a new work, and the defendant misappropriating value from the right holders. According to the CJEU, Article 2(a) of the Information Society Directive bans unauthorised reproduction, and the defendant infringed on the reproduction right in the Directive by moving the work to a new media.[528] This is an extremely broad interpretation of the reproduction right. It is conceivable that this concept also includes numerous instances of adaptations.

Apart from the wide interpretation of 'reproduction', the CJEU also held that the alterations are sufficient to constitute a new object as well. By accepting that there was a new object, the CJEU found that the right of distribution was also infringed, and this right was not exhausted.[529] However, this finding is also an indirect confirmation of adaptation as a separate work because there was an alteration, which the CJEU accepted amounted to the formation of a new work.

The judgment did not discuss the existence of adaptation as a separate work. It is possible that the CJEU counted this act under the right of reproduction. According to Headdon, 'there is nothing in art.2 to suggest that the concept of reproduction could not extend to cover acts which do not involve replication'.[530] In contrast, Cabay and Lambrecht argue that this decision

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[526] European Commission, 'Leaked Draft Impact Assessment' <https://www.statewatch.org/media/documents/news/2014/apr/eu-com-copyright-ia-draft.pdf> accessed 10 January 2022.
[527] *Art & Allposters International BV v Stichting Pictoright* [2015] ECJ Case C-419/13.
[528] ibid 43.
[529] ibid 46.
[530] Toby Headdon, 'The Allposters Problem: Reproduction, Alteration and the Misappropriation of Value' 11.

amounts to minimal harmonization of the adaptation right.[531] The French Government in this case also argued that the transformation to a new medium is an adaptation.[532] It may very well be that the CJEU considered the new work as an adaptation as a separate work, but did not explicitly say so because the judgment was relying on the right to reproduction.

Nonetheless, it is clear that the right to reproduction and the right to adaptation overlap significantly. Additionally, there are compelling reasons for and against such a fusion. This debate, however, finds its way into national policy as well.

In France, according to Ricketson and Ginsburg, placing the right to adaptation within the right to reproduction right, CPI allows more control to the original author in contrast to an exclusive right to adaptation.[533] If adaptation as an action is regarded as a form of reproduction then the author of the underlying work will always be able to prevent the adaptor from exploiting the work. This is because the adapted work is going to be regarded as a simple reproduction. Desbois argues the same conclusion as well. According to him, the original author's influence over the adapted work is almost the same as the second author.[534] Therefore, there are two concurrent rights over the adapted work. However, Lucas and others believe that this is not accurate and there is a separate right of adaptation.[535] According to them, it is not explicit in the code, but it is implied.

In the United Kingdom and Ireland, the distinction between the reproduction right and the adaptation right is much more distinct than other selected jurisdictions. The main reason is that

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[531] J Cabay and M Lambrecht, 'Remix Prohibited: How Rigid EU Copyright Laws Inhibit Creativity' (2015) 10 Journal of Intellectual Property Law & Practice 359 <https://academic.oup.com/jiplp/article-lookup/doi/10.1093/jiplp/jpv015> accessed 22 October 2018.
[532] *Opinion of Mr Advocate General Cruz Villalón delivered on 11 September 2014 Art & Allposters International BV v Stichting Pictoright Reference for a preliminary ruling: Hoge Raad der Nederlanden - Netherlands Reference for a preliminary ruling - Intellectual property - Copyright and related rights - Directive 2001/29/EC - Article 4 - Distribution right - Exhaustion rule - Concept of 'object' - Transfer of the image of a protected work from a paper poster to a painter's canvas - Replacement of the medium - Impact on exhaustion Case C-419/13* (ECJ) [31].
[533] Ricketson and Ginsburg (n 8) ss 11–28.
[534] Desbois (n 235).
[535] Lucas, Lucas and Lucas-Schloetter (n 235).

these jurisdictions do not follow a general prohibition of adaptation. Their approach is limited to certain type of results and they follow a closed list of exclusive rights. With this approach, only particular actions result in infringement of the adaptation right.

According to Afori, in the United Kingdom and other Commonwealth jurisdictions, right to reproduction and right to adaptation are complementary and right to reproduction acts as a safety net for the right to adaptation.[536] If an adaptation as an action is not in the closed list, it might nevertheless fall into the scope of right to reproduction. The right to adaptation in the United Kingdom introduced to protect copyright works against infringements that do not involve mere duplication.[537] A special provision introduced to protect the work against unauthorized translation and dramatization. [538] Since the development of the right to adaptation in the United Kingdom was reactionary to new types of exploitation. At a later stage, when right to reproduction evolved into a vast scope, a close relationship between right to adaptation and right to reproduction shaped into today. [539]

In Germany, there are three schools of thought. The first one considers adaptations as special form of reproduction and right to adaptation as an extension of the right to reproduction. [540] In support of their argument, they claim that UrhG Section 15 enumerates exploitation rights but does not mention Section 23 or 24 which deals with adaptation right and free use. Therefore, omission of Section 23 indicates that right to adaptation is not a separate exclusive exploitation right. Furthermore, to prove that the list in Section 15 is exhaustive, they point out new addition of exploitations such as satellite broadcasting, cable retransmissions and making available to the list.

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[536] Afori (n 516) 20.
[537] ibid 21.
[538] ibid.
[539] ibid 20.
[540] Ulrich Loewenheim, 'Die Benutzung Urheberrechtlich Geschützter Schriftwerke in Sekundärliteratur Für Den Schulunterricht'; Thomas Dreier and Gernot Schulze, *Urheberrechtsgesetz Urheberrechtswahrnehmungsgesetz, Kunsturhebergesetz* (Beck, C H 2015) s 16(10).

The second view accepts that the right to adaptation exists but when the adapted work remains recognizable it is also reproduced. It does not matter whether it is integrated into a new work. The right to adaptation is a special exploitation right that stands beside the right to reproduction.[541] Existence of a partial reproduction does not stand in the way of an adaptation as a separate work.[542] The BGH on several occasions argued that any adaptation within the meaning of UrhG Section 23, in so far it is physically fixed, is at the same time a reproduction.[543]

The third view argues that the legislator in their justification of UrhG defined the right to reproduction as 'capable of making a new work in some way directly or indirectly perceptible to the human senses'.[544] According to Nordemann and others, this statement assumes that the original work must remain unchanged when it comes to reproduction.[545] Therefore, an adaptation as a separate work contains some degree of reproduction but it is too far to call the work as a special case of reproduction. If there is a change, whether it is a result of original or non-original contribution, then it is an adaptation as a separate work.[546] The explicit mention of the term 'transformation' in UrhG Section 23(1) indicates that non-original changes are also in the scope of right to adaptation. Otherwise, mentioning the term "transformation" would be unnecessary.

In the end, the relationship between right to reproduction and right to adaptation is problematic. It is difficult to draw a clean border between these rights. In this matter, Afori also discusses circumstances where adaptation exists without reproduction of the work.[547] According to her, the scope of the right of reproduction must be narrow enough to allow an independent right of

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[541] Hartwig Ahlberg and Horst-Peter Götting, *Urheberrecht* (Verlag CH Beck 2017) s 16(11); Matthias Leistner, 'Von Joseph Beuys' [2011] Marcel Duchamps und der dokumentarischen Fotografie von Kunstaktionen, ZUM 468.
[542] Leistner (n 541).
[543] *Beuys-Aktion* [2013] BGH I ZR 28/12, GRUR 2014 65 [36–38]; *Mit Die allein* [1962] BGH I ZR 48/61, GRUR 1963 441; *Sherlock Holmes* [1957] BGH I ZR 83/56, GRUR 1958 354.
[544] Axel Nordemann, 'UrhG § 3 Urheber' in Axel Nordemann, Jan Bernd Nordemann and Christian Czychowski (eds), *Fromm/Nordemann Urheberrecht: Kommentar* (12. Auflage, Kohlhammer Verlag 2018) s 9.
[545] ibid.
[546] ibid 10.
[547] Afori (n 516).

adaptation. Otherwise, the only example of an adaptation would be “integrated works”. In her definition, integrated works do not involve copying of the source work, but they remain closely attached to the work. For instance, a book providing answers to quizzes in another book without copying any of the content. This, however, may be understood as a completely independent work in some jurisdictions.

Without a clear borderline, as Afori argues, their respective scope remains a policy decision.[548] Some solutions may bring clarity to the issue such as limiting the right to reproduction to only literal reproductions or removing the right to adaptation all together by declaring it as a special form of right to reproduction. Unfortunately, there is no single accepted way to deal with the issue. It remains a source of discussion at international, supranational and national levels.

This research is going to opt for a separate right to adaptation. Following the *Deckymn* decision and discussion of right to adaptation covered under the Information Society Directive, there is a high possibility of autonomous understanding of right to adaptation in the EU. Additionally, since the European Union is required to follow the Berne Convention by virtue of signing the WCT, there is a need for European understanding of the right. From the standpoint of legal certainty, the predictability of a precise articulation is preferable to the CJEU's interpretation. Additionally, an independent and distinct right enables right holders to permit specific acts with defined boundaries, simplifying the authorization process greatly. Making the procedure simpler enhances the internal market's efficiency. For these reasons, the proposed directive is going to include a separate right to adaptation. Its scope and meaning is going to be discussed in the next subsection.

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### 1.2. Scope of right to adaptation in national jurisdictions

#### *1.2.1. History and development of the right*

In the United Kingdom, from a historical perspective, right to reproduction was designed with a narrow scope. With the advancement in technology, new forms of exploitation emerged such

[548] ibid.

as translation and dramatization. In the United Kingdom, authors, publishers and other interested parties tried to establish a translation right in favor of the authors as early as 1897.[549]

A separate adaptation right was not introduced until the 1956 Act. To protect author's interest, the legislator established right to adaptation under a closed list. However, before the 1956 Act, translation and dramatization rights were defined under the Copyright Act 1911 ss.1(2)(a), (b) and (c). The 1956 Act brought together these rights and added others acts to conceptualize right to adaptation.[550]

In the current Act, there are two restricted acts that need to be granted by this right; adaptation and communication to the public of the adaptation.[551] Since it is difficult to demonstrate amount of the damage by simple act of adaptation, the legislator included act of communication to the public as well.[552] By this way, it is easier to prove the infringement and damage.

In Ireland, CRRA section 37(1)(c) follows the same methodology. It is also restricted to adapt and to communicate to the public that adaption in Ireland. There is no separate translation right in these acts. The adaptation right covers translation right as well.

In related case law, *Interlego* decision did not accepted copy of a painting in an enlarged state as an original work.[553] Similarly in Ireland, *Gormley v EMI Records (Ireland) Ltd* rejected protection for a recital of a bible story.[554] There were small and unoriginal changes to the story. Nevertheless, Privy Council's judgment should be applied strictly to the subject matter of the

[549] Lionel Bently, 'Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries' 61, 1212–1214.
[550] Gillian Davies and others, *Copinger and Skone James on Copyright* (Sweet & Maxwell/Thomson Reuters 2016) ss 7–261.
[551] CDPA 1988 s.21(2)
[552] Davies and others (n 550).
[553] *Interlego AG Appellant v Tyco Industries Inc and Others Respondents* (1988) [1988] 3 WLR 678 (Privy Council).
[554] *Pauline Gormley v EMI Records (Ireland) Limited* [2000] ECC 370 (Supreme Court (Ireland)).

case.[555] In *Sawkins v Hyperion Records* decision, the distinction between a mere copyist and an original contributor is made.[556]

In Germany, before UrhG there were three different legislations; LUG for literature and musical work, KUG for fine arts and photographs and VerlG as a publishing act. KUG was issued on January 9, 1907 and LUG was legislated on June 19, 1901. With the developments in the Berne Convention, the German legislator worried that LUG and KUG were outdated and there was a need for a revision.[557] UrhG was accepted on 09 September 1965 and repealed KUG and LUG with most of the provisions in VerlG.

LUG sec. 12 and KUG sec. 15(2) defined right to adaptation for their respective subject matter. The overall understanding of the right is transferred to UrhG without modification. LUG sec 12(2), however, enumerated possible adaptations and this approach did not make it to UrhG. Also, in previous laws, transfer of the adaptation right was possible under KUG sec 29(1) and LUG art 8(3).[558]

In UrhG, right to adaptation is closely linked to three provisions; Sections 3, 23 and 39. UrhG section 3 makes it clear that independent adaptations are protected as separate works. UrhG section 23 grants the author right to allow or prohibit exploitation of adaptations;

> Adaptations or other transformations of the work may be published or exploited only with the consent of the author of the adapted or transformed work. In the case of a film version of the work, the execution of plans and drafts of an artistic work, the reproduction of an architectural work or the adaptation or transformation of a database work, the production of the adaptation or transformation shall already require the consent of the author.

Finally, UrhG sec. 39 prohibits modifications by a holder of a right of use;

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[555] HIL Laddie and others, *The Modern Law of Copyright* (5th edition, LexisNexis 2018) s 4.44.
[556] *Sawkins v Hyperion Records Ltd* [2005] 1 WLR 3281 [81–86].
[557] BT-Drucks IV/270, 23.03.1962
[558] Nordemann, 'UrhG § 3 Urheber' (n 544) s 5.

> (1) The holder of an exploitation right shall not be permitted to alter the work, its title or designation of authorship (Article 10 (1)), unless otherwise agreed.
> (2) Alterations to the work and its title to which the author cannot refuse his consent based on the principles of good faith shall be permissible.

To address this prohibition in copyright exceptions, UrhG sec 62(1) refers back to sec. 39;

> (1) Where according to the provisions of this Section the use of a work is permissible, no alterations to the work shall be permissible. Article 39 shall apply mutatis mutandis.

LUG sec. 9 and KUG sec. 12 are transferred to UrhG sec. 39 almost word by word. However, the application of good faith in section 39(2) is a new addition and brought significant changes.[559] The details of good faith in this provision will be analyzed in the following sections. These three sections cover the subject of right to adaptation by its results, and its application during and before the exploitation of the work. Finally, with the introduction of the Software Directive, UrhG sec. 69c(2) added specifically to recognize adaptation, modification or other alterations of a computer program as restricted acts.

In France, before the introduction of the act of March 11, 1957, the decree of 1793 represented the protection of authorial rights.[560] The legislator, starting from as early as 1841, intended to modernize the decree and supplement its shortcomings.[561] Until 1957, the shortcomings of the decree were tried to be remedied by the case law. Also, to answer the call by the UNESCO to modernize copyright legislation, the French legislator introduced the act of March 11, 1957.[562] It is later repealed by CPI and integrated into a more comprehensive intellectual property code without much modification to its content.

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[559] Wilhelm Nordemann and Friedrich Karl Fromm, *Urheberrecht: Kommentar zum Urheberrechtsgesetz und zum Urheberrechtswahrnehmungsgesetz* (10. Auflage, Kohlhammer 2008) s 39(4).
[560] Loi n° 57-298 du 11 mars 1957 sur la propriété littéraire et artistique
[561] Conseil de la Republique, 'Docments Parlementaries - Annexes Aux Proces -Verbaux Des Séances - Annexe No 11' Session Ordinarie de 1956-1957 <http://www.senat.fr/comptes-rendus-seances/4eme/pdf/documents_parlementaires/1956/DP19561002_19561115_0001_0097_0001_0083.pdf>.
[562] ibid

In the 1793 decree, there was not a mention of right to adaptation. Article 1, however, recognizes the right to reproduction for authors;

> Authors of writings of any kind, composers of music, painters and draughtsmen who shall cause paintings and drawings to be engraved, shall throughout their entire life enjoy the exclusive right to sell, authorize for sale and distribute their works in the territory of the Republic, and to transfer that property in full or in part.[563]

Later with the recognition of the right to adaptation in the 1948 Brussels Conference, the proposal of the 1957 Act defined two exclusive exploitation rights in article 26; right to representation and right to reproduction. Later in article 40, while listing restricted acts, the 1957 act mentions the term adaptation;

> Any complete or partial performance or reproduction made without the consent of the author or of his successors in title or assigns shall be unlawful. The same shall apply to translation, adaptation or transformation, arrangement or reproduction by any technique or process whatsoever.

Article 4 of the 1957 Act recognizes that adaptations can be protected as independent works. However, there is no clear mention of right to adaptation in the Act. In a 1989 case, the Court of Cassation decided on a matter of moral rights infringement by non-exploitation of a work.[564] Authors of a novel and a scenario ceded their reproduction rights to a company which in return sub-assigned the right to adaptation to another company. Failure to deliver a cinematographic adaptation of the works resulted in a moral right infringement of the authors. The significance of the case is that the court accepted assignment of the right to adaptation by the first company, which only received right to reproduction. This line of thought indicates that right to reproduction covers the right to adaptation and also there is a specific exploitation mode called "right to adaptation" which can be assigned independently. A 1995 case in the Court of Cassation recognizes a valid "contract of adaptation" between parties as well.[565]

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[563]Lionel Bently and Martin Kretschmer (eds), 'French Literary and Artistic Property Act, Paris (1793)', *Primary Sources on Copyright (1450-1900)* <https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_f_1793> accessed 10 January 2022.

[564] *Cour de cassation, Chambre civile 1, du 8 novembre 1989, 87-10440, Inédit* Legifrance.gouv.fr.

[565] *Cour de Cassation, Chambre civile 1, du 7 juin 1995, 92-15539, Inédit* Legifrance.gouv.fr.

In the current law, Article L122-4 of the CPI is an identical copy of art. 40 of the 1957 Act. The same uncertainty whether there is an exclusive right to adaptation or not still exits. On this matter, Lucas and others argue that right of adaptation is an autonomous prerogative, independent from the right of reproduction.[566] Therefore, the right of adaptation exists indirectly and implied under the umbrella of right of reproduction. It can be used without the right of reproduction. Gautier maintains that the right to adaptation is a derivative from of right to reproduction. However, the right to adaptation must be assigned independently.[567]

In 2007, the Court of Cassation decided on an issue of book sequels.[568] An author decided to write two sequels for Victor Hugo's Les Miserables. When the heirs of Victor Hugo brought infringement claims before the court, the Court of Cassation argued that a sequel of a literary work is closely related to the right of adaptation. This recognition of the right without mentioning right to reproduction may suggest that right to adaptation is independent. To summarize the French position, the boundaries between right to adaptation and right to reproduction remains elusive and there is no unanimous answer to the problem.

*1.2.2. Authorization during the development and the commercialization phase*

Adaptation right has two components; right to allow adaptation as an action and right to allow exploitation in adaptation as a separate work. The former is about the preparing stage of an adaptation. An author who decided to use a pre-existing work, in some jurisdictions, is required to get a permission from the original author. However, this authorization, in a legal sense, contains a permission to modify, transform or alter the work. When the work has passed the preparatory stage, the second component of the adaptation right is engaged, i.e. exploitation.

In the second stage, the originality of the contribution is evaluated. If the contribution fails during the originality test, then it can only be regarded as a work of reproduction. In this case, the right to reproduction is engaged and there is no more use for the adaptation right. Otherwise,

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[566] Lucas, Lucas and Lucas-Schloetter (n 235) s 231.
[567] Gautier (n 499) s 585.
[568] *Cour de cassation, civile, Chambre civile 1, 30 janvier 2007, 04-15543, Publié au bulletin* Bulletin 2007 N° 47 41.

when the contribution is protected, the author of the pre-existing work has two options. The author can allow the exploitation, or the author can prevent the publication by claiming moral right infringement or, while it seems unlikely, if contractually possible, by revoking the adaptation right.

During the development stage, seeking an authorization could be unnecessary. The second author may not decide to exploit the adaptation and the process could remain uncompleted. It is also difficult for an author to pursue authorization in every attempt at an adaptation. And it is hard for the author of the pre-existing work to demonstrate any meaningful harm during the development stage. For these reasons, several jurisdictions have chosen to relax the authorization requirement during the initial phase. This subsection is going to analyse the selected jurisdictions on whether they follow the relaxed approach or not.

Starting with the United Kingdom[569] and Ireland[570], the adaptation is made when it is recorded in writing or otherwise. The writing is defined in both statutes as 'any form of notation or code, whether by hand or otherwise and regardless of the method by which, or medium in or on which, it is recorded'.[571] Both legislations also cover acts of performance without fixation as adaptations.[572] It is clear that, there is a need for authorization while working on the adaptation. This is because according to the legislation, a small alteration is considered an adaptation. However, fair dealing arguments can protect the editing author.

In France, there are no provisions that resolve when the authorization is required.[573] The doctrine splits into two groups. According to Pollaud-Dulian, the adaptation exists with fixation, therefore the author must seek the consent in the beginning.[574] Lucas and others defend that any form of authorization can be postponed until before the publishing.[575] On this issue,

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[569] CDPA 1988 s.21(1); CDPA 1988 s.21(2)
[570] CRAA 2000 s.43(1)(a)
[571] CDPA 1988 s.178; CRRA 2000 s.2
[572] CRRA 2000 s.43(1)(b); CDPA 1988 s.21(2)
[573] Desbois (n 243) s 613.
[574] Frédéric Pollaud-Dulian, *Le droit d'auteur: propriété intellectuelle* (Economica 2014) s 530.
[575] Lucas, Lucas and Lucas-Schloetter (n 235) s 231.

Court of Cassation decided that a musical arrangement of a pre-existing song does not require authorization, because it is a simple project and is heard by only a limited audience. Therefore, there is no infringement of adaptation rights without communication to the public.[576] A performance to the public or publishing infringes the adaptation right but exhibiting to a closed circle of friends or family is not considered to be an adaptation. The Court of Cassation preferred the view of Lucas and others on this issue.

Lucas and others claim that exceptions to the right of reproduction also apply to the right of adaptation.[577] In their reasoning, because the right to adaptation is defined inside the right of reproduction, it is also subject to the same limitations. For this reason, copyright exceptions to reproduction right, such as private copying, can be applied to the adaptation right. The mentioned the Court of Cassation case regarding a musical arrangement is also an example for this view. While, the Court looked for the lack of commercialization, it also means that there is no need to seek authorization when it is for personal use.

In Germany, UrhG sec. 23(1) states that an adaptation can only be '…published or exploited … with the consent of the author…'. According to the written report of the Government's UrhG draft, normally consent should be required for the adaptation, however it is impractical to determine whether an adaption is or is not aimed at private use.[578] Therefore, as a rule there is no need for authorization until exploitation of the work. The Committee on Legal Affairs at the time of the legislation argued that the rule should be seeking authorization at both stages, and the exception of personal use should be applied when necessary.[579]

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[576] *Cour de Cassation, Chambre civile 1, du 17 novembre 1981, 80-12546, Publié au bulletin* Bulletin des arrêts Cour de Cassation Chambre civile 1 N 339.
[577] Lucas, Lucas and Lucas-Schloetter (n 235) s 231.
[578] 'Schriftlicher Bericht Des Rechtsausschusses (12. Ausschuß) Über Den von Der Bundesregierung Eingebrachten Entwurf Eines Gesetzes Über Urheberrecht Und Verwandte Schutzrechte (Urheberrechtsgesetz)' (Drucksachen IV/270, IV/3401) <https://dserver.bundestag.de/btd/04/034/0403401zu.pdf> accessed 10 January 2022.
[579] ibid.

The Government's draft suggested an exception to no authorization rule only for film adaptations. The Committee argued that this exception should be broader and should include some other subject matters. In the current version UrhG sec. 23(2) states that;

> In the case of a film version of the work, the execution of plans and drafts of an artistic work, the reproduction of an architectural work or the adaptation or transformation of a database work, the production of the adaptation or transformation shall already require the consent of the author.

According to the Committee, this addition reaches a desirable agreement with the provision in UrhG sec. 54(5). According to the provision, there are some cases where copying for personal use without consent is not permitted.[580] The Government's report on the draft argues that any cinematographic adaptation attempt is not intended for personal use and requires considerable investment. Therefore, it is logical that the consent should be sought before beginning the adaptation. In film adaptations, the author of the underlying work can withhold the second component[581] of the adaptation right.[582] Under these circumstances, an adaptation can be announced to the public. The film, however, cannot be exploited. In practice, this is used when there is a prolonged discussion between authors regarding the authorization agreement. The original author accepts to grant authorization limiting exploitation, so that the project can start.

The execution of plans and drafts of an artistic work is actually considered a reproduction of that work in Germany.[583] The consent is required for adaptation or transformation of a database work due to the Database Directive.

According to Nordemann and others, in the development phase the original author can prohibit modifications with UrhG sec. 39 and 14 in all subject matters.[584] The right to integrity defined in the UrhG sec. 14, if requirements are satisfied, could be infringed in the development phase.

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[580] ibid.
[581] The second component is right to exploit the adaptation, whereas the first component is to allow right to adaptation to take place. The first component is more focused on the alteration, transformation or adaptation of the original work, the second component is focused on the commercialization.
[582] Artur-Axel Wandtke and others, *Praxiskommentar zum Urheberrecht* (C H Beck 2014) ss 23–7.
[583] Nordemann, 'UrhG § 3 Urheber' (n 544) s 19.
[584] ibid 3.

The right to integrity, as part of author's moral right, defend against distortions or other impairments of the work. UrhG sec. 39, on the other hand, focuses on the changes to the work, its title or copyright designation by a right holder. The provision deals with the exploitation of the original work (not any adaptation of the work) and the admissibility of changes made to it.[585] If there is an actual exploitation is intended, the right holder cannot claim that the work is in the development phase.

To summarise, authorisation is required in the United Kingdom and Ireland unless the act can be justified under fair dealing principles. In France, there are two schools of thought: need authorisation at all times or wait until real exploitation to obtain authorization. Apart from audiovisual works and specific exclusions, authorisation is not necessary in Germany until the adaptation is marketed. This research will use a similar approach to that taken in Germany.

There are various reasons why, in general, it is preferable not to seek authorisation during the adaptation's development. To begin, it is impractical to assess if adaptation has begun prior to the work being made public. Without disclosure, there will be no financial advantage, and without commercialization, it is difficult to justify a restriction on the right to freedom of speech. Additionally, Article 5(2)(b) of the Information Society Directive identifies private use as a possible exemption that Member States may adopt. Such an excessive limitation would violate the proportionality principle, therefore this research will contain a clause deferring authorisation until the commercialization phase. This manner, users' freedom is not unnecessarily constrained, and rights holders' rights to commercialization are maintained.

For deviations to this general norm, Member States may adopt a similar approach to Germany's audiovisual work exception. The proportionality concept must be aggressively followed. Each exception must be reasonable in comparison to the overall norm. This research will abstain from articulating exceptions. It's difficult to find common ground when there is no consensus to begin with. However, this research will argue that exceptions to this rule can be justified in

[585] Axel Nordemann, 'UrhG § 39 Urheber' in Axel Nordemann, Jan Bernd Nordemann and Christian Czychowski (eds), *Fromm/Nordemann Urheberrecht: Kommentar* (12. Auflage, Kohlhammer Verlag 2018) s 3.

light of the proportionality principle. This proportionality must be justified by the likelihood that anticipated adaptations will be commercialised.

*1.2.3. Authorization agreements*

A pre-existing work is a prerequisite of an adaptation. By the time of adaptation, the copyright protection for that work is already established. A contract between authors is required to ensure lawful adaptation unless there is an exception. These contracts are subject to respective copyright provisions in each country. This section is going to discuss these specific provisions relating to the adaptation contracts.

In France, numerous types of limitation can affect the scope of the authorization.[586] On the one hand, these limitations can be based on exploitation specific conditions such as place or timing of the exploitation. On the other hand, there could be limitations stemming from the content of the work such as subject limitation, or language limitation. To illustrate, an adaptation agreement can involve a condition to limit its exploitation in one country and for only twenty years. It also can specify that the adaptation must be limited to theatrical application and only in French and English languages. These are valid limitations.

However, the limitations are applied strictly and there is little room for interpretation. For instance, in a judgment the Lyon First Instance Court decided that along with the film, the production company could not produce a pamphlet describing the adapted work.[587] Under the guises of literary criticism or duty to inform the public or supplementary documents an unlicensed adaptation cannot be concealed. It is also significant to state that theatrical authorization does not include any film adaptations.[588]

While the adapter is limited by its subject, the original author is not limited to license multiple adaptations on the same subject, unless there is an exclusive license. In an interesting case, the Paris Court of Appeal decided on a conflict between the author of a composite work and author

[586] Pollaud-Dulian, *Le droit d'auteur* (n 259) s 531.
[587] Tribunal civil de Lyon, du 8 juin 1950 mentioned in Desbois (n 243) s 615.
[588] Desbois (n 235) s 615.

of the pre-existing work.[589] The author of the first work authorized the second author to make a comedy based on its novel. The comedy gained wide recognition and resulted in a film production. The required rights were cleared accordingly. However, after the production of the film, the first author authorized another film production. This production was going to be based on the novel rather than the comedy. The production company sued the first author to prevent another film production. The issue was about the scope of adaptation right transferred in the license. The court in this matter decided that a film from a comedy which is based on the novel is not the same as a film from the novel. Their perspectives and materials may seem similar, but they are based on two different original works. Therefore, the original author is not also limited by the second adaptations in the same subject.

In CPI art. L131-2, the contracts for performance and production are required to be in writing. Additionally, according to CPI art. L131-3(1), each right should be explicitly mentioned in order to transfer them. According to Pollaud-Dulian, in authorization contracts exclusivity is never presumed.[590] It is important explicitly to specify such condition. Furthermore, according to Desbois and Pollaud-Dulian, a simple authorization does not cover sub-adaptation of a composite work.[591] Sub-adaptation is the further adaptation of a composite work. In this case, the authorization of the author of the work that was made into a composite work must be sought. In a judgment, Court of Cassation found infringement in an adaptation of an opera to the cinema without obtaining the consent of the first author.[592]

Apart from these contractual limitations, the moral rights of the original author are reserved under any situation. The right of attribution is a classic example. The composite work must attribute the original author. The right of integrity is also vital. There are several cases where the final work has infringed the right of integrity of the original author.[593] In a case before Paris

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[589] Cour d'Appel de Paris, du 23 mars 1937 mentioned in Desbois (n 243) s 615.
[590] Pollaud-Dulian, *Le droit d'auteur* (n 259) s 533.
[591] ibid 534; Desbois (n 235) s 635.
[592] Cour de Cassation, du 22 juin 1959 mentioned in Desbois (n 243) s 633.
[593] *Cour de Cassation, Chambre civile 1, du 23 janvier 2001, 98-17926, Publié au bulletin* Bulletin 2001 I N° 12 7, 12; *Cour de Cassation, Chambre civile 1, du 12 juin 2001, 99-10284, Publié au bulletin* Bulletin 2001 I N° 172 112.

Court of Appeal, a translator's omission of two chapters was found to be an infringement of the original author's right to integrity.[594]

However, this issue should be treated with caution. The scope of moral rights in an adaptation is not as broad. Because, an adaptation by its nature could be modifying, transforming, or altering the original work. This is a direct result of the process of adaptation. For instance, in a case of cinematographic adaptation, limitations in the genre or necessities of the industry could force the adaptor to reshape some parts of the original work. This is unavoidable. The Court of the Cassation reflects the same understanding in its decisions.[595] It is also significant to state that contract of authorization is finalized with the will of both parties. Such agreement presumes a successful adaptation. The original author must not wilfully seek to prevent the publication of the composite work.[596]

In Germany, according to the BGH, consent can be expressly or tacitly given to authorize an adaptation.[597] This interpretation is based on the reflection of contract provisions in the UrhG sec 37(1). According to this interpretation, in any case of doubt, the right to adaptation remains with the author. However, from the purpose of the contract it is possible to grant the right according to UrhG sec. 31(5). OLG Dusseldorf applied this provision to the sale of a painting by an employee.[598] Sale of the painting by the employee to the employer was assumed to include right to adaptation as well.

According to Nordemann and others, UrhG sec. 23 grants nothing more than a right to use, it could be simple or exclusive.[599] Contractual limitations are applied in Germany as well. The author can limit the authorization by place, time, subject, content or language.[600] The right to

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[594] Cour d'Appel de Paris, du 2 julliet 1962 mentioned in Desbois (n 243) s 640.
[595] *Cour de cassation, civile, Chambre civile 1, 30 janvier 2007, 04-15.543, Publié au bulletin* (n 568).
[596] Pollaud-Dulian, *Le droit d'auteur* (n 259) s 545.
[597] *Oberammergauer Passionsspiele* [1985] BGH I ZR 104/83, GRUR 1986 458 459.
[598] *Immendorff-Bild* [2014] OLG Düsseldorf I-20 U 167/12, NJW 2014 3455 3456.
[599] Nordemann, 'UrhG § 3 Urheber' (n 544) s 13.
[600] Thomas K Dreier, 'Authorship and New Technologies from the Viewpoint of Civil Law Traditions' (1996) 26 International Review of Intellectual Property and Competition Law 989, s 23(13).

adaptation in itself is a right of exploitation and is therefore subject to the right to adaptation as well. In other words, the original author can also control the adaptation of an adaptation.[601]

Similar to the French position, the original author retains his or her moral rights. However, the nature of an adaptation may pose some limitation.[602] For instance, dramatization of a novel one way or other may require some cuttings and some misrepresentation due to technical limitations. Normally, this is a moral rights infringement. In these cases, however, they are unavoidable. The scope of this limitation is left to the courts and determined case-by-case. Furthermore, the place of an infringement is important. Infringement in a private sphere is less damaging than in a public sphere.[603]

In the United Kingdom and Ireland, copyright contracts are not as regulated as in other jurisdictions. CDPA section 90(2) and CRRA section 120(2) allow partial or limited assignment of copyright. Authorization can be given expressly or it can be implied.[604] For instance, commissioning an adaptation usually include implied authorization.[605] However, failing to prevent an infringement does not mean implied authorization.[606] Contractual limitations such as time, space, subject and others are accepted in the authorization. In terms of moral rights, the right to object to derogatory treatment covers adaptation.[607] However, this treatment must amount to distortion or mutilation and it must be prejudicial to the honour or reputation of the author.[608] Distortion of a work involves a perversion of the work and appears to be limited. For instance, in *Tidy v Trustees of the Natural History Museum* courts did not find the reduction in size as a distortion of the work.[609] Mutilation covers partial deletion or destruction of the work.

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[601] Nordemann, 'UrhG § 3 Urheber' (n 544) s 23.
[602] *Oberammergauer Passionsspiele II* [1988] BGH I ZR 15/87, GRUR 1989 106 107.
[603] *Felseneiland mit Sirenen* [1912] RG Rep. I. 382/11, RGZ 79 397 402.
[604] Nicholas Caddick, Gwilym Harbottle and Uma Suthersanen, *Copinger and Skone James on Copyright* (2020) ss 7–275.
[605] *Pensher Security Door Co Ltd v Sunderland CC* [2000] RPC 249.
[606] *Durand v Molino* [2000] ECDR 320.
[607] CDPA s.80(2)(a)
[608] CDPA s.80(2)(b)
[609] *Tidy v Trustees of the Natural History Museum* (1996) 39 IPR 501.

The term treatment is considerably narrower in the CDPA than the Berne Convention's Article 6bis.[610] In the United Kingdom, treatment does not cover non-transformational uses. For instance, using the work in a particular context which is undesirable to the author would not infringe the author's right to integrity.[611] The term treatment is further restricted by CDPA sec. 80(2)(a). According to the section, translations of literary and dramatic works, and arrangements or transcriptions of musical works involving no more than a change of key or register are not considered treatments. On the other hand, in *Harrison v Harrison*, Judge Fysh QC states that treatment is a broad concept and even destruction of a work can be counted a treatment.[612] This understanding of treatment broadens the scope of the right.

Furthermore, proving that a treatment is prejudicial to the author's honor or reputation is difficult. The claimant must show his or her reputation or good name in the eyes of others.[613] Then the claimant must prove the value of its reputation or good name is affected by these treatments.[614] Both of these actions have little standards and are difficult to argue. For instance, in *Confetti Records & Others v Warner Music UK Ltd*, the claimant argued that an addition of a rap song to an album should constitute an infringement to the right to integrity.[615] According to the court, there was no indication of a prejudice to the honour or reputation of the author.

In summary, while contracts regarding copyright viewed as a special type of agreement, the effects of contractual law of the selected jurisdictions are undeniable. Moral rights also plays a crucial role. Apart from contractual remedies, when conditions are satisfied, an author can claim moral right infringement as well. However, moral rights remain outside of this research's

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[610] Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford University Press, USA 2014) 284.
[611] Gillian Davies and Kevin M Garnett, *Moral Rights* (Sweet & Maxwell London 2010); Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press 2006); Mira T Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (Oxford University Press 2011).
[612] *Harrison v Harrison* [2010] FSR 25.
[613] Davies and others (n 550) ss 11–50.
[614] *Tidy v Trustees of the Natural History Museum* (1996) 39 IPR 501.
[615] *Confetti Records & Others v Warner Music UK Ltd* (2003) [2003] EWCH 1274; *Confetti Records & Others v Warner Music UK Ltd* [2003] EMLR 790.

scope. This research is not going to propose any harmonization on authorization agreements due to the dependence of authorization agreements to contractual law.

*1.2.4. Double creation or independent creation doctrine*

A concept called double or independent creation receives considerable attention in legal literature and by scholars. According to this concept, an author can create a new work, which resembles a pre-existing work, without knowing that such pre-existing work exists.[616] This is not considered to be an adaptation.

According to a decision by the BGH, the author of the pre-existing work can bring an infringement claim. At first, if the claimant's work is obviously created before the defendant's work, then the courts accept *prima facia* evidence of infringement. After this stage, the burden of proof passes to the second author.[617] The second author must prove that the latter work is created without the knowledge of the former. Otherwise, if it is not obvious, then the claimant must prove that his or her work is created before the defendant's.

Double creations are possible and accepted by the BGH.[618] However, according to Wandtke and others, the complexity of the later work makes it harder to prove innocence.[619] It is easy to prove that same expression can be achieved if the work is not too complex.[620] Under normal circumstances, an adaptation presupposes positive knowledge of the older work by the adapter. Otherwise, a double creation occurs.[621]

In France, according to Desbois, *fortuitous similarities* are accepted and possible. This is an identical concept to the double creation doctrine.[622] In a court decision by the Court of Cassation Criminal Chamber, an author of a pre-existing work sued an author with a more recent work

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[616] Dreier and Schulze (n 540) ss 23–29; Gerhard Schricker and Ulrich Loewenheim, *Kommentar Zum UrhG* (4. Auflage, 2010) ss 23–33; Wandtke and others (n 582) ss 23–19.
[617] *Brown Girl II* [1991] BGH I ZR 72/89, NJW-RR 1991 812 814.
[618] *Melodienentnahme* [1988] BGH I ZR 143/86, GRUR 1988 210 811; *Magdalenenarie* [1970] BGH I ZR 44/68, GRUR 1971 266 268.
[619] Wandtke and others (n 582) ss 23–21.
[620] Dreier and Schulze (n 540) ss 23–29.
[621] Ahlberg and Götting (n 541) ss 3–6.
[622] Desbois (n 235) s 117.

for infringement.[623] After establishing that the claimant's work existed before the defendant's, the court assumed bad faith and passed the burden of proof to the defendant. The defendant proved that the work was created without knowledge of the other work. For this reason, the court did not find any infringement.

In the United Kingdom and Ireland, the independent creation doctrine approaches the issue in a similar way. The decision in *Mitchell v BBC* was about a designer's character idea which was sent to a broadcaster.[624] After the broadcaster rejected the idea, it created a tv show with a similar character. First, the court looked at the defendant's access to the idea. After establishing that the defendant was able to access the idea, the court turned to look at subconscious and conscious borrowing. By using the character of the work and the degree of the similarity, the court found that there was no subconscious or conscious borrowing by the broadcaster. By utilizing the character of the work, the judges looked for any particularly memorable qualities in the work.[625] According to this decision, general similarities can exist if there is no conscious or subconscious borrowing from the existing work.

The concept of double or independent creation is accepted in all jurisdictions. Additionally, the notion is consistent with the author's own intellectual creation test. Because the work's originality is not replicated and exists uniquely in each work, it should be protected. While recognition is only a clarification and application of originality test, this research is going to recognize the doctrine. Since the concept is never articulated, rather acknowledged by the case law, and it does not introduce any new rights or exceptions this research is going to explain its position in recitals. This is also backed up by the right to protect intellectual property. Failure to safeguard an original work results in the loss of rights.

### *1.2.5. Unlicensed adaptation*

Another point of discussion is whether an unlicensed adaptation can attract copyright protection. According to Ricketson and Ginsburg, the term "without prejudice to the author"

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[623] Cour de Cassation, chambre criminelle, du 7 decembre 1900 cited in Desbois (n 243) s 117.
[624] *Michael Mitchell v British Broadcasting Corp* (2011) 42 EWPCC (ewhc.ch.patent).
[625] ibid 124.

in the Berne Article 2(3) means that an unlicensed adaptation would fail to attract copyright protection.[626] Lacking authorization means that the acts are prejudicial to the author. Therefore, these acts are unlawful and should not attract copyright protection. This understanding is not followed by the Union members. Despite its infringing nature, it is still protected by the national legislations.

In Germany, the difference between double creation and the unlicensed adaptation is significant. According to the BHG, an author can create a similar work while not using any pre-existing work. Whether the author uses the pre-existing work is the indicator for unlicensed adaptation.[627] Unlicensed adaptation covers modified or unmodified, partial or full incorporation of the original work.[628] In other words, both unlicensed adaptation and double creation are original works. However, the author of an unlicensed adaptation knowingly utilizes a pre-existing work, whereas the author of a double creation without knowing the existence of a pre-existing work creates a similar work. Nordemann and others also point out the issue of self-adaptation.[629] This is observed when there is a contractual obligation to produce original works and the author utilizes its pre-existing work as a template to circumvent this obligation.

In the United Kingdom and Ireland, it is not important whether the author sought the consent of the original author when it comes to copyright protection. The permission to use a work is a contractual issue. On the other hand, if the unlicensed work passes the originality test then it qualifies for the copyright protection.[630]

Attraction of copyright to unlicensed adaptation should be based on author's own intellectual creation test. Independent from its originality, an unlicensed adaptation's exploitation is always comes with the assumption of infringement. Therefore, while there is no need to add anything

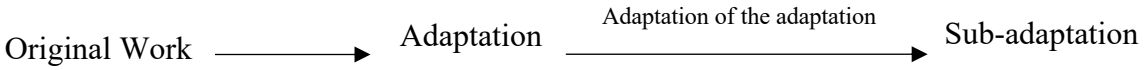
[626] Ricketson and Ginsburg (n 8) s 8.82-83.
[627] *Plagiatsvorwurf* [1960] BGH I ZR 30/58, GRUR 1960 500 503.
[628] Dreier and Schulze (n 540) ss 23–27.
[629] Nordemann, 'UrhG § 3 Urheber' (n 544) s 61.
[630] Aplin and Davis (n 75).

to the proposed directive, the autonomous understanding of author's own intellectual property should be accepted even when there is an infringement.

*1.2.6. Exploitation of the right*

Unlike the basic formulation, in adaptation, there are only minor deviations from the standard exploitation of rights. Vesting the authorship to the editing author means that majority of the issues are resolved before the creation of the work possibly with the contract. In other words, there is an issue of license or permission to clear the rights relevant to the adaptation. To clear these rights, parties are assumed to come to an understanding in a form of a contract. Nevertheless, the adaptation can be a sole authored work or a collaborative work. However, in a collaborative work the rules from the basic formulation govern the relationship between editing authors. This section is going to discuss the relationship between the original author and the subsequent author.

First of all, it is prudent to mention that the authors cannot exploit each other's work unless it is explicitly decided in the agreement. The Court of Cassation prevented both the original author's attempt to exploit the composite work[631] and the second author's attempt to exploit the original work unlawfully.[632] The BGH also stopped the original author using the subsequent work without the consent of the adapter.[633] While this is accepted in all selected jurisdictions, for the sake of legal certainty, this research is going to include a recital to stress out that author's cannot use each other's work




Sub-adaptations are accepted as a new type of exploitation and require specific authorization from the original author in selected jurisdictions. While there is a consensus on this issue

[631] *Cour de Cassation, Chambre civile 1, du 3 décembre 2002, 00-20664, Publié au bulletin* Bulletin 2002 I N° 295 230.
[632] *Cour de Cassation, Chambre civile 1, du 14 novembre 1973, 71-14709, Publié au bulletin* Bulletin des arrêts Cour de Cassation Chambre civile 1 N 309 275.
[633] BGH GRUR 1962, 370, 373

Desbois criticizes this requirement.[634] According to him, the author of a composite work is free to use his work without seeking further authorization until the end of its protection but when it comes to the adaptation of the composite work the author must come back and seek further authorization.[635] This is not fair to the author of the first adaptation. However, on the other hand, weak legal relationship prevents the original author from fully receiving the economic benefits from an adaptation. For instance, in a case where a sudden popularization of the adapted work may result in further adaptations such as conversion to the film, it is fair to involve the original author in this process to ensure that author is receiving an economic benefit. Nordemann also thinks that the author of the underlying work should have the power to allow sub-adaptations.[636]

According to Article 14(2) of the Berne Convention, adaptation of a cinematographic work based on a literary or artistic work require clearance of rights from both author of the original work and author of the cinematographic work. By this provision, any sub-adaptation within the scope is of original author's concern. Moreover, Article 2(3) of the Berne Convention, while recognising adaptations as original works, stipulates without prejudice to the original work. According to Ricketson and Ginsburg, such stipulation means that any sub-adaptation require authorization from the original author.[637]

Another important aspect in the exploitation of these works is the obligation not to undermine the adaptation. The original author can impose various limitations on the subsequent authors. Moreover, the moral rights from the original work can always be invoked in case of an infringement. However, after a successful authorization, the original author has an obligation not to undermine the adaptation. This is a direct result of the authorization contract. Furthermore, according to Desbois, as a result of the contract, the original author should first ask the holder of the adaptation right if a new type of adaptation became available by the

[634] Desbois (n 243) s 626.
[635] ibid.
[636] Nordemann, 'UrhG § 3 Urheber' (n 544) s 25.
[637] Ricketson and Ginsburg (n 8) s 8.82.

technological advancement.[638] For instance, when the cinematography became available and the holder of the theatrical adaptation right should be the first to be offered.

Additionally, in Germany, there is a provision that allows the original author to assert that the negotiated remuneration is insufficient. With UrhG 32 and 32a, the original author can claim any unanticipated revenue gained by a sub-adaptation. The agreed upon compensation must be revalued and adjusted to reflect the increased revenue.

This research is going to propose a similar approach to Ricketson's and Ginsburg's understanding of the Berne Convention. Any sub-adaptation of a work should be approved in advance by the original author. However, all authorizations must adhere to the proportionality principle. The following author must be able to seek judicial redress for the author's rejection. Because, although the economic interests of the original author are critical, the economic interests of succeeding authors should not be unnecessarily curtailed. Courts play a key role in this equation. By requiring permission for sub-adaptation, the original author is protected at the expense of succeeding authors. There is a danger of impeding the work's development. The courts must mitigate this danger. The rights of the original author and the rights of later authors are in conflict. Without the interference of a court, the authors can strike a reasonable balance. However, where intervention is unavoidable, courts should prioritise work's further advancement and equitable remuneration. Preventing additional adaptations of the work is unavoidably detrimental to both the authors and the public. A utilitarian approach would simply discard the permission of the original author, as the right holder has already transferred the required right. An argument based on natural rights would argue otherwise. As evidenced by various provisions of EU copyright law, a balance must be achieved. According to this research, the appropriate compromise should be defining the right and allowing a strict application of proportionality by the courts.

[638] Desbois (n 243) s 619.

### 1.3. Scope of adaptation as an action

Every process of adaptation requires certain interactions with the original work by the subsequent author. These interactions are called processing, editing or sometimes adaptation. Adaptation in this sense refers to actions made by the editing author. It is important to point out that while a successful independent adaptation as a separate work requires processing or editing, not every editing results in an independent, protectable, separate work. In some cases, adaptations as actions are restricted acts and require permission from the author.[639] Some of them may result in adaptations as separate works (where there is an original contribution), while others may be categorized as unprotectable works or under the works of reproduction (assuming that necessary rights are cleared). Originality of the subsequent contributions decide which category is suitable for the final work.

In the Berne Convention, Article 12 considers adaptations, arrangements and other alterations as actions within the right of adaptation. In addition to these actions, act of translation is separately articulated in the Article 8. Actions in these articles are not defined in the Convention. Terms, 'other alterations' and 'adaptations', are among the list of actions to expand the room for interpretation at the national level.

In the United Kingdom and Ireland, the adaptations as actions are counted in a list. According to CDPA Section 21(3) adaptations as actions cover;

> (a) in relation to a literary work, other than a computer program or a database, or in relation to a dramatic work, means—
>
> (i) a translation of the work;
>
> (ii) a version of a dramatic work in which it is converted into a non-dramatic work or, as the case may be, of a non-dramatic work in which it is converted into a dramatic work;
>
> (iii) a version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical;
>
> (ab) in relation to a computer program, means an arrangement or altered version of the program or a translation of it;
>
> (ac) in relation to a database, means an arrangement or altered version of the database or a translation of it;
>
> (b) in relation to a musical work, means an arrangement or transcription of the work.

In a similar manner but with some differences CRRA section 43(2) lists five subsections;

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[639] See above section 1.2.2

(a) a literary or dramatic work, film, sound recording, broadcast, cable programme or typographical arrangement of a published edition, includes—
    (i) a translation, arrangement or other alteration of the work,
    (ii) a version of a dramatic work which is converted into a non-dramatic work or the conversion of a non-dramatic work into a dramatic work, and
    (iii) a version of a work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction;
(b) a musical work, includes a translation, arrangement or other alteration or transcription of the work;
(c) an artistic work, includes a collage of the work with other works, an arrangement or other alteration of the work;
(d) a computer program, includes a translation, arrangement or other alteration of the computer program; or
(e) an original database, includes a translation, arrangement or other alteration of the original database.

Any original work resulting from actions in these lists is regarded as an adaptation as a separate work. Since a closed list approach is used for subject matter, the adaptations as separate works are also categorized according to that closed list, as literary, dramatic, musical or artistic works.

In Germany, UrhG sec. 3 lists 'translation and other adaptations' as actions. This is an open-ended approach compared to Ireland and the UK. Other adaptations are not defined; therefore, it is left to the courts and doctrine to fill this gap. In the previous acts, LUG sec. 12 enumerates a closed list of actions while KUG sec. 15(2) follows a more open approach. Following the open-ended approach, UrhG sec. 3(2) states that;

> The insubstantial adaptation of an unprotected musical work is not protected as an independent work.

The UrhG denies independent protection to insubstantial adaptations of unprotected musical works. From the outset, this seems unnecessary. Insubstantial adaptations are categorized under reproductions by the BGH.[640] Hence, they do not merit independent protection. The reasoning behind this addition is better explained by the parliamentary discussions. According to the discussions, this limitation is implemented to protect folklore/traditional music.[641] Traditional music is often brought to life by fixation of contemporary artists. These fixations vary slightly due to cultural differences within Germany. The Parliament aims to prevent resurrection of

[640] *Bibelreproduktion* [1989] BGH I ZR 14/88, GRUR 1990 669 673.
[641] BT-Drs 10/3360, 18

copyright protections in these fixations, due to minor changes. The method, however, has been criticized for being too broad and unnecessary.[642] The wording does not single out folklore music and targets the entire music industry.

According to Ahlberg and Nordemann, this limitation should be understood as a clarifying statement that reiterates the BGH's position.[643] Otherwise, it would introduce a higher threshold of originality than the level that exists in the UrhG.[644]

Finally, UrhG sec. 69c(2) adds that for a computer program, translation, adaptation or other modifications are restricted acts. In addition to adaptation, this article also adds the term other modifications. The addition seems unnecessary, since the term "adaptation" is utilized to widen the coverage on purpose.

In France, CPI Article L112-3 covers translations, adaptations, transformations, arrangements and collections under acceptable actions. The approach is similar to the German practice. The term 'adaptation' is again used to widen the scope of actions. There is no genre classification. Article L122-6 adds that translation, adaptation, arrangement or any other alteration of software are restricted acts.

There are different types of approach to the articulation of adaptation as an action in the selected jurisdictions. Albeit they are subject specific, there is an established practice within the EU Directive to define adaptation as an action. Both Software Directive and Database Directive recognizes adaptation as an action for their subject matter in a same manner. This research is going to follow their established formulation in its proposal. The following sections is going to analyze the meaning of the terms used in the formulations of the selected jurisdictions and the EU Directives.

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[642] Ahlberg and Götting (n 541) ss 3–36.
[643] Nordemann, 'UrhG § 3 Urheber' (n 544) s 54; Ahlberg and Götting (n 541) ss 3–39.
[644] Wandtke and others (n 582) ss 3–30.

*1.3.1. Translation*

According to the Oxford English Dictionary, translation is defined as 'the process of translating words or text from one language into another'.[645] Ricketson and Ginsburg give a similar and more focused definition while commenting on the Berne Convention, namely, the 'product of turning literary or dramatic work from one language to other'.[646] However, they also question the scope of translation. For instance, does translation cover converting spoken words to sign language?

Limiting the scope of translation into literary or dramatic works may not reflect contemporary understanding of the term. Presently, translation can 'claim to be more than a mere interlinguistic transfer taking place in the dimensions of law, economy or cultural politics'.[647] A translation transports a work from one market to another and supplement the work with novel expressions from the translated language.[648] Assuming this definition, translation would have a scope similar to adaptation in general. Whether that is the case or not, this research has no intention to severe any adaptation as an action from others. Therefore, in any case, defining translation in a broad sense or not, would yield the same result. That is, the neutral term of 'adaptation' would always fill the remaining gap in the overall scope.

Basalamah and Sadek defend that while copyright theory perceives translation as a continuation of a work, according to translation theory, translation is the afterlife of that said work.[649] Texts, by virtue of language, is never original. While it seems unique, it is always inspired from another existing set of words. The idea is the component that is translated into another language. The expression is always inspired. Since copyright upholds idea-expression dichotomy to be absolute, a translation should not be the privilege of the author to allow.

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[645] Oxford University Press, 'Translation, Noun' (*the Oxford Advanced American Dictionary*, 2021) <https://www.oxfordlearnersdictionaries.com/definition/american_english/translation> accessed 19 July 2021.
[646] Ricketson and Ginsburg (n 8) s 8.78.
[647] Salah Basalamah and Gaafar Sadek, 'Copyright Law and Translation: Crossing Epistemologies' (2014) 20 The Translator 396, 396.
[648] ibid 399.
[649] ibid 402.

The selected jurisdictions do not offer a definition of translation in their legislation. However, CRRA[650] and CDPA[651] explain what a translation means when it comes to computer programs. According to them, instances of making a version of the program, converting to another computer language and converting into or out of a computer language are considered to be translations of a computer program.

In France, the subjects of translation are literary works. This also includes software. According to Desbois, some authors consider that adapting a musical work from one instrument to another is translation of that musical work.[652] However, this is much more suited to arrangement of a musical work. This is because musical arrangements are defined as change of instrument or change of rhythm in a musical composition. This is explained in more detail under the arrangements in section A(3)(c).

According to Lucas and others, a translation implies an intimate interaction with the original work and also a translation's originality is obvious and self-evident.[653] Paris First Instance Court accepted that even word-by-word translations are accepted as original and protectable by the copyright.[654] According to the Court of Cassation, converting software from one computer language to another in order to work with certain type of software or hardware is also an improvement.[655] The software's capacity is changed, therefore, the translation should be considered an original work.

In Germany, according to the Zweibrücken Court of Appeal, for literary works, a translation to another language requires that language have empathy and stylistic abilities.[656] This requirement ensures that there is no mechanical conversion of the work. On the contrary, the translator must embrace the content of the work and embed its personality into the translation

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[650] CRRA 2000 s.43(3)
[651] CDPA 1988 s.21(4)
[652] Desbois (n 243) s 113.
[653] Lucas and others (n 235) s 129.
[654] André Kerever, 'Chronique de Jurisprudence - Tribunal de Grande Instance de Paris, Chambre 1, Du 13 Octobre 1992' RIDA 01/1993 163.
[655] *Cour de cassation, civile, Chambre civile 1, 22 septembre 2011, 09-71337, Inédit* Legifrance.gouv.fr.
[656] *Jüdische Friedhöfe* [1997] OLG Zweibrücken 2 U 30/96, GRUR 1997 363.

to show empathy and stylistic choices. The amount of the text is irrelevant. In a case where an author translated comic book dialogues from Italian to the German language, BGH found this to be a valid adaptation.[657] According to the judgment, it requires great effort to convert such limited contexts in dialogues into another language in such simple fashion for children to understand. To be fair, there is no need for the translation to be accurate or a quality translation to attract protection.[658] However, originality is still a required element. For instance, in a court decision translation of golf rules were found to be too simple to reflect the personality of the translator.[659] According to Dreier and others, it is possible to translate a computer program from one computer language to another.[660]

Machine translation represent translation done by a software in an automatic manner. The object of the translation can be a literary work in a traditional sense, or it can be a software translation from one programming language to another. The issue remains whether a machine can be an author. The act of translation, in some extent, is observable. The authorship, however, is linked only to humans and a machine translation should be accepted as mere reproduction.

The meaning of translation, whether defined in a broader sense or not, should be left to national courts to define. Definition, by virtue, would limit the possibility of new interpretation. In ever growing information society, the term translation could represent new techniques of information transportation. For this reason, this research is not going to venture further than recognising translation as an action of adaptation.

### *1.3.2. Adaptation as an action*

According to Ricketson and Ginsburg, to meet the requirements of a different audience is an adaptation.[661] This is an open-ended definition. In other words, for instance, a literary work meets the requirement for an audience that reads, however, when the literary work is converted to a cinematographic work, then it meets the requirements of a different audience that watches.

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[657] *Comic-Übersetzungen II* [1999] BGH I ZR 57/97, GRUR 2000 144.
[658] *Angélique* [1967] BGH Ib ZR 113/65, GRUR 1968 152 153.
[659] *Golfregeln* [1995] OLG Frankfurt 11 U 76/94, ZUM 1995 795 798.
[660] Dreier and Schulze (n 242) ss 3–15.
[661] Ricketson and Ginsburg (n 8) s 12.

It is true that the term "adaptation" is used as a catch-all phrase. However, by utilizing the element of audience, Ricketson and Ginsburg are focusing on the final work rather than the process or actions. To make it clearer, this definition can be rephrased as; turning a work into another work that attracts audience by its own characteristic differences. By this rephrasing, it is safe to say that Ricketson and Ginsburg focused on the element of originality in the adaptation while devising this definition.

Ireland and the United Kingdom do not have the term "adaptation" as an action in their code. It is used to describe the right of adaptation. However, both France and Germany use the term as an action.

In Germany, commentators are classifying transformations, arrangements, collections and adaptations under the umbrella of "other adaptations". The choice of wording in the UrhG contains only translations and other adaptations. As other types of actions are discussed under their own separate sections, the adaptation as an action covers converting the works to another genre. For instance, dramatization of a novel or audiovisual adaptation of a literary work. In a decision, Munich Court of Appeal recognized that transfer of a novel character to a drawing is an adaptation.[662]

According to Nordemann, as long as traits of the respective genres are different then there is no adaptation but a separate independent original work. They argue that if a novel is converted to an opera then the libretto part can be considered an adaptation, but the music part is not a part of the adaptation. It is an independent separate work.[663] Munich First Instance Court decided on a case that involves production of a painting after a sculpture.[664] The court decided that there was no adaptation.

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[662] *Pumuckl-Figur II* [2007] OLG München 29 U 5512/06, GRUR-RR 2008 37 39.
[663] Nordemann, 'UrhG § 3 Urheber' (n 544) s 10.
[664] *Hubschrauber mit Damen* [1985] LG München I 21 O 17164/85, GRUR 1988 36 37.

In France, adaptation as an action also refers to dramatizations, adaptation to film and conversion to another genre. However, Desbois warns that in this category, the connection between a derivative work and an original work may become loose to a point where the derivative work should be considered to be original on its own.[665] However, it is important to state that simply re-categorizing a work is not sufficient. In a decision, Paris Court of Appeal denied the existence of an adaptation for use of a musical work in an audiovisual work.[666]

Apart from the common law countries, adaptation as an action is linked to conversion of a work to another genre. Genre, on the other hand, is not a sufficiently defined concept. It is hard to point out where one genre begins and other ends. Ricketson's and Ginsburg's idea of focusing on the result rather than the process is an attractive solution. However, in their argument difference in audience is the key representative of adaptation. This by itself leads to a more complex issue of defining what is a new public pertaining to European copyright law.

*1.3.3. Arrangements*

According to Ricketson and Ginsburg, arrangements represent a change in the structure of the work in order to fit a new purpose. For instance, arranging a musical work for broadcasting.[667]

In France, the terms musical works and arrangements are used together. According to Desbois, there are two types of musical arrangements; adaptation of a musical work from one instrument to another and reduction of a musical work to one or a reduced number of instruments.[668] Lucas and others also define the musical arrangements as adapting the musical work to a foreign instrument.[669] In a court decision between SACEM and one of its members, Paris Court of Appeal decided that a song that is inspired from a French / Canadian folklore was not original.[670] According to the court's reasoning, the similarity in wording is usually consistent but the

[665] Desbois (n 235) s 113.
[666] *Tribunal Civil de la Seine, chambre 3, du 5 novembre 1953* RIDA 1/1954 111.
[667] Ricketson and Ginsburg (n 8) s 12.
[668] Desbois (n 235) s 113.
[669] Lucas and others (n 235) s 130.
[670] Cour d'Appel de Paris, chambre 1, du 16 decembre 1959 cited in Desbois (n 243) s 114.

musical design was identical. Since there was no arrangement in the musical work, the work in question was classified as work of a reproduction.

In Germany, changing instruments, selection of instruments and/or composition of the orchestra are examples of musical arrangements.[671] According to the BGH, implementation of a new instrument to a pre-existing musical work is considered to be a musical arrangement.[672] However, Hamburg Court of Appeal decided that simple increase in the speed of a tune is not considered a musical arrangement.[673] Another example of a musical arrangement is conversion to ringtones. In a BGH decision, the court affirmed that a shortened and digitally processed musical work is a musical arrangement.[674] On the other hand, recording a live concert is not considered to be an adaptation. The BGH decided it is not a conversion or adaptation but a reproduction of the musical work.[675]

*1.3.4. Transformation*

Transformations are difficult to distinguish. It is challenging to provide a practical guideline in relation to this action. The court has to determine case-by-case whether a transformation was sufficient and original to be considered an independent work.

In Germany, changing the proportions of an artistic work is not considered a transformation.[676] The BGH considers mere implementation of the work in another medium as a work of reproduction as well. In a case concerning changes in format and sentence width of a bible, the BGH refused to recognize transformation.[677] Moreover, implementation of a design to three-dimensional form is also not a transformation.[678] This is the same with conversion to another material or material related enrichment.[679] These instances are accepted as reproductions. However, in some cases, if conversion to another material affects the aesthetic qualities of the

[671] Dreier and Schulze (n 242) ss 3–24.
[672] *Haselnuß* [1967] BGH Ib ZR 123/65, GRUR 1968 321 324.
[673] *Nach einem Zug pfeifen* [2005] OLG Hamburg 5 U 181/04, ZUM-RD 2007 71 75.
[674] *Klingeltöne für Mobiltelefone II* [2010] BGH I ZR 18/08, GRUR 2010 920 921.
[675] *Alpensinfonie* [2006] BGH I ZR 5/03, GRUR 2006 319 321.
[676] *Vorschaubilder* [2010] BGH I ZR 69/08, GRUR 2010 628 630.
[677] *Bibelreproduktion* (n 640).
[678] *Staatsbibliothek* (n 249) 234.
[679] *Rechtsmittel* [1963] BGH I ZR 96/61, GRUR 1963 328 329.

work it is accepted as an adaptation. In a judgment, BGH found that conversion of a figure to glass added aesthetic qualities by affecting the light around the figure.[680] The new work was accepted as an adaptation.

It is important to stress the process of painting. Painting an object is commonly accepted as an adaptation[681] because the process requires a sufficient amount of personal decision by the painter. From a different perspective, the BGH also affirmed that a non-transformative use of the work is an adaptation.[682] Two paintings of a famous artist 'Hundertwasser House in Vienna' and 'The four solitudes' were distributed as copies by the defendant with custom built frames. The defendant was authorized to distribute these copies of the paintings but did not have the consent of the author to use the custom frames. Inside the custom frames, the art prints looked as if they were continued on to the frame. The Munich District Court found that the distribution of the art prints infringed the author's right to adaptation.[683] The BGH confirmed its findings. Therefore, without making any alteration the defendant infringed the painter's right to adaptation.[684]

In France, manual re-creations of artistic works are considered composite works rather than works of reproduction.[685] Colorization of a film was considered a transformation by the Paris Court of Appeal.[686] For musical works, variations in the work are considered transformations. For instance, in a court decision, it was decided that substantial change in rhythm while keeping most of the musical phrases was a transformation of the musical work.[687]

In the United Kingdom and Ireland, changing physical attributes of a painting did not accepted as an original work in *Interlego* decision.[688] Additionally, in *Honeywell* decision, mere change

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[680] *Kristallfiguren* [1988] BGH I ZR 99/86, GRUR 1988 690 692.
[681] Dreier and Schulze (n 242) ss 3–35.
[682] *Unikatrahmen* [2002] BGH I ZR 304/99, GRUR 202 532 534.
[683] *Hundertwasser-Haus* [2000] OLG München 6 U 5629/99, ZUM 2001 76.
[684] *Unikatrahmen* (n 682) 534.
[685] *Cour de Cassation, Chambre civile 1, du 5 mai 1998, 96-17184, Publié au bulletin* Bulletin 1998 I N° 162 109.
[686] *Tribunal Civil de la Seine, chambre 3, du 5 novembre 1953* (n 666).
[687] Cour d'Appel de Paris, 20 novembre 1857, Annales, 1857, p. 455 cited in Pollaud-Dulian, *Le droit d'auteur* (n 259) s 517.
[688] *Interlego A.G. Appellant v Tyco Industries Inc. and Others Respondents* (n 553).

of scale, which is not visually significant, did not accepted an adaptation.[689] In terms of artistic work, conversion between two dimension and three dimension is explicitly prohibited by CDPA s17(3) and CRRA s39(b). These conversions accepted as a form of reproduction. In *Sandman v Panasonic UK Ltd*, applying a circuit drawing into a circuit board considered as a conversion from two dimension object to three dimension application.[690] However, since CDPA s17(3) is restricted to artistic works, the Court argued that physical circuit, actually, contains original content from the literary work. Laddie and others affirm this view and defend that expression of "reproduction in material form"[691], whether it is an artistic work or a literary work or any other type of work, always covers three dimensional conversion.[692] Nevertheless, transformation as a term is not defined in the United Kingdom and Ireland. Following the jurisprudence, the courts require the standard of originality satisfied in order to dismiss the supposition of mere reproduction.

In conclusion, the definition of transformation is imprecise. The existence of transformation is determined on a case-by-case basis. There is little agreement on a normative framework or a judicial standard. Nonetheless, this uncertainty is advantageous. The term 'transformation' is a neutral phrase with an open definition that allows it to be adaptable to future ways of exploitation or hypothetical transformations. Its advantages stem from its technical neutrality. Unpredictability is a concern. However, the process of adaptation is inherently uncertain. Each new technological innovation opens up new possibilities for adaptation. While legal certainty is an important guideline to follow, too stringent interpretation provides for loopholes in the provision and limit the court's ability to deal with unforeseen changes. This research suggests enabling courts to interpret the term 'transformation' rather than defining it in the proposed directive. This flexibility's outer boundary should be determined by applying the freedom of speech and idea-expression dichotomy. A transformation might be carried out in order to demonstrate one's right to free speech. In such instance, judges must strike a balance between the author's copyright and the adaptor's freedom of expression. Additionally, a transformation

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[689] *Drayton Controls (Engineering) Limited and Another v Honeywell Control Systems Limited* [1992] FSR 245.
[690] *Aubrey Max Sandman v Panasonic UK Limited and Another* [1998] FSR 651, 657.
[691] As in CDPA s17(2), similar provision does not exist in CRRA.
[692] Laddie and others (n 555) s 14.19.

might distance the succeeding work from the original work to the point that it becomes impossible to believe that any borrowed expressions exist. Without borrowing terms, adaptability is impossible.

*1.3.5. Collection of works*

Collection of works or anthologies are protected due to their originality based on composition. The author's editing choices in selecting and arranging the works included in the adaptation is protected. The final work is protected as a collection in respective jurisdictions. Nevertheless, the process by the author of the collection is an adaptation and the relationship between the original author and the author of a collection is regulated by adaptation rules. Because, author of a collection uses pre-existing works to obtains the final work. The relationship between the two authors is in the scope of adaptation rules.

In France, according to Seine First Instance Court, an anthology of poems is accepted as a composite work.[693]

In Germany, original compositions are protected as well. In a judgment, BGH decided that a collection of medical exam questions was an adaptation of those exam questions.[694] Also, a selection of court decisions is protected where the decisions are categorized in an original manner.[695]

In the United Kingdom and Ireland, compilations or anthologies are protected as an original works. Even though, neither CDPA nor CRRA lists compilation as original works, following *Kelly v Morris* decision, their existence is accepted.[696] In terms of anthologies, copying the selection of poems from a literary work was accepted as an infringement.[697]

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[693] *Tribunal Civil de la Seine, chambre 3, du 5 novembre 1953* (n 666).
[694] *Fragensammlung* [1981] BGH I ZR 20/79, GRUR 1981 520 521.
[695] *Leitsätze* [1991] BGH I ZR 190/89, GRUR 1992 382 385.
[696] *Kelly v Morris* (1865-66) LR 1 Eq. 697.
[697] *Macmillan & Co v Suresh Chunder Deb* (1890) 17 ILR 951.

While there is a consensus among selected jurisdictions, there is no need for a proposal by this research. Also the scope of this subject belongs to originality rather than adaptation.

*1.3.6. Revisions and restoration of a work*

According to Desbois, there are two categories of revisions; revisions made while the original author is alive, and revisions made after the original author has passed.[698] This distinction is useful when measuring the originality and the classification of the work.

For instance, the revisions made while the original author is alive are most likely collaboration rather than an adaptation. If the revisions are nothing more than proofreading, then it is not an original contribution. In that case, it is neither a collaboration nor an adaptation.

In France, simple updates in a book by placing new case law after the author is deceased is not accepted as a protectable revision.[699] Also according to Desbois, in a protectable revision, the editing author must refrain from making any changes that is against the original author's wishes.[700]

In Germany, similarly, corrections and editorial works are less likely to be accepted as adaptations. According to the BGH, the editions must move beyond simple grammatical modifications and stylistic alterations.[701] However, if a revision shows originality, it is protected as an adaptation.[702]

According to Ahlberg and others, completing an unfinished work of a deceased author is an adaptation.[703] However, the course of the work must be clear in the fragments. In other words, if the original work fails to pass the level of an inspiration, then the completion is an individual

[698] Desbois (n 235) ss 23–24.
[699] Desbois (n 243) s 24.
[700] Desbois (n 235) s 28.
[701] *Biografie: Ein Spiel* [1971] BGH I ZR 31/70, GRUR 1972 143 145.
[702] ibid.
[703] Ahlberg and Götting (n 541) ss 3–2.

work on its own. By remaining an inspiration, the subsequent works are benefited from the free use.

In the United Kingdom and Ireland, relevant sections include alterations in each subject matter. It is safe to claim that these countries follow German and French approach in revisions.

Restoration of old works is a complex issue. In France, according to Desbois, in a true restoration, there is no original contribution from the second author.[704] Unless, the second author translated the work from a dead language to modern language. Then there is a translation and choice of wording is sufficient to claim adaptation.

*1.3.7. Summary*

In the Berne Convention and the selected jurisdictions, adaptation as an action is defined without exception. These definition often involves not well defined terms such as other alterations, adaptation, transformations. This research believes that this is intentional. The scope of an action is ever changing and hard to quantify. Defining these terms would potentially defeat their purpose.

While translation is the most obvious and the first recognized adaptation in copyright, its definition is changing with the introduction of computer programs. Arrangements may seem to be confined within musical works, but it is going to deal with remixes and other processes of adaptations. Processing a musical works normally required a studio, however with the advancement of home equipment and powerful personal computers, almost everyone can make remixes and create musical arrangement with in the comforts of their home. This advancement is going to bring more complex issues without any precedents to the courts.

Transformation and adaptation as terms are genre neutral. They can be associated with literary works, computer programs, musical works or audiovisual works. Their ambiguity serve as a safety net for other actions. When a courts finds a compelling argument for infringement of

[704] Desbois (n 235) s 27.

adaptation right, but cannot find a suitable resemblance in translation, alteration or arrangement, then the courts can invoke the terms adaptation or transformation to define the infringing actions.

Without a detailed definition, the proposed solution by this research is to introduce a recognition of the actions and leave the interpretation of these actions to the courts. In the European Union, there is a definition that used on more than one directive. This definition includes recognition of the actions and avoids a detailed explanation of the terms. This research is going to adopt this definition in its proposal as it would present consistency among directives and serve the purpose of the research.

### 1.4. Scope of adaptation as a separate work

In Article 2(3) of the Berne Convention, adaptations recognised as an original work without prejudice to the copyright in the original work. The scope of the terms in the article is a matter for the national legislations.[705] On the other hand, "without prejudice to the copyright of the original work" means that rights within the adaptation cannot extend to the original work and cannot undermine the exploitation of the original work.[706] This section is going to analyse these boundaries between authors and other mode of exploitations. In the end, this research is going to propose an explicit recognition of adaptation as a separate work to promote legal certainty.

#### *1.4.1. Distinguishing from the basic formulation*

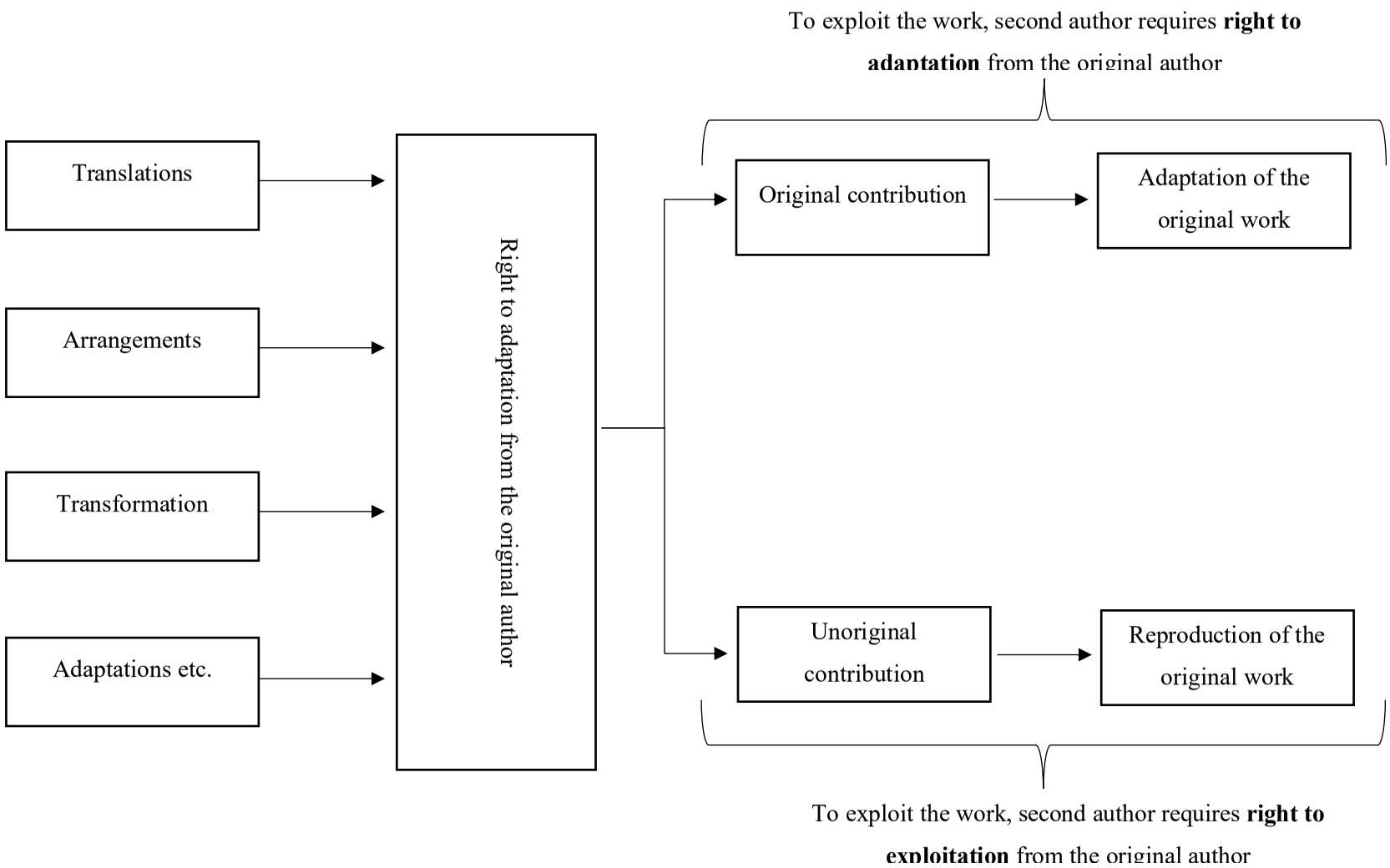
The characteristic differences of an adaptation from a basic formulation are its lack of collaboration and the existence of a previous work. In other words, while in the basic formulation, each contribution must be collaborated with others and finalized at the same time, this is not the case for the adaptation. These distinctions make adaptations distinguishable from the basic formulation.

[705] Ricketson and Ginsburg (n 8) s 8.78.
[706] ibid 8.82.

*1.4.2. Distinguishing from the work of a reproduction*

In the case of reproductions and adaptations, it is much more difficult to separate an adaptation.[707] Separating a work of reproduction from an adaptation of the same work is essentially about whether there is an original contribution. To better illustrate the point, the following workflow explains the outcomes where one contribution becomes an adaptation and the other becomes a reproduction.

[707] Caddick, Harbottle and Suthersanen (n 604) ss 7–235.


To exploit the work, second author requires **right to adaptation** from the original author
Translations
Arrangements
Transformation
Adaptations etc.
Right to adaptation from the original author
Original contribution
Adaptation of the original work
Unoriginal contribution
Reproduction of the original work
To exploit the work, second author requires **right to exploitation** from the original author

This illustration presumes that the second author started the processing with an intention to produce an original adaptation. Otherwise, the second author does not need to clear right to adaptation. Instead, the second author should acquire right to reproduction before the final stage. Right to adaptation is required at two stages; the first is when acquiring right to make an adaptation and the second is when acquiring right to exploit an adaptation. This is going to be discussed in the next section.

The distinction, therefore, reveals itself with the question of originality. An author can start the work with an intention to produce an original adaptation. However, if the contribution lacks originality then by default the work is not different from the pre-existing work. Exploiting the final work under these circumstances needs permission from the original author to reproduce the work.

In France, Desbois and Lucas and others have also brought new perspectives to this discussion. Desbois introduced the concepts of relative and absolute originality to define the subject of right of adaptation.[708] According to these concepts, originality comes from composition, expression or both of them. If one of these elements is borrowed from a pre-existing work while other elements are added, then there is a relative originality. Desbois did not think that adaptation should cover transfer of the work to another genre.[709] According to him, exploitation in one genre has no economic effect on the exploitation in another genre. Therefore, it is wise to understand Desbois' concept in its categorical perspective.

Lucas and others, on the other hand, explained the limits of the adaptation right in more genre independent terms.[710] According to them, borrowing elements that generate copyright protection in the source work is the purview of the adaptation right. Gervais also defines the

[708] Desbois (n 235) ch 2.
[709] ibid 198.
[710] Lucas, Lucas and Lucas-Schloetter (n 235) s 195.

scope of the adaptation right in a similar manner.[711] According to him, taking the elements that gave the infringed work its originality requires clearing the adaptation right of the author.

These two French approaches emphasize originality in two different factors while defining the adaptation right. First the borrowed part must bear originality of the source work and secondly the subsequent author must bring independent originality to the work. With these two elements of originality the final work is considered an adaptation. The Court of Cassation, when deciding whether there is an adaptation or not, required a strict comparison of the intrinsic elements of the two works.[712] In another case, the Court of Cassation returned the decision to the Paris Court of Appeal, because there was not a comparison of expression, composition, the scenes and the dialogues between two literature works. This comparison must be the legal basis when deciding whether the work in question is a reproduction or an adaptation.[713] Therefore, the test to decide whether a work is a reproduction, or an adaptation require determining the original elements in the first and the second work. Then a comparison would yield to what extent the second work borrowed the original elements from the first work. When the second work can exhibit its own original elements alongside with the borrowed elements, then there is an adaptation. Otherwise, it is a work of reproduction.

In Germany, the BGH introduced a test to differentiate work of a reproduction from work of an adaptation. The case was about an exhibition. The defendant organized an exhibition at Museum Schloss Moyland. It is called "Joseph Beuys – Unpublished photographs by Manfred Tischer". The plaintiff was a collecting society for visual arts. It held the copyrights for Joseph Beuys' works. The exhibition contained eighteen black and white photographs of an artistic event organized by Joseph Beuys in 1994 at the national television. The plaintiff requested injunctive relief to prohibit publishing of the photographs by Tischer. The district court has

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[711] Daniel Gervais, 'The Derivative Right, or Why Copyright Law Protects Foxes Better than Hedgehogs' 15 73.
[712] *Cour de Cassation, Chambre civile 1, du 23 février 1983, 81-14731, Publié au bulletin* Bulletin des arrêts Cour de Cassation Chambre civile 1 N 74.
[713] *Cour de Cassation, Chambre civile 1, du 4 février 1992, 90-21630, Publié au bulletin* Bulletin 1992 I N° 42 31.

granted the claim.[714] The first instance court designated the photographs as adaptations of the event by Beuys. The Court of Appeal rejected the appeal by the defendant. According to the court, the photographs fixed essential protected elements of the scenic performance. The photo series is not an unchanged reproduction of the Beuys action but its transformation. It is also not a free use, because the photographer aimed to represent the original action.[715] When the case brought before the BGH, the court applied a four-step test to determine whether the photographs were adaptations.

The court started by determining which objective characteristics constitute the creative aspect of the original work. In the second step, the court assessed to what extent in the new work the creative aspects of the original work have been adopted. The next step consisted of comparison of the respective overall impressions while taking into account all acquired creative content. And finally, if the overall impression was similar then the new work should be a reproduction, if the new work had such substantial changes that it cannot be regarded as a mere duplication then it should be considered an adaptation.[716]

### *1.4.3. Originality of the final work*

In France, according to the Court of Cassation, a composite work must be original and must not simply reproduce the originality of the first work.[717] In a case where a package design of an apple company was taken and improved by a designer for a potato company, the Court found that the designer's contribution in itself was original and the final work should be classified as composite work.

The editing author must produce original additions to the existing work.[718] From the outset, the threshold of originality is the same as for other works. As discussed in Chapter II (2)(1), however, the practice in determining the originality could be characteristic. For instance, in the

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[714] *Einstweilige Untersagung der Beuys Ausstellung auf Schloss Moyland* [2009] LG Düsseldorf 12 O 191/09, ZUM 2009 975.
[715] *Beuys Fotografien* [2011] OLG Düsseldorf 20 U 101/10.
[716] *Beuys-Aktion* (n 543) 70.
[717] *Cour de Cassation, Chambre civile 1, du 15 février 2005, 02-16957, Publié au bulletin* Bulletin 2005 I N° 85 75.
[718] Pollaud-Dulian, *Le droit d'auteur* (n 574) ss 527 and 539.

basic formulation the courts would look for contribution in the formatting of the work. Although the composite work is characterized by lack of collaboration, it does not mean that personal contributions are not original.[719] In a decision by Versailles Court of Appeal, colorization of a film was considered as a transformation of the work but was not accepted as a composite work due to lack of original contribution.[720] Additionally, it is important to state that when proving originality of the adaptation, it is not compared to the originality of the first work.[721] In other words, the adaptation does not have to surpass or meet the originality level of the first work.

In Germany, the adaptation must include the adapter's own intellectual creation. According to Nordemann, the editing author must add something creative or change the original work creatively.[722] According to the BGH, the originality requirements are as same as for other works.[723] Furthermore, the threshold of the originality is not dependent on the first work's originality level.[724] For instance, in a situation where originality produced by the subsequent authors is minor compared to the original author, the subsequent works are still protected. It does not matter whether the subsequent originality is lower in comparison.

In the United Kingdom and Ireland, adaptations are subject to the originality test that is applied to every other work in copyright.

In the European Union, the author's own intellectual creation test is accepted. Therefore, there is an already established harmonization in place. This research is not going to propose anything new on this topic.

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[719] Gautier (n 499) s 586.
[720] *Cour d'appel, Versailles, Ch Civ Réunies, du 19 decembre 1994* RIDA 2/1995 389.
[721] Pollaud-Dulian, *Le droit d'auteur* (n 574) s 527.
[722] Nordemann, 'UrhG § 3 Urheber' (n 544) s 17.
[723] *Comic-Übersetzungen II* (n 657) 145.
[724] *Biografie: Ein Spiel* (n 701) 144.

*1.4.4. Categorizing the final work*

While adaptation is not an independent category of work in selected jurisdictions, these jurisdictions are using the term to clearly point out which works are affected by the provisions regarding adaptation. It is similar to the basic formulation. There is no independent category of work called collaborative work or joint authorship. It is designed to point out which works are subject to the specific rules.

In France, adaptation as a separate work is included in the composite works. In Article L113-2 (2), the CPI defines it as a new work in which a pre-existing work is incorporated without the collaboration of the author of the adapted work. Composite work is characterized by the absent participation of the original author.[725] It is an unorthodox way of defining the adaptation as a separate work. The Article's focus is on the relationship between authors rather than the adaptation as actions or the originality of the final work.

There are two specific and one general conditions for composite works. The work must integrate a pre-existing work.[726] Lack of pre-existing works may classify the work as a collaborative work or, without collaboration, concurrent productions would result in two independent works.[727] According to the Court of Cassation, filming a painter while he is painting is not a composite work.[728] The painting did not exist before the production of the film. Therefore, the film cannot be classified as a composite work. The second is lack of collaboration between the first and the second author. Otherwise, the final work would be subject to the basic formulation.[729] In a similar situation, the Paris Court of Appeal decided that a jazz improvisation of a song by two singers constituted a collaboration between those singers, however the original author was not counted as co-author. The final work remained both a composite work vis-a-visa the original author and a collaborative work vis-à-vis the two singers.[730]

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[725] Gautier (n 499) s 586.
[726] Lucas and others (n 235) s 228.
[727] Pollaud-Dulian, *Le droit d'auteur* (n 574) s 528.
[728] *Cour de Cassation, Chambre civile 1, du 3 novembre 1988, 87-13.042, Publié au bulletin* (n 239).
[729] Lucas and others (n 235) s 229.
[730] *Cour d'appel, Paris, chambre 4, du 12 Mai 1999* JurisData 1999-024101.

Post-mortem collaboration is not an accepted method of collaboration according to the Court of Cassation. In a famous case, Borodin's opera completed by Rimsky-Korsakov and Glaznovov was brought before the Court.[731] After the death of Borodin, his opera remained unfinished. Rimsky-Korsakov and Glaznovov inspired from existing fragments tried to finish the opera with an intention to imitate the original author. The Paris Court of Appeal regarded these combined efforts as collaboration between two authors and accepted the final work as a composite work.[732] In the appeal, the Court of Cassation accepted this approach and stated that dependence does not result in collaboration and post-mortem collaboration is not possible.[733]

Article L113-2(2) uses the phrase 'incorporation of an existing work into a new work'. There are two types of incorporation; intellectual (indirect) and material (direct) incorporation. Examples of direct or material incorporations are a floral decoration of Pont-Neuf[734], inserting a photograph into advertising[735] and incorporation of music into a TV commercial.[736] In these instances, the form of the pre-existing work is not changed. In indirect or intellection incorporation the pre-existing work dissolves in the composite work. Examples of indirect or intellectual incorporations are; making puppets from models,[737] or producing an opera inspired from a novel.[738] In these examples, the form of the pre-existing work is not obvious in the subsequent works. Its effect on the final work is intellectual. This type of incorporation is common when the genre of the composite work is different from the original work.

Lucas and others[739] and Desbois[740] have raised their concerns about categorizing the composite work as a form of co-authorship. According to them, without collaboration, this work should not be considered as co-authored. This is because the composite work solely belongs to the

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[731] *Cour de Cassation, Chambre civile 1, du 14 novembre 1973, 71-14.709, Publié au bulletin* (n 632).
[732] Cour d'Appel de Paris, chamber 7, du 8 juin 1971 cited in Pollaud-Dulian, *Le droit d'auteur* (n 574) s 546.
[733] *Cour de Cassation, Chambre civile 1, du 14 novembre 1973, 71-14.709, Publié au bulletin* (n 632).
[734] *Cour d'appel, Paris, Chambre 4, section A, 29 Avril 1998* JurisData 1998-022161.
[735] *Cour d'appel, VERSAILLES, Chambre 12, 28 Avril 1988* JurisData 1988-050352.
[736] *Cour d'appel, Paris, chambre 4, du 7 avril 1994* RIDA 2/1995 351.
[737] *Cour de Cassation, Chambre civile 1, du 26 janvier 1994, 92-11.701, Publié au bulletin* (n 73).
[738] *Cour d'appel, Paris, Chambre 4, section A, 29 Avril 1998* (n 734).
[739] Lucas and others (n 235) s 229.
[740] Desbois (n 243) s 214.

author who created it. In any case, the author of the pre-existing work does not qualify as a co-author of the composite work. The relationship between the first and the second author is contractual. The scope and the details of this relationship is discussed below in the right to adaptation section.

In the United Kingdom and Ireland, the substance of adaptation is limited by a closed list. The works listed in CDPA and CRRA are considered adaptations. This resolves some confusion between adaptation and other concepts like reproduction. CDPA and CRRA avoids designating the author of the adapted work as a sole author. But from the limited scope of the basic formulation, it is safe to deduce that the adapter is the only author.

In Germany, adaptations are defined in Section 3 of the UrhG. The code establishes that the copyright of the work belongs to the author who created it. While it is not explicitly stated as with composite works in France, adaptations in Germany also require a pre-existing work. According to Dreier and others, the adaptation differs from co-authorship because an adaptation is not created jointly, but it is retroactively created on a pre-existing work.[741]

Since the introduction of author's own intellectual creation as an autonomous concept, the categorizing the works is not necessary. There are not different criteria for different categories. The only accepted test is the author's own intellectual creation. For this reason, this research is not going to propose any categorization for the adaptation as a separate work.

### 1.5. Copyright exceptions related to right to adaptation

There are number of copyright exceptions. Most of them, however, are related to right to reproduction. Nevertheless, exceptions such as parodies and pastiches are related to right to adaptation. These exceptions are going to be analysed in this section. According to Ricketson and Ginsburg, parodies and other similar actions are the only exceptions to right to adaptation

[741] Dreier and Schulze (n 540) ss 3–6.

in the Berne Convention.[742] However, there is not an explicit exception of the right to adaptation in the Berne Convention, it leaves this matter to the Member States.[743]

In the European Union, there are several explicitly mentioned exceptions to the right to adaptation in the Software and the Database directives. For instance, in art.5 and art.6 of the Software Directive it states that;

> Art 5(1). In the absence of specific contractual provisions, the acts referred to in points (a) and (b) of Article 4(1) shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction
> Art6(1). The authorisation of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of points (a) and (b) of Article 4(1) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs…

These exceptions of error correction and decompilation are specific to the software. The Database Directive, however, does not have database specific exceptions. Instead, the Directive offers a list of suggested exceptions in art. 6 that are similar to exceptions in the national legislations.

Similar to the Database Directive, the Information Society Directive in article 5 enumerates a long list of possible exceptions for the right to reproduction, the making available right and if it is justified for the right to distribution as well. Under normal circumstances, these exceptions do not concern the right to adaptation. However, Article 5(3)(k) proposes parody, pastiche or caricature exception which is traditionally in the purview of the right to adaptation. This may start a line of thought whether right to adaptation is included in the Directive's right to reproduction. This discussion is analysed before this section.

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[742] Ricketson and Ginsburg (n 8) s 8.83.
[743] Axel Nordemann, 'UrhG § 23-24 Urheber' in Axel Nordemann, Jan Bernd Nordemann and Christian Czychowski (eds), *Fromm/Nordemann Urheberrecht: Kommentar* (12. Auflage, Kohlhammer Verlag 2018) s 7.

Nonetheless, the national legislations which have a parody exception continued their old methods despite the introduction of Article 5(3)(k) until the *Deckmyn* decision. In this decision, the CJEU declared the term parody as an autonomous European concept and prohibited the national jurisdictions to provide their own understanding. Starting from the beginning, *Deckmyn* decision is a preliminary ruling initiated by Brussels Court of Appeal. Johan Deckmyn copied a cover of a book which he replaced a man with the mayor of Ghent. With this derivative work Deckmyn intended to highlight that tax payer's money is distributed to non-Ghent people by the mayor. The rights holders of the book sued Deckmyn for copyright infringement. The Belgian court submitter three questions to the CJEU in the preliminary ruling;

1. Is the concept of "parody" an independent concept in European Union law?
2. If so, which of four suggested characteristics of parody have to be met to determine if a work is a parody?
3. Are there additional requirements?

The Advocate General in his opinion answered the first question positively.[744] For the second question, he stated that a parody must possess a number of basic features, both structural and functional. As structural features, a parody is both a copy and a creation. Because, it borrows original elements from the underlying work and combines with its own original characteristics. The AG also added that it is left to Member States to decide whether a parody is just a reproduction or an adaptation. As functional elements, the AG discussed subject, effect and content of the parody. For the subject element, a parody can be "parody of" or make a "parody with" something. These are also called as weapon and target parodies in the literature.[745] According to the AG, the Information Society Directive covers both types of parodies. For the intent element, the AG discussed humorous effect of the parody and argued that it is left to the Member States to define what is a humorous effect.[746]

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[744] *Opinion of Mr Advocate General Cruz Villalón delivered on 22 May 2014 Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others Case C-201/13* (ECJ).
[745] Bently and Sherman (n 610).
[746] *Opinion of Mr Advocate General Cruz Villalón delivered on 22 May 2014. Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others. Reference for a preliminary ruling* (n 744).

The CJEU followed the AG Opinion in the first question and decided that parody is an independent European concept. On the second question, the court stated that a parody must be understood according to 'its usual meaning in everyday language'.[747] Parody has two essential elements. First, a parody must be based on an existing work while being considerably different from it. Secondly, a parody has to contain humorous expression. Contrary to the AG Opinion, a parody does not need to be original on its own.[748] This is because there are no additional requirements in the everyday use of the term parody or in the Information Society Directive. The CJEU, unfortunately, avoids defining what is a humorous element.

According to Rosati, there are three possible tests to determine humorous element; intent, effect and society.[749] When considering intent as a humorous element, the scope of the parody exception is broader than other tests. However, applying intent test would be more compliant with freedom of expression. Otherwise, it would be restrictive and only funny people would benefit from the parody exception.[750]

If the test was effect, then it would be nearly impossible to maintain a standard through different courts. And finally, Rosati argues that a society test, which would mimic average consumer concept form trademark law, could be an option. In the end, Rosati maintains that the correct test under *Deckmyn* should be the test of intent.

After the *Deckmyn* decision, the courts had to adjust their own understanding of exceptions and tests regarding the right to adaptation to accommodate new European concept of parody. In Germany, since there is no independent exception for parody, parodies are allowed if they constitute a free use. Before *Deckmyn*, a parody must be an independent original creation. Furthermore, according to the BGH, there must be an inner distance between borrowed

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[747] *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* [2014] ECJ Case C-201/13.
[748] ibid 21.
[749] Eleonora Rosati, 'Just a Matter of Laugh? Why the CJEU Decision in Deckmyn Is Broader than Parody' 14.
[750] ibid.

elements and original elements of a parody.[751] And a parody has to present anti-thematic attitude towards the underlying work.[752] This approach is changed after the *Deckmyn* decision. According to the BGH, in the wake of the *Deckmyn* decision, it is necessary to relinquish independent original creation requirement.[753] Furthermore, other considerations such as inner distance and anti-thematic examination are abandoned as well.

In France, CPI art. 122-5(4) allows for parody exception. Before the decision, parodies have to have humorous element and this humorous character must make a substantial modification. Without sufficient transformation, parodies are not protected. For instance, in a decision regarding a French TV chain, the court decided that a parody commentary to a song is not protected. Since there is no modification to the original work, a simple addition of commentary is not sufficient for the exception.[754] Another requirement for parody exception in France is rules of the genre. However, it is doubtful that after *Deckmyn* decision France would be still able to follow this requirement.[755]

In the United Kingdom, parody exception was first suggested by the Gowers review in 2008.[756] According to the review, introducing statutory defence for parodies would create value for the United Kingdom. The Intellectual Property Office, however, at that time thought that fair dealing provisions were sufficient, and that it is possible to ask for permission before making a parody.[757] At that time, the fair dealing clause, defined in CDPA 1988 sec. 30(1), permitted criticism and review. This may allowed narrow 'target parody' but it was not possible to generate weapon parody under this exception.[758] In 2011, the Hargreaves Review brought the issue of parody into the attention again.[759] The review concluded that failure to follow the

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[751] *Alcolix* [1993] BGH I ZR 263/91, GRUR 1994 206 208.
[752] *Gies-Adler* [2003] BGH I ZR 117/00, GRUR 2003 956 958.
[753] *Auf fett getrimmt* [2016] BGH I ZR 9/15, GRUR 2016 1157.
[754] Footnote 90 in Rosati, 'Just a Matter of Laugh? Why the CJEU Decision in Deckmyn Is Broader than Parody' (n 749) .
[755] ibid.
[756] Andrew Gowers, *Gowers Review of Intellectual Property* (The Stationery Office 2006).
[757] ibid.
[758] Martin Kretschmer and Dr Dinusha Mendis, 'The Treatment of Parodies Under Copyright Law in Seven Jurisdictions' 92.
[759] Professor Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' 130.

Gowers advise is a demonstration of the failure of copyright framework to adapt. Without an exception, parodies are decided on a case-by-case basis under the 'substantial part' doctrine.[760]

After the Hargreaves Review, the United Kingdom introduced CDPA sec. 30A; an exclusive fair dealing exception for parodies. With the introduction of the exception under a fair dealing clause, the courts could take into account factors such as 'the amount taken from the work, the use made of the work, the impact of the use upon the market for the work, whether the work was published or unpublished, the manner in which the work was obtained, and the motives underlying the use of the work'.[761] According to the UK Government, the fair dealing clause is there to ensure parodies are not misused.[762] The UK courts adopt the perspective of a fair-minded and honest person[763] when considering us of an impression[764] is fair or not. It is concerning that whether such requirement would introduce a third qualification for parodies.[765] Any additional qualifications are prohibited by the CJEU in the *Deckmyn* decision.

In Germany, UrhG sec. 24 offers a blanket exception provision for the right to adaptation. According to the article, an independent work created with a free use of another work does not require any authorization from the work's author. The term 'free use' is not defined in the article. According to the BGH, if the features of the used work fade behind the features of the new work, then the work can be published according to the free use.[766]

> (1) An independent work created in the free use of the work of another person may be published or exploited without the consent of the author of the work used.

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[760] Kretschmer and Mendis (n 758).
[761] Yin Harn Lee, 'United Kingdom Copyright Decisions and Legislative Developments 2014' (2015) 46 IIC - International Review of Intellectual Property and Competition Law 226 <http://link.springer.com/10.1007/s40319-015-0309-0> accessed 11 May 2019.
[762] Hargreaves (n 759).
[763] *Hyde Park Residence Ltd v Yelland and others* [2001] Ch 143.
[764] *Hubbard v Vosper* [1972] (CivDiv) 2 Q.B.84 CA.
[765] Sabine Jacques, 'Are the New "Fair Dealing" Provisions an Improvement on the Previous UK Law, and Why?' (2015) 10 Journal of Intellectual Property Law & Practice 699 <https://academic.oup.com/jiplp/article-lookup/doi/10.1093/jiplp/jpv137> accessed 11 May 2019.
[766] *Mecki-Igel I* [1958] BGH I ZR 49/57, GRUR 1958 500 502.

(2) Paragraph (1) shall not apply to the use of a musical work in which a melody is recognisably taken from the work and used as the basis for a new work.

Free use is different from exceptions like quotation.[767] A quote uses a copyright-protected part, however, the author quoting is exempted from clearing permission. In a case of free use, the work is absorbed in the new work and its effect reduced to suggestion. Therefore, there is no exemption since there is no infringement of the rights. The authors must accept that their works can be used to stimulate others, however, the distance between them is too large to consider the work an adaptation.[768] In other words, the distinction between adaptation and free use is actually the distinction between idea and expression in the copyright.[769]

It is important for the second work to have its original statement. The free use is not designed to benefit from the economic success of the first work. The second work must be different and original to a degree that it does not rely on the first work. For instance, a new work using pre-existing research on German prisoners of war during the Second World War must have different arrangement and selection of resources from the first work. Otherwise, there is no free use but rather an adaptation.[770]

Free use is also different from exploiting works in the public domain. According to Article 23(1) UrhG, the older work must be protected to qualify under free use. Otherwise, a work in a public domain can be adapted without requiring to satisfy free use conditions.[771] On the other hand, according to the BGH, unprotected parts of a pre-existing work can be used by the new works under the provisions of free use.[772] For instance, UrhG does not protect style or technique.[773] While using these unprotected parts, the second author can refer to the first author.

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[767] Dreier and Schulze (n 540) ss 24–2.
[768] *Beuys-Kopf* [2003] OLG Düsseldorf I-20 U 170/02, ZUM 2004 71 72.
[769] Nordemann, 'UrhG § 23-24 Urheber' (n 743).
[770] *WK-Dokumentation* [1981] BGH I ZR 95/79, GRUR 1982 32 39.
[771] *Warenzeichenlexika* [1987] BGH I ZR 71/85, GRUR 1987 704 705; *Dachgauben* [1995] OLG München 29 U 2795/94, ZUM 1995 427 428; Dreier and Schulze (n 540) ss 24–4; Ulrich Loewenheim and others, *Urheberrecht.* (2019) ss 2–29; Wandtke and others (n 582) ss 24–3.
[772] *Hummel III* [1968] BGH I ZR 85/65, GRUR 1970 250 251.
[773] Dreier and Schulze (n 540) ss 24–6.

The first author cannot prevent such reference.[774] However, according to the OLG Brandenburg, in some cases, the first author can claim moral right infringements.[775] In addition to the unprotected parts, it is free to use the parts of the first work that are already taken from the public domain.[776] Public resources remain free to use, whether it is already adapted by protected works or not.[777]

One of the most problematic applications of the free use doctrine is the transformation to another genre. Because instances of conversion to another genre are also considered as examples of adaptation. However, according to Nordemann and others, a free use exists if a pre-existing work is converted into another genre in such a way that it is not obviously observable in the new work.[778] Transformation of a literary work to musical composition can be an example of this situation.[779] A literary work can inspire a musical composition. However, without the existence of lyrics, the literary work is not observable in the musical composition.

It is significant to distinguish free use from adaptation. The examination process used by the BGH in this matter is a threefold process: comparison; the scope of reoccurrences; and the scope of protection.[780] In the beginning, it is important to point out the characteristic aspects of the first work.[781] Then, comparison of these two works can show the similarities between them. At this stage, the amount of reoccurrences is relevant to determine whether there is a free use or not.[782] The amount of differences between them is immaterial to the process.[783] The next stage focuses on whether borrowed parts of the first work are actually protectable by copyright.[784] As mentioned above, unprotected parts or parts that are already taken from the

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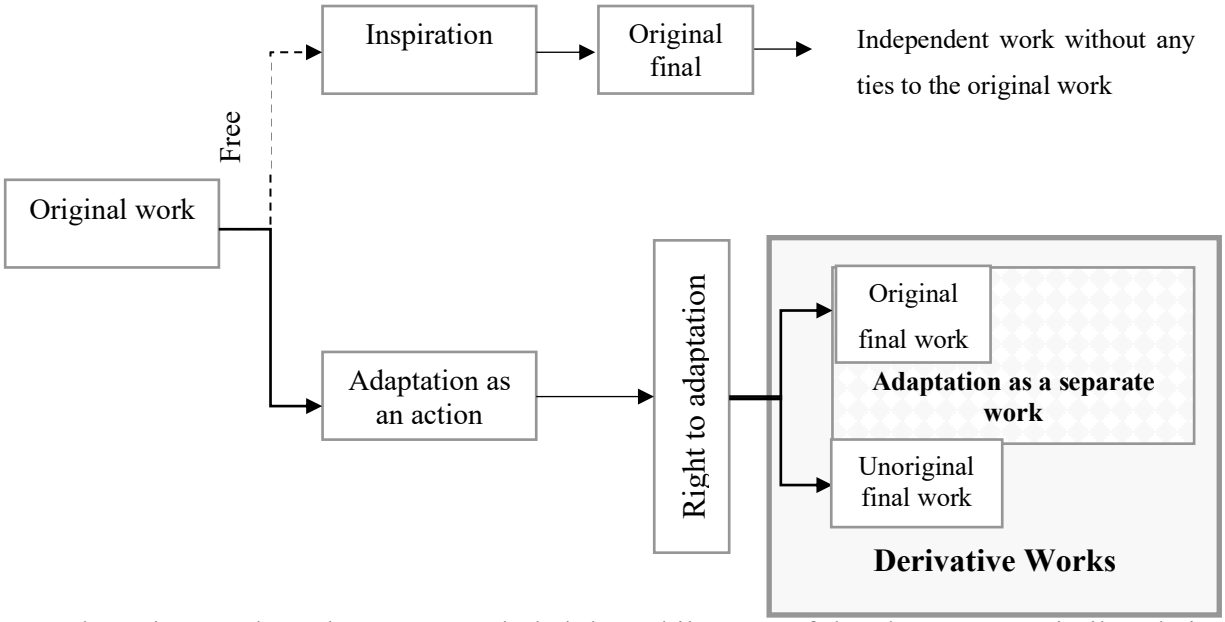
[774] Wandtke and others (n 582) ss 24–4.
[775] *OLG Brandenburg, 24101995 - 2 U 65/95* [1995] OLG Brandenburg 2 U 65/95, OLGR 1996 292.
[776] Dreier and Schulze (n 540) ss 24–3; Loewenheim and others (n 771) ss 24–7; Wandtke and others (n 582) ss 24–5.
[777] *Apfel-Madonna* [1965] BGH Ib ZR 111/63, GRUR 1966 503 508.
[778] Nordemann, 'UrhG § 23-24 Urheber' (n 743) s 39.
[779] Dreier and Schulze (n 540) ss 24–19.
[780] *Hundefigur* [2004] BGH I ZR 25/02, GRUR 2004 855 857.
[781] *Architektenwechsel* [1980] BGH I ZR 32/78, GRUR 1980 853 854.
[782] *Asterix-Persiflagen* [1993] BGH I ZR 264/91, GRUR 1994 191 193.
[783] *Innungsprogramm* [2003] BGH I ZR 18/00, GRUR 2003 786 787.
[784] *Fernsprechbuch* [1961] BGH I ZR 105/59, GRUR 1961 631 633.

public domain can be used freely. Before the last stage, the borrowed parts, which are protected by the copyright, are determined. The last stage evaluates the available scope of protection to the first work. There are slight variations on the scope of protection among protected works. For instance, tender documents,[785] short descriptions of electronic circuits,[786] state examination documents[787] are found to have a limited scope of protection by the courts. Also, the Dusseldorf Court of Appeal found the scope of protections in aesthetic materials to be more limited than non-aesthetic materials.[788] The result of this process determines whether the borrowed part can benefit from free use.

In France, the courts also found that in some cases the connection is too weak to be considered an adaptation. In a decision by Seine First Instance Court, the court considered the spirit of a




comedy and a novel.[789] The court concluded that while most of the elements are similar, their treatment in the works is different. For this reason, there is only a weak connection which could be called inspiration. Therefore, there is no adaptation.

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[785] *Ausschreibungsunterlagen* [1984] BGH I ZR 32/82, GRUR 1984 659 661.
[786] *zum Schutz von Kurzbeschreibungen elektronischer Schaltungen* I ZUM 1996 709 (LG München) 711.
[787] *Staatsexamensarbeit* [1980] BGH I ZR 106/78, GRUR 1981 352 355.
[788] *Engel aus Maria Laach genießt Urheberrechtsschutz* [2007] OLG Düsseldorf I-20 U 64/07, ZUM 2008 140 142.
[789] Tribunal civil de la Seine, 19 decembre 1928 cited in Gert A Meyer, *The Law of Motion Pictures: A Study of the Law of All Countries of the World in Motion Picture Matters. I-* (Grosby Press, Incorporated 1938) 23.

## 2. Connected works

With the proposed structure to basic formulation in Chapter II, German conceptualization of connected works are included under the proposed basic formulation. For this reason, this research is going to point out its characteristics against the French conception of basic formulation but it is not going to suggest any harmonisation regarding connected works.

### 2.1. Formation of the connected work

#### *2.1.1. Agreement and collaboration*

UrhG Section 9 defines connected work as authors of two or more pre-existing independent works agreed to exploit their works together. There is a requirement of an agreement between authors to establish the connected work. It is important, however, that both parties to the agreement must be authors of these particular works. A joint exploitation agreement with a publisher has been rejected by the courts.[790]

The jurisprudence is not seeking strict conditions for the agreement between authors. For instance, courts have held that a verbal agreement between a freelance composer and a lyricist was sufficient to establish a connected work.[791] Furthermore, a third party can act as a broker to this agreement.[792] According to a decision, an advertising company can issue separate orders for the production of a musical composition and a text. If the authors agree from the outset that the works are going to be used together, then the agreement is presumed between authors to form a connected work.[793] A representative of the author can also give consent.[794] This representative can be the publisher, but the author must give proper power of representation. In the case of a written agreement, the wording should be carefully selected to differentiate the agreement from an assignment contract[795].

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[790] *Künstlerexklusivvertrag* [2003] OLG Frankfurt 11 U 23/02, GRUR 2004 144.
[791] *Werbesong* [1994] OLG Hamburg 3 U 21/93, ZUM 1994 738.
[792] Ahlberg and Götting (n 541) ss 9–8.
[793] *Hier ist DEA* [2000] OLG Hamburg 3 U 79/99, GRUR-RR 2002 6.
[794] Wilhelm Nordemann and others, *Urheberrecht: Kommentar zum Urheberrechtsgesetz, Verlagsgesetz, Einigungsvertrag (Urheberrecht), neu: zur EU-Portabilitätsverordnung.* (12. Auflage, Kohlhammer Verlag 2018) ss 9–8 <https://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=1901142> accessed 20 July 2021.
[795] *Fernsehwerbespots* [2006] OLG München 29 U 3486/06, GRUR-RR 2007 139.

The connected works do not require an active collaboration or pursuit of a common design from the authors.[796] According to Ahlberg and others, the connected work exists in every case of fusion between works from a different genre.[797] Other commentators take a different view. According to Loewenheim and others, audiovisual works are not considered as connected works. Dreier and others also point out that creative contributors are considered as co-authors and the existing works are incorporated according to the provision of adaptation.[798]

The agreement between authors is aimed at joint exploitation. According to the BGH, this joint exploitation is an independent right and it does not prevent separate exploitation of the work.[799] The consensual agreement is a key to joint exploitation. Lack of consent would result in adaptation of the work.

In the French basic formulation, an agreement is not always satisfactory. The requirement of collaboration cannot be proved by a contract.[800] The courts are the final authority in determining the existence of collaboration. 'Common inspiration' and 'mutual control' are essential elements of collaboration in the French basic formulation.[801] In the basic formulation, intention is evaluated by collaboration. Lack of collaboration means lack of intention to become co-authors and therefore joint exploiters. In this case, similar to the connected works, this would result in adaptation of the work.

The proposed basic formulation also follows French basic formulation on this point. There is no requirement of an agreement. The existence of collaboration is essential. Furthermore, two independent for according to UrhG Section 9 can be accepted as works under proposed basic formulation since the proposed solution does not subscribe to any indivisibility requirement.

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[796] Ahlberg and Götting (n 541) ss 9–8.
[797] ibid 9–5.
[798] Dreier and Schulze (n 540) ss 9–3.
[799] *Textdichteranmeldung* [1977] BGH I ZR 67/75, GRUR 1977 551 554.
[800] *Cour de Cassation, Chambre civile 1, du 3 juillet 1990, 89-11.246, Publié au bulletin* (n 270).
[801] Desbois (n 235) s 133.

### 2.2. Term of protection

Unlike collaborative works, a connected work does not merit protection as a separate work. It is simply a multitude of copyright protections. Because authors simply agree to use their pre-existing works. When one of the works' copyright expires, the connected work naturally dissolves. That part becomes available through public domain. Then the other author can use the work without requiring any permission. However, the new work would not be classified as connected work.

The sole exception to this rule is musical compositions with words. According to Section 65(3) of the UrhG;

> (3) The term of protection of a musical composition with text expires 70 years after the death of the last surviving of the following persons: the author of the lyrics, the composer of the musical composition, provided that both contributions were specifically created for the respective musical composition with words. This shall apply regardless of whether these persons are designated as joint authors.

In the French basic formulation and the proposed basic formulation, the term of protection is calculated exactly like Section 65(3) on every occasion.

### 2.3. Exploitation of the work

With connected works, the interests of the authors are equal. Authors should not override the interest of remaining authors.[802] Starting from the point of formation, every action of exploitation requires the consent of each author.[803] According to the BGH, this is required both for the termination and the commencement of the exploitation contracts.[804]

The balance of interests is ensured by the application of good faith. According to the legislation, the authors cannot refuse to consent in bad faith. For instance, according to the BGH, if one of

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[802] Dreier and Schulze (n 540) ss 9–18.
[803] BGB Section 709
[804] *Musikverleger II* [1972] BGH I ZR 81/70, I ZR 18/71, GRUR 1973 328 329.

the authors cannot sufficiently show that a termination of a contract is reasonable, any attempt by that author to terminate the contract is ineffective.[805]

In the basic formulation, according to CPI Article L. 113-2 paragraph 2, co-authors must follow a common accord while exercising their rights. According to Lucas and others, this should also include the exercise of moral rights, except for the right to paternity[806]. Under normal circumstances, co-authors can bring an infringement claim of their moral rights without involving other authors.[807] However, any usage of the right of disclosure presupposes a common accord between the co-authors.[808] This is also the same case for the right of integrity, more specifically decision to modify the work.[809] CPI Article L. 113-3 leaves any disagreement between co-authors to the civil courts. This includes disagreements regarding moral rights as well. For instance, Paris CA decided that co-authors cannot use their moral rights to impose their will on the entire work and cause its ruin.[810] In other words, unnecessary and excessive use of moral rights is prohibited. This is similar to Germany's principle of good faith.

According to Article 2(2) of the proposed structure for basic formulation, co-authors must unanimously agree for exploitation of economic rights. Since the moral rights out of the scope of this research, the article mention economic rights. In the case that a common ground cannot be found, the co-authors have the option to bring the issue to the civil courts.

### *2.3.1. Separate exploitation*

The authors in the connected work are free to exploit their respective contribution outside the civil partnership as long as the exploitation does not prejudice the connected work.[811]

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[805] *Verbundene Werke* [1982] BGH I ZR 5/80, GRUR 1982 743 744.
[806] Lucas, Lucas and Lucas-Schloetter (n 235) s 198.
[807] *Cour de Cassation, Chambre civile 1, du 10 mai 1995, 93-10.945* (n 381).
[808] *Cour de Cassation, Chambre civile 1, du 19 mai 1976, 74-15.025, Publié au bulletin* (n 382).
[809] *Cour de Cassation, Chambre civile 1, du 15 février 2005, 01-16.297 01-16.500 01-17.255, Publié au bulletin* (n 383).
[810] *Cour d'Appel de Paris, 1re Chambre, du 18 Avril 1956* (n 384).
[811] Dreier and Schulze (n 540) ss 9–25.

Material divisibility in the French basic formulation ensures the possibility of separate exploitation. CPI, however, limits this possibility for the benefit of the collaborated work. CPI Article L113-3 states that if contributions are from a different genre, authors can exploit their own part without prejudicing the collaborated work. This article ensures that there is not going to be a possibility of harm to co-authored work from individual contributions.

The proposed directive's Article 2(6) follows a similar approach to the French basic formulation. Where a contribution is distinguishable and exploitable, the contribution can be individually exploited without jeopardizing the entire work. The opposite of this rule can be agreed by the co-authors.

### 2.4. Legal status and applicable law to the partnership

The formation of a connected work establishes a partnership between authors. This partnership is regulated by the provisions of Civil Code 705 and following articles.[812] The agreement transfers the rights of exploitation, publication and modification into the founded civil partnership. These rights are considered to be the partnership's assets.[813] Longevity of the connected work can be decided with the initial agreement. In case of doubt, the BGH assumes that the civil partnership continues until the end of the copyright protection.[814] The civil partnership cannot be terminated without a good cause according to the BGB Section 723. The interest of the authors must be weighed against each other. According to Loewenheim and others, an opportunity of a more lucrative connected work option is not a valid reason for termination.[815] Dreier and others also support this view.[816] One possible solution is offered in doctrine. According to the solution, the authors can compromise and accept the existence of two concurrent connected works.[817]

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[812] *Musikverleger II* (n 804).
[813] Dreier and Schulze (n 540) ss 9–17.
[814] *Musikverleger II* (n 804) 330.
[815] Loewenheim and others (n 771) ss 9–23.
[816] Dreier and Schulze (n 540) ss 9–24.
[817] ibid.

According to CPI Article L113-3, a collaborative work is the joint property of its co-authors. Court of Cassation defined this joint ownership as 'total co-ownership of the totality of the work'.[818] Therefore, a co-author who has written only a single chapter in a book can assert his right over the totality of the work. This is a special partnership that is original to the collaborative works.[819] However, according to the Court of Cassation, undefined circumstances in this partnership can be supplemented by the Article 835 et seq. in *Code Civil* of France[820]. The common law of indivision in France is a supplementary source for the partnership in the collaborative works.

The proposed structure offers the Member States to apply similar civil partnership rules vis-à-vis to co-authored works unless there is a provision on that specific issue in the proposal.

### 2.5. Distribution of income

In the connected works, there is no regulation regarding distribution of income. According to Ahlberg and others, it is necessary to resort to general principles while determining this issue.[821] Generally, the freedom of contract is applied in the connected works. The parties expected to agree on their mutual share beforehand. Nevertheless, in absence of an agreement the Article 8 is going to applied mutatis mutandis. According to UrhG Section 8(3), distribution of income between co-authors is based on their respective participation in the work. According to *OLG Hamburg*, if shares cannot be calculated exactly, it can be estimated by the courts. If indications for an estimate cause doubt, the co-organizers are entitled to equal shares.[822]

In French basic formulation, the desired position is an agreement between co-authors.[823] The default position, on the other hand, is not defined in the code. The courts have two opinions. According to the Paris First Instance Court, an egalitarian partition should be accepted as a default.[824] Paris Court of Appeal, however, applied a proportional partition according to the

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[818] *Cour de cassation, Chambre civile 1, du 19 février 1991, 88-14270* JurisData 1991-000831.
[819] Lucas, Lucas and Lucas-Schloetter (n 235) s 195; Pollaud-Dulian, *Le droit d'auteur* (n 259) s 453.
[820] *Cour de Cassation, Chambre civile 1, du 4 Avril 1991* (n 368).
[821] Ahlberg and Götting (n 541) ss 9–22.
[822] *Ratgeber für Tierheilkunde* OLGZ 207 6 (OLG Hamburg Schulze).
[823] Pollaud-Dulian, *Le droit d'auteur* (n 259) s 455.
[824] *Tribunal de Grande Instance de Paris, 3e Chambre, du 27 février 1968* (n 397).

authors respective contribution as a default position.[825] The CPI's sole provision is about a possibility of disagreement between co-authors.[826] According to the provision, in case of a disagreement the courts have the competence to decide on the partition. Court of Cassation is interpreting this article as a check against abuse of rights by one of the co-authors.[827] Similar to mentioned first instance and court of appeal decisions, in a case regarding Article 113-3, Pollaud-Dulian argues that the courts should seek the will of the parties, if that fails, the courts should distribute the rights according to the respective contributions, if that is not possible, then the shares should be assumed equal.[828]

The proposed basic formulation in this research deals with this issue in its Article 2(4). The agreement between co-authors is respected. Without an agreement, co-authors' shares should be calculated according to their respective contributions. When a calculation is not possible the rule is to assume equal shares among co-authors.

### 2.6. Actions before the court

In case of disagreement within the connected work, one of the parties can sue the other for the consent. According to Ahlberg and others, however, the trial is lengthy and does not produce justice to the interest of the authors.[829] In some specific instances for the preservation of the common work, one of the authors can act without seeking the consent of the others under emergency administration law.[830] However, these circumstances must be proved afterwards.

In French basic formulation, the same rules about exploitation of the economic rights apply to the defense of the economic rights. The rule is that, as stated by the Court of Cassation, a co-author cannot sue for infringement without involving others.[831] It is irrelevant whether the involved authors participate in the proceedings or not.[832] They can be absent in the court, but

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[825] *Cour d'Appel de Paris, 4o Chambre, du 3 Novembre 1956* (n 398).
[826] Article L113-3 para 3
[827] *Cour de Cassation, Chambre civile 1, du 24 novembre 1993, 91-18.881, Publié au bulletin* (n 400).
[828] Pollaud-Dulian, *Le droit d'auteur* (n 259) s 455.
[829] Ahlberg and Götting (n 541) ss 9–21.
[830] *Musikverleger III* (n 341).
[831] *Cour de Cassation, Chambre civile 1, du 4 octobre 1988, 86-19.272, Publié au bulletin* (n 402).
[832] *Cour de Cassation, Chambre civile 1, du 5 décembre 1995, 93-13.559, Publié au bulletin* (n 403).

they must be formally involved. In an isolated case, the court speculated the possibility of individually bringing actions for separable contributions.[833]

In the defense of moral rights, the authors have no obligation to involve others. This is due to the intimate nature of moral rights in French law.[834] It is not relevant whether the moral right represents the overall work or only the one author's contribution.[835]

In the proposed structure, according to the recitals, the Member States are free to introduce clauses for allowing emergency administration and preventing abuse of rights by applying good faith principles. Additionally, co-authors can refer to the civil courts in case of a disagreement and co-authors can sue against infringement without involving other co-authors. However, the suing co-author must ask remedy on behalf of all co-authors.

### 2.7. Normative Discussions

This section compared connected works to French and proposed basic formulations. Their similarity are striking. However, they differ when it comes to their formation. While connected works are formed by an agreement between authors, others are formed by operation of law. Due to overlapping scope of the proposed basic formulation and connected works, this thesis is not going to suggest another formulation. A strict German basic formulation could benefit from connected works. However, adopting another formulation along with the basic formulation would bring unpredictability and not introducing would not change the scope of protection offered to the authors.

## 3. Conclusion

This chapter discussed the topic of adaptation rights and, to a lesser extent, whether to amend the proposed directive by introducing another formulation. The section on adaptation featured debates over the meaning and scope of notions associated with the term. It is argued that prior to proposing any harmonisation, the terminology must be clear and definitive. Following a

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[833] *Cour de Cassation, Chambre civile 1, du 10 mai 1995, 93-10.945* (n 381).
[834] Article L121-1
[835] *Cour de cassation, civile, Chambre civile 1, 11 décembre 2013, 12-25.974, Publié au bulletin* (n 406).

definition of terms, the scope of adaptation properly, adaptation as an action, and adaptation as a distinct work were examined. In both national and EU copyright law, the right to adaptation has a complicated connection with the right to reproduction. This chapter included recommendations for clarifications and separation from the right to reproduction. Additionally, it is argued whether or not to authorise this right of adaptation. The dilemma of whether to seek permission during the work's development phase is resolved by proposing a general rule of deferring authorisation until the work is ready for commercialization. Exceptions to this rule are permitted. To ensure equitable remuneration, the chapter proposes that additional adaptations of works require the original author's approval. However, this fairness must be subtle. The original author shall not attempt to extort succeeding authors or to impede the creation of a new adaptation via the exercise of this privilege.

Adaptation as an action is often characterised with acts like transformation, arrangement, alteration, translation or revision. Unfortunately, every instance of definition contains an imprecise phrase such as transformation or adaptation to encompass any unanticipated form of adaptations. This chapter, although striving to clarify each term, acknowledges this ambiguity and supports the view that such flexibility is essential where adaptation is involved. For adaptation as a separate work, the question whether a new class of work is necessary for adaptation is discussed. It is argued that a distinct category of work is unnecessary in the absence of any kind of legal relationship between authors.

Regarding connected works, their scope was compared to the scope of the French basic formulation and the proposed basic formulation. Finally, it was determined that the creation of a new secondary formulation was superfluous and detrimental to the suggested fundamental formulation.

The next chapter will explore collections and collective works. It is examined in depth whether a new sort of work known as collective work is necessary or whether collections may be utilised to address collective work related concerns.

# CHAPTER IV: COLLECTIVE WORKS AND COLLECTIONS

The names collective and collection come from the plurality of the contributions. While both the basic formulation and secondary formulations exhibit plurality in their contributions, collective works or collections, in general, contain a higher number. This does not necessarily mean that collective works or collections have significantly more authors within a work; a collective work can be formed by one author's contributions as well.

The term 'collection' is known and used in the copyright systems. For instance, in the Berne Convention Article 2(5), a collection is considered to be a subject of copyright.[836] The problem starts with its meaning and uses in national jurisdictions. Categorizing the approaches into two general groups make sense. The first one is the way that is followed by the majority of the Berne Members such as the United Kingdom, Germany, and Ireland. In this approach, a collection is mainly protected for its originality in selecting or arranging its contents. In the second approach, which is favoured by France, the collection has a close relative, collective work. The category of collective work is used as a tool to vest the author's rights in all contributions to a principal director who is responsible for its management.[837] In the other, France also follows the first approach and protects the selection or arrangement in the contents.[838]

The terminology remains problematic for comparative reasons as well. Collections are widely used in Berne, and in jurisdictions including Germany, the United Kingdom, Ireland, France, and the European Union. However, Germany, for instance, uses the term 'compilations' as non-protected collected works, whereas the terms collections or collective works as protected collected works. It is better to set out which term refers to which concept in this chapter before the comparison.

[836] Berne Convention.
[837] CPI Article L113-5 and Article L113-2
[838] CPI Article L112-3

For this chapter, the collective work refers to the French formulation where the principal director is vested with the authors' rights. Collections refer to works that are protected due to their originality in the selection or arrangement of their contents. Compilation, on the other hand, refers to unprotected collected works which lack any originality.

This chapter is going to start by analysing the French conception of collective work. It is a unique concept and it is better to explain it before getting into a more familiar concept of collections. Afterwards, collections will be explained in comparison to French collective works.

## 1. Collective Works

### 1.1. Genesis and Historical Development

Collective work is a concept unique to France among the selected jurisdictions. The most significant aspect of collective work is its deviation from personalist author's right law. There are two instances where a legal person can be the first owner of copyright; collective works and posthumous works.

The first discussion about collective work started in Napoleonic-era. The famous case of *Dictionnaire de l'Académie française* was the first time the Court of Cassation decided that the owner of a work is the publisher, a legal person.[839] The Academy Dictionary contained forty contributors. There was a practical impossibility when it came to determining the collaboration.[840] In the matter of deciding who the owner was, the Court agreed with the government advocate's assessment[841] and decided that the publisher who made the investment was the initial copyright owner.[842]

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[839] Cass. 7 prair. XI, Dev. & Var. 1791-An XI.1.806; J. Pal. An XI-Floreal-An-XII.293, Bossange c Moutardier. cited in Jane C Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' in Steven Wilf (ed), *Intellectual Property Law and History* (1st edn, Routledge 2017).
[840] Desbois (n 243) s 173.
[841] Jane C Ginsburg, '65. FRENCH COPYRIGHT LAW: A COMPARATIVE OVERVIEW' 18.
[842] ibid.

The concept of collective in the 1945 draft of author's right law is based on the Academy Dictionary decision.[843] The 1945 draft was changed in the 1950 draft. In the 1945 draft, the phrase 'it is impossible to determine separately the work of each … collaborators' was used. The 1950 draft altered this phrase to 'without it being possible to attribute to each one of them a distinct right over all'.[844] According to Desbois, the 1950 draft aimed to make the distinction between collaborative work and collective work clearer.[845] During the parliamentary discussion, collective works were labelled as a work without an author.[846] Based on the 1950 draft, in 1957, collective work was inserted to the legislation. At the time, collective work was the only instance where a legal person could be an initial copyright owner.[847]

The Academy Dictionary case paved the way for collective works in the law of 1957. However, according to Pollaud-Dulian, it is not wise to accept this decision as a perfect example of collective work. At that time, the distinction between collaborative works and collective works was not clear.[848] The Court of Cassation maybe did not aim to establish a novel concept.

Furthermore, Desbois and Cedras draw attention to the decision's limited scope.[849] The decision was about dictionaries. It can be stretched to similar works like encyclopaedias, newspapers or journals. However, according to the law of 1957, save audiovisual works, there is a little limitation to what can be a collective work.

### 1.2. Definition

In the current law, collective work is defined as 'a work created at the initiative of a natural or legal person who edits it, publishes it and discloses it under his direction and name and in which the personal contributions of the various authors who participated in its production are merged

[843] Desbois (n 243) s 173; Jean Cedras, 'Collective Works in French Law' (1979) 102 RIDA 2.
[844] Desbois (n 243) s 1972.
[845] ibid 172.
[846] Travaux de la Commission de la propriété intellectuelle préparatoires à la loi de 1957. Rapport du Conseiller Lerebours-Pigeonnière : Gaz. pal. 1948, 1, p. 55 ; D. 1947, doctr. p. 529
[847] Pollaud-Dulian, *Le droit d'auteur* (n 574) s 505.
[848] ibid 502.
[849] Desbois (n 243) s 168.

in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created'.[850]

Until to a point where 'in which' comes, the article defines the principal director. Afterward, the article states a requirement regarding the contributions in the collective works. There are two components to this article; principal director and contributions.

*1.2.1. Who is the principal director?*

The law defines the principal director with two main aspects; initiative, and publishing/disclosure. The director by promoting the work exhibits specific initiative. The initiative means management, investment and leading. For instance, while making a book called 'Football Guide', a company's effort of organizing, funding and its guidance proved initiative and harmonizing role by the company. Based on this initiative, the Court of Cassation classified the book as a collective work and included harmonizing role or effort of organizing as elements of director's initiative.[851]

Harmonizing role points to director's efforts to overall coordination. External coordination is necessary because the contributors excluded from overall view. Harmonizing role can also come from an employer-employee relationship. In 2002, the Court of Cassation argued that an employment contract, unless proved otherwise, is a reliable indicator of an initiative by the employer.[852] However, while subordination is a significant indicator, it is not sufficient to satisfy all requirements.[853] For instance, when a company subcontracted work to another company, without providing instructions, the Paris Court of Appeal refused the company's claim of collective work.[854]

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[850] CPI Article L113-2 para 3
[851] *Cour de Cassation, Chambre civile 1, du 28 octobre 2003, 01-03059, Publié au bulletin* Bulletin 2003 I N° 217 180.
[852] *Cour de Cassation, Chambre civile 1, du 3 avril 2002, 00-13139, Publié au bulletin* Bulletin 2002 I N° 109 85.
[853] Cedras (n 843).
[854] *Cour d'appel, Paris, Chambre 4 section B, 25 Février 1988* JurisData 1988-020552.

In addition to certain subordination, there must also be the managing role of the principal director. It is Pollaud-Dulian's argument that without this overarching direction contributions are merely two separate works, they are not collective works.[855] The courts agree with his assessment. A publishing company was refused ownership by the courts due to its limited contribution amount to technical implementation.[856] Furthermore, the courts prevented a university from ownership of a lexicon about international relations put together by a student without any help from the faculty.[857] In these cases, the publishing company and the university did not present managing and coordinating roles.

The second criterion is more straightforward. The collective work must be published and disclosed under the name of the principal director. Publishing and disclosing are two different acts and the director must satisfy both of them. According to Desbois, publication refers to indirect communication[858] and disclosure refers to direct communication[859] (broadcast, in particular).[860] According to him, in radio and radio-visual works, the publication (indirect communication) part is missing. Therefore, they cannot be classified as collective works.[861]

This argument may be correct, because there is already accepted the exclusion of audiovisual works. However, there are some other types of works where, in practice, it is not possible to publish or to disclose them in a traditional sense. Software and works of applied art are some examples. According to Lucas and others, to remedy this situation jurisprudence accepts acts of exploitation or commercialization instead of disclosure of the work.[862] For instance, the Court of Cassation accepted the first exploitation of a model of a door handle as the disclosure of the work.[863] Paris Court of Appeal decided that marketing a work under the name of a

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[855] Pollaud-Dulian, *Le droit d'auteur* (n 574) s 510.
[856] *Cour d'Appel de Paris, chambre 4, du 28 Avril 2000* RIDA 1/2001 314.
[857] *Tribunal de grande instance, PARIS, Chambre 3 section 2, 15 Mars 2002* JurisData 2002-170857.
[858] Article L122-3
[859] Article L122-2
[860] Desbois (n 243) s 174.
[861] ibid.
[862] Lucas and others (n 235) s 218.
[863] *Cour de cassation, Chambre civile 1, du 24 mars 1993, 91-17887, Inédit* [1993] Cour de cassation 91-17.887, Legifrance.gouv.fr.

company also satisfies the requirement of disclosure in the collective works.[864] As usual, it is essential to state that omission of the contributor's name in favour of the publisher does not categorically make the work a collective work.[865]

Therefore, a director has three roles; one at the beginning stage as an initiator, one in the preparatory stage as an organizer and one in the commercialization stage as a publisher. Failing in one of the roles results in losing initial copyright ownership.

*1.2.2. Contributions and contributors*

In the French code, there is one explicit requirement regarding the contributions. It is the impossibility of assigning separate rights to the contributors. There is also an implicit requirement; the plurality of authors.

Starting with the latter, a collective work requires more than one author, apart from the director. Gauiter[866] and Pollaud-Dulian[867] emphasize the requirement as well. It is a simple and clear requirement.

However, the explicit requirement is not straightforward. There are three different interpretations. It is due to legislator's failure to provide an adequate description. The first one focuses on the collaboration element as a distinction between collaborative works and the collective works. The second one interprets the "distinct rights" as "undivided rights" and tries to put a clear boundary between collaborative works and collective works. The last one focuses on the purpose of the collective works and concentrates on the investment aspect.

The first view starts from a point that collaborative actions are in contrast with the non-collaborative nature of the collective works. The contributor's participation is limited to the contribution that is requested from them.[868] Because the management and the promotion of the

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[864] *Cour d'Appel de Paris, Chambre 4 section A, 19 Novembre 1991* JurisData 1991-024555.
[865] Pollaud-Dulian, *Le droit d'auteur* (n 574) s 508.
[866] Gautier (n 499) s 688.
[867] Pollaud-Dulian, *Le droit d'auteur* (n 574) s 510.
[868] Desbois (n 243) s 171.

work are ensured by the principal director, there is no common inspiration and no common project between contributors.[869] The contributors, in a sense, are fragmentary creators in the collective works.[870] The link to the "impossibility to assign separate rights" is that failure to provide a collaboration will result in failure to establish separate rights, because it is not a collaborative work. In other words, if there was a possibility of assigning separate rights to the contributors, the work would be classified as a collaborative work. In 1994, the Court of Cassation ruled about an exhibition catalogue and decided that due to lack of concerted action between authors and coordination by the director, the work should be categorized as a collective work.[871]

The second view is promoted by Desbois. According to Desbois, one way or another every collective work involves a minimum of consultation between the participants including newspapers. Lucas and others also agree with this point.[872] Therefore, the collaboration element should not be the definitive criterion. Desbois focuses on the alteration made on the 1945 draft. According to him, the purpose of the drafters is to make the distinction between collaborative work and collective work clearer. Therefore, if a contributor cannot claim an undivided right similar to collaborative works, then it is not a collaborative work but a collective work. However, there is no mention of "undivided" right in the wording. Desbois understands the word "distinct" as "undivided" because of the purpose of the drafters.

It is a problematic interpretation of the wording. Also, it completely ignores the condition of fusion between contributions. Therefore, while it distinguishes collective work from collaborative work, the interpretation is far-reaching and ignores the condition of the merger from the article.

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[869] Pollaud-Dulian, *Le droit d'auteur* (n 574) s 512.
[870] Cedras (n 843).
[871] *Cour de Cassation, Chambre civile 1, du 18 octobre 1994, 92-17.770, Publié au bulletin* (n 236).
[872] Lucas and others (n 235) s 221.

The last view is favoured by Lucas and others.[873] In their view, the remaining approaches are not suitable for collective works. In order to interpret according to the purpose of the article, Lucas and others propose to focus on the investment by the principal director. In the end, CPI is trying to protect such investment by collective work. The problem is that there is nothing in the article to support this view.

According to Cedars, anonymity of the contributions is not a requirement for collective work. A collaborative work can be published under a pseudonym, whereas contributions in collective works does not necessarily remain anonymous. For instance, articles in newspapers are usually well identified.[874]

### 1.3. Regime

Collective works differ from other types of multi-authored works when it comes to ownership. This is due to collective work's departure from the standard vesting of authorship and creator rule. According to CPI, a third party, whether a legal person or not, whose job is to organize and manage the collective work is vested with the author's rights. It is important to note that CPI does not make this third party, principal director, an author. It is merely vested with all the rights, including moral rights, which are given to the actual author or authors. This is in line with the Court of Cassation's view as well. In a decision, the court refrained from labelling the director of a collective work as an author it is rather stated that the director is entitled to the legal protections given to an author.[875] In terms of moral rights, In 2012, Court of Cassation stated that a legal person can be vested with moral prerogatives,[876] however in 2016, Court of Cassation denied a legal person to receive a payment for infringement of right to attribution.[877] This dichotomy is going to be discussed in section 4.1.3.4.

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[873] ibid.
[874] Cedras (n 843).
[875] *Cour de Cassation, Chambre civile 1, du 8 décembre 1993, 91-20170, Publié au bulletin* Bulletin 1993 I N° 361 251.
[876] *Cour de cassation, civile, Chambre civile 1, 22 mars 2012, 11-10132, Publié au bulletin* Bulletin 2012, I 70.
[877] *Cour de cassation, civile, Chambre civile 1, 16 novembre 2016, 15-22723, Inédit* Legifrance.gouv.fr.

This type of arrangement has a significant effect on the regime of collective work. The term of protection is impossible to be calculated based on the author(s). Because the principal director could be a legal person and legal persons can theoretically exist forever. It also leads to a complex relationship between the principal director and contributor in terms of remuneration, moral and economic rights of a single contributor.

*1.3.1. Vesting of the ownership*

As explained above, the principal director is vested with the author's rights rather than an assignment similar to employer clauses in the CPI. In this matter, the Court of Cassation decided that it is not necessary for the principal author to prove the assignment by the contributors.[878] It is sufficient to disclose the work under the principal director's name. This is, however, true when the work is actually a collective work. For instance, a professor sued a publisher over a dictionary of business law to gain the author's rights over the collective work. In this decision, the Court of Cassation recognized that despite the work being published under the name of the publisher, the professor was not managed or supervised by the publisher. The professor did not consult and the sole requirement by the publisher was a deadline. The court decided in favour of the professor.[879]

The principal director, similar to authors, enjoys the presumption of ownership against third parties. The director does not need to prove the ownership against third-party infringements. In a court case about infringement of a practical city guide, the Court of Cassation ruled that with regard to the third parties, it is safe to assume that the publisher who is commercially exploiting the work under its name is the actual owner.[880] This presumption is heavily criticized. A legal person can put its name on a work and this will automatically presume the existence of a collective work where there is not any. The courts accept this to prevent third-party infringements more effectively. For instance, the Commercial Chamber of Court of Cassation

[878] *Cour de Cassation, Chambre civile 1, du 17 mars 1982, 80-14838, Publié au bulletin* Bulletin des arrêts Cour de Cassation Chambre civile 1 N 116.
[879] *Cour de Cassation, Chambre civile 1, du 20 juin 1995, 91-19715, Publié au bulletin* Bulletin 1995 I N° 268 186.
[880] *Cour de Cassation, Chambre civile 1, du 24 mars 1993, 91-16543, Publié au bulletin* Bulletin 1993 I N° 126 84.

decided that in the absence of a claim by the author or authors, the exploitation of a work by a legal person under its name makes it presumed, with regard to third-party infringement, that whether it is collective or not this person is the owner of the work.[881]

There is no presumption of ownership against contributors. However, contributors need to prove that the work does not satisfy the requirements of a collective work[882] and they are actually authors of the work.[883] Proving authorship is a difficult task. The contribution may not be obvious or identifiable.

The scope of this vesting expands to both economic and moral rights. According to CPI art L. 121-1, moral rights are attached to a natural person. However, according to the Court of Cassation, a natural or a legal person at the initiative of a collective work is vested with the rights of the author on collective work and, in particular, prerogatives of moral rights.[884] CPI art. L. 113-5 does not specifically address moral rights, however it states that the owner is invested with the rights of the author. Moral rights are closely linked to the personality of the author. Therefore, it is illogical to think that a legal person has personality. However, according to Pollaud-Dulian, the moral right in a collective work is transformed. It is not protecting an authorial interest. It is rather detached, and it is protecting the collective work's interest.[885] This approach is more logical. Unfortunately, Pollaud-Dulian does not exemplify this concept of detached moral rights. Also, there is not any jurisprudence to exemplify such moral rights in practice. There is, however, a decision by the Court of Cassation in 2016. According to the court, a legal person cannot receive compensation against a moral right infringement and ownership alone cannot confer the moral rights to a legal person.[886] This discussion is analysed in detail in section 4.1.3.4.

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[881] *Cour de Cassation, Chambre commerciale, du 20 juin 2006, 04-20776, Publié au bulletin* Bulletin 2006 IV N° 147 156, 200.
[882] CA Paris, pôle 5, 13 déc. 2013 : Propr. intell. 2014, p. 63, obs. A. Lucas.
[883] *Cour de cassation, civile, Chambre civile 1, 15 novembre 2010, 09-66160, Publié au bulletin* Bulletin 2010, I, n° 231.
[884] *Cour de cassation, civile, Chambre civile 1, 22 mars 2012, 11-10.132, Publié au bulletin* (n 876).
[885] Pollaud-Dulian, *Le droit d'auteur* (n 574) s 514.
[886] *Cour de cassation, civile, Chambre civile 1, 16 novembre 2016, 15-22.723, Inédit* (n 877).

*1.3.2. Term of protection*

Article L123-3 deals with the calculation of the copyright term in collective work. The protection is 70 years, beginning from January of the following year after the publication. The methodology is similar to anonymous and pseudonymous works. The date of publication is determined by the legal deposit.

However, there are some exceptions. In periodical publications, if the publication of all elements is finished in twenty years then the term of protection starts from the last publication and lasts for 50 years.

If the work is withheld and not disclosed in the first seventy years of its creation then the publisher is protected for twenty-five years after the publication. These adjustments are to ensure that the principal directors do not have an unnatural advantage over natural authors in terms of copyright protection.

*1.3.3. Economic rights*

As a general rule, by vesting the authorial rights, the principal director can freely enjoy economic rights. The principal director is not restricted to the initial exploitation, she can also further exploit the work without consulting the contributors. For instance, when a newspaper adapted its older articles to digital media, the Court of Cassation found that there is no need to ask the permission of the contributors.[887]

However, the general rule does not apply in a similar manner when it comes to exploiting a contribution. In the above decision where the Court of Cassation decided on a newspaper adapting to digital media, the court ruled that if one of the articles was singled out and digitized then the newspaper would require the permission of the author.[888] In another decision, the Court of Cassation argued that if a photographer for a newspaper (collective work) is remunerated

[887] *Cour de cassation, civile, Chambre civile 1, 3 juillet 2013, 12-21481, Inédit* Legifrance.gouv.fr.
[888] ibid.

with a fixed rate per photograph, not by a salary, then the newspaper is limited by the first publication. Any further exploitation of that singular photograph requires the photographer's permission.[889]

An interesting argument by Lucas and others is that, when a principal director is a legal person, the right of loan in the library and private copying remuneration should not be received.[890] According to them, these rights are regulated by the European Union Directives and under European Union terminology an author cannot mean a legal person. Therefore, they should not be used by a legal person in regard to collective works. However, Lucas and others do not speculate about what would happen if a legal person is the director. Does it mean that right of loan in the library and private copying remuneration cannot be used indefinitely? Or does it mean that the contributors can use these rights as a group?

*1.3.4. Moral rights*

As an exception to the creator rule, the notion of collective work has challenging issues regarding vesting of moral rights. While analysing the scope in the vesting of ownership, it is concluded that according to 2012 Court of Cassation decision; in addition to economic rights, the a legal person as a director also receives prerogatives of moral rights,[891] according to 2016 decision ownership whether obtained by employment or commission is not sufficient to confer the moral right to a legal person.[892] In legal literature, while Pollaud-Dulian believes that moral rights would transform and detach from the traditional understanding,[893] others believe that if the director is a legal person then it cannot enjoy moral rights.[894]

From another perspective, according to Cedars, when it comes to the director, there are peculiarities to exercising the prerogatives of the moral rights. With an exception of the right to respect, right to authorship and right to disclosure are legal requirements for a collective

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[889] *Cour de Cassation, Chambre civile 1, du 20 décembre 1982, 81-15862, Publié au bulletin* Bulletin des arrêts Cour de Cassation Chambre civile 1 N 368.
[890] Lucas and others (n 235) s 223.
[891] *Cour de cassation, civile, Chambre civile 1, 22 mars 2012, 11-10.132, Publié au bulletin* (n 876).
[892] *Cour de cassation, civile, Chambre civile 1, 16 novembre 2016, 15-22.723, Inédit* (n 877).
[893] Pollaud-Dulian, *Le droit d'auteur* (n 574) s 514.
[894] Lucas and others (n 235).

work. In order to receive the status of a collective work, a director must disclose the work under its name.[895] Also, right to withdrawal can only be reserved for the creator. Additionally, post-mortem prerogatives is irrelevant in case of a collective work.

### 1.4. Rights of the contributors

#### *1.4.1. Exploitation of the contributions*

According to the Court of Cassation's decision, it is safe to argue that the publisher does not have the right to exploit isolated contributions.[896] However, is the opposite also true? Is it possible for the contributors to exploit their contributions out of the collective work? In Article L121-8 paragraph 2, CPI deals with the exploitation of contributions in newspapers or periodicals. There is one requirement; not to compete with the original work. For instance, the Paris Court of Appeal affirmed exploitation of a contribution, recipes in this case, in a periodical. According to the court, as long as the exploitation does not compete with the periodical then the contributor can exploit his or her own work in isolation.[897]

However, there is no mention of collective works that are not periodicals. According to Desbois, Article L121-8 regarding newspapers and other articles about collaborative and audiovisual works follow certain liberal approach regarding the exploitation of contributions outside of the work. He argues that, this liberal approach should be applied to all contributions by analogy with the requirement not to compete.[898]

In a more recent decision, the Court of Cassation followed Desbois and argued that the authors of the collective work retain their copyrights on their particular contribution and can exploit it separately, unless this exploitation conflict with that of the collective work.[899] The decision was about jewellery drawings. During the employment, the author designed jewelleries in a project and after the end of employment, the author requested the drawings. The company refused and claimed that the author has no rights, because the project was a collective work and the

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[895] CPI Article L.113-5
[896] *Cour de Cassation, Chambre civile 1, du 20 décembre 1982, 81-15.862, Publié au bulletin* (n 889).
[897] *Cour d'Appel de Paris, chambre 1, du 27 mai 1992* RIDA 154 157.
[898] Desbois (n 243) s 704.
[899] *Cour de cassation, civile, Chambre civile 1, 31 janvier 2018, 16-26020, Inédit* Legifrance.gouv.fr.

authorial rights belong to the company. The Court of Cassation, however, decided that the author can exploit the drawings, and participating in a collective work does not strip the author of its copyright entirely.

Similarly, the Paris Court of Appeal, in a case where a contributor sued the owner of the collective work for economic and moral rights claims, ruled that the contributions of various participants to a collective work may give their respective authors rights to their contribution, provided that it is used in isolation, and independently of the collective work in which it is integrated, but does not confer on them any right in the collective work.[900] Also, the court concluded that exploiting one contribution from the collective work, a slogan, in this case, is only possible when the exploitation does not interfere with the exploitation of the collective work.

About separate exploitation, Gautier argues that, the contribution must be distinguished. However, it is hard to distinguish the contribution in a work where the contributions are merged into one single unit.[901] This is a significant point in order to differentiate a contribution from the whole that contribution must have clear boundaries. Photographs are great examples. They can be distinguished from the rest of the materials. However, it is not the same on all occasions.

Another right of the contributor is right to collect his articles and speeches in a work and publish them. This is an exclusive right explained in Article L121-8 paragraph 1. According to this, the author may collect his isolated contributions, if they can be isolated, from various collective works and publish them.

*1.4.2. Remuneration of the contributor*

According to CPI art. L131-4, proportional remuneration is the default rule. However, in some limited cases, the author's remuneration can be calculated as a lump sum. Desbois argues that

[900] *Cour d'Appel de Paris, chambre 4, du 18 avril 1991* RIDA 153 166.
[901] Gautier (n 499) s 691.

collective work is the best example of an instance where calculating proportional participation cannot be practically determined.[902]

According to him, a collective work is an object of common exploitation. The contributions are far from melted into an indivisible whole. The components will lose their identity, but they remain identifiable. It is precisely because of this particularism, it is not appropriate to use proportional remuneration. Taken in isolation, none of the components is sufficient to represent the collective work. They constitute elements of a whole. Therefore, the remuneration should be calculated as a lump sum.[903]

For the disadvantages of this assessment, an argument usually revolves around a director who seeks to impose the qualification of collective work whereby it can pay the creators a mere lump sum. On the contrary, the creators prefer the qualification of a work of collaboration which gives them access to proportional renumeration.[904]

*1.4.3. Moral rights*

In terms of the contributor's moral rights, Gautier argues that the director can defend the contributors' moral rights in the collective work, but the director cannot be the recipient of any compensation.[905] Nevertheless, the contributor can act by itself to protect his/her moral rights.

For instance, while evaluating the right of paternity regarding several advertising campaigns, the Court of Cassation decided that the contributor has the right to ask to be named as the author. It is irrelevant whether the work is categorized as a collective work.[906] The contribution, however, must be distinguishable from others to be addressed.[907]

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[902] Desbois (n 243) s 700.
[903] ibid.
[904] Cedras (n 843).
[905] Gautier (n 499) s 693.
[906] *Cour de Cassation, Chambre civile 1, du 15 avril 1986, 84-12008, Publié au bulletin* Bulletin 1986 I N° 89 90.
[907] *Cour de cassation, civile, Chambre civile 1, 22 mars 2012, 11-10.132, Publié au bulletin* (n 876).

In regards to the right to integrity, the Court of Cassation diminished its scope for the benefit of the harmonization of the work. The director can modify the contribution to the extent where it is necessary to the harmonization of the work. [908]

### 1.5. Place of collective works

As an exception to the personalist view of the French author's right law, collective works do not come from the same source as copyright, it is an artificial institution designed for the conveniences of the publication.[909] The autonomous regime of collective work is not based on creation but based on the disclosure of the work. Similar to posthumous works, the desired outcome is the disclosure of such work.[910]

CPI art. L123-4(3) opens the door for initial ownership for a legal person regarding posthumous works; "If disclosure is made on expiry of that term, the right shall belong to the owners of the work, whether by succession or for other reason, who publish or have the work published." The term of protection for such ownership is determined as twenty-five years.

The status of posthumous works is similar to collective works. The publisher is granted limited authorial rights, even though the publisher is not the author. According to Desbois, it is for practical reasons that have nothing to do with copyright. Therefore, it is not contradictory to open access to legal persons, while denying them the right of authors.[911]

Pollaud-Dulian focuses on the impossibility of determining the role of each contributor. According to him, it is sensible that the principal author should be the initial copyright owner.[912] It is also a practical way to solve the problem. Even the legislator tried to respond to the situations similar to the Academy Dictionary with establishing collective works.

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[908] *Cour de Cassation, Chambre civile 1, du 8 octobre 1980, 79-11135, Publié au bulletin* Bulletin des arrêts Cour de Cassation Chambre civile 1 N 251.
[909] Desbois (n 243) s 693.
[910] ibid 696.
[911] ibid 693.
[912] Pollaud-Dulian, *Le droit d'auteur* (n 574) s 507.

A collective work is established with publication and disclosure. However, the contributions are protected by copyright when they are created which is before the collective work. This means that if the director contributes to the collective work, then it can be partially composite work.[913] Because, the director is taking pre-existing works and making a new work. There could be more than one director and collective work can be done with collaboration or a contribution can be done with collaboration as well.

Collective work is a category of work where contributors do not know or could ignore the nature and the purpose of the other contributions as well as the identity of the contributors.[914] It should also not be confused with collections. While the collection is composed of successive volumes which are united to each other by an intellectual and practical link and they retain their autonomy respectively, the collective work is something else entirely. However, this does not mean that there is a collection within a collective work. If selection or arrangement of contributions is original then there is also a protected collection.

On this comparison, Desbois distinguishes true ensemble, sign of a collective work, from the factitious ensemble, sign of a collection, which regroups several individual works.[915] In other words, an element of a collection can be created as an individual work or as a part of an ensemble whereas contributions in a collective work are constituted with an intention to place in an ensemble.[916] Nevertheless, collection and collective work are very similar to each other in form. According to Cedars, an observable distinction can be found in the contract of creation between contributors and the publisher.[917] A court should interpret this contract in order to classify the work properly.

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[913] Cedras (n 843).
[914] Desbois (n 243) s 174.
[915] ibid.
[916] Cedras (n 843).
[917] ibid.

The limits of collective work are not clear. Pollaud-Dulian argues that the definition is not good for an exception.[918] As a result of this, according to Antonie, confusion in the scope allows the courts to interpret in a wider fashion.[919]

### 1.6. Summary

Collective works was first recognized by the case law in France. According to Desbois, it is born out of convenience and its purpose remain the same.[920] While, per CPI Article L111-1, an employment contract does not allow an assumption for transfer of rights, collective works declares the principle as the initial owner.[921] Collective works' term of protection and the principal's non-original contributions are obvious exceptions to author-centred approach. Therefore, collective work must be treated as an exception and its purpose of convenience should be remembered when proposing a harmonisation to the European Union.

Collective work exception is not unheard of but it is also not dominant in the European Union. There are other solutions to provide convenience into assignment and exploitation of copyrights. For instance Article 38 Regime in Germany aims to resolve these issues surrounding periodicals, newspapers and some other works.

From another perspective, collective works started to act as a convenience, but in modern copyright its purpose evolved into protecting investments.[922] By providing a wide protection to investments in copyright works, it acts as an incentive. Aiming to protect investment by introducing copyright protection is not a new concept to the European Union. For instance, Database Directive introduced a sui generis protection to certain database. One can argue for its purpose of protecting the investment behind these databases. However, one constant remains that collective work is an exception to author-centred copyright approach.

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[918] Pollaud-Dulian, *Le droit d'auteur* (n 574) s 500.
[919] Cedras (n 843).
[920] Desbois (n 243) 693.
[921] Software are the exception to this rule, according to CPI Article L113-9.
[922] Lucas and others (n 235) 221.

For an exception, collective work is not well defined.[923] Its scope is not consistent and its interpretation by the courts varies over time.[924] Its initial scope was designed to resolve problems surrounding works involved multitude of authors such as encyclopaedias, newspapers or journals. The modern conception, however, does not have such a limited scope. Collective work can be applied every category of work with the exception of audiovisual works.

This research is not going to suggest a new formulation like collective work. While collective works is an established practice in some Member States, it is quite impossible to find a precise scope of the concept. It is also easier and practical to introduce exceptions for convenience or to protect investments to specific group of work rather than subject neutral concept like collective work.

## 2. Collections

### 2.1. Definition

A collection is defined as collected works based on original selection criteria or arranged in an original manner. The collected works should be independent elements. The term element also includes data. Data could be defined as elements which have value and correspondence in information society environment.

According to Database Directive, a database is 'a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.'[925]

Berne Convention Article 2(5) also counts the collection of works as protected works. TRIPS Article 10(2) and WCT Article 1(4) confirm the Berne's understanding with a minor addition. The Article also articulates as 'collection of works and data'. In France, collections and

[923] Pollaud-Dulian, *Le droit d'auteur* (n 259) 500.
[924] Cedras (n 843).
[925] Database Directive 9.

databases are counted as protected works in CPI Article L112-3 and in Germany, collection is defined in UrhG art 4(1), whereas database is defined in the subsequent UrhG art 4(2). This may point out possible differences in their scope. This difference is going to be explored in Section 2(B)(I).

### 2.2. Database Directive

Database Directive is established on 11 March 1996 to provide legal protection to databases. According to Article 1 of the Directive, it comes with a broad definition, including electronic and non-electronic forms. According to the CJEU, a broad definition is intended to involve as many media as possible.[926]

Its definition is near identical to international and national definitions. There are some additions such as 'independent works', 'arranged in a systematic or methodical way' and 'individually accessible'. The object of protection is also similar; selection or arrangement of the contents.[927]

The meaning of independence is not defined in the Directive. The last sentence of Recital 17, however, can be interpreted as an example of failed independence;[928] 'whereas this means that a recording of an audiovisual, cinematographic, literary or musical work as such does not fall within the scope of this Directive'.[929]

According to CJEU, an independent material means that it is valuable on its own, because of the information it carries.[930] This is the reason why a musical work is not a database. Because, a separated part is meaningless without the whole. In other terms, the elements of a database can be withdrawn or added without the whole database losing its meaning.[931]

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[926] *Fixtures Marketing Ltd v Organismos prognostikon agonon podosfairou AE (OPAP)* [2004] ECJ Case C-444/02 [20].
[927] Directive Art. 3(1)
[928] Estelle Derclaye, 'What Is a Database?: A Critical Analysis of the Definition of a Database in the European Database Directive and Suggestions for an International Definition' (2005) 5 The Journal of World Intellectual Property 981 <http://doi.wiley.com/10.1111/j.1747-1796.2002.tb00189.x> accessed 2 March 2019.
[929] Directive Recital 17
[930] *Fixtures Marketing Case C-444/02* (n 926) para 33.
[931] Estelle Derclaye, *The Legal Protection of Databases: A Comparative Analysis* (Edward Elgar Publishing 2008) ss 62–3.

For the systematic or methodical way, Derclaye found that their meaning is circular.[932] Systematic means methodical and vice versa. However, system and method are universal concepts and arrangement is a personal concept. Therefore, 'arranged in a systematic or methodical way' could mean that an arrangement which is understandable by a sufficient number of people.[933]

Lastly, individual accessibility refers to physical inseparability whereas independence is related to the meaning of the material.[934] This could be explained with this example. A collage of pictures consists of independent pictures. However, they are not individually accessible because a collage is a single material.

*2.2.1. Databases and Collections*

With the definition of database, at least in national legislations, the scope of database remains a subset of a collection. With the implementation of the Database Directive, the selected jurisdictions inserted the exact definition of the database into their legislation. However, neither France, nor Germany, nor the United Kingdom eliminated the definition of collection from their legislation. This maybe in odds with the Directive's purpose. Recitals 4 of the Directive points out the inconsistent level of protection for databases. Such information would not be needed if there was no intention to harmonize different approaches altogether.

In CPI art. L112-3, collections defined as 'collections of miscellaneous works or data, such as databases, which, by reason of the selection or the arrangement of their contents, constitute intellectual creations'. After this definition, the exact definition from the Directive is inserted to define the database. In the article, the database used as an example of collection. This indicates that, the French legislator assumes that collection is a broader concept than a database.

[932] Database Directive Recital 17
[933] Database Directive Recital 17
[934] Database Directive Recital 17

UrhG Article 4 is titled as collections and database work. There are two paragraphs. The former defines collections as ‘collections of works, data or other independent elements which by reason of the selection or arrangement of the elements constitute the author's own intellectual creation (collections) are protected as independent works without prejudice to existing copyright or related right in one of the individual elements’. Unlike the French articulation, the German code mentions independent works. However, the second paragraph is not the exact copy of the Database Directive.

According to the second paragraph; ‘a database work within the meaning of this Act is a collection whose elements are arranged systematically or methodically and the individual elements are individually accessible by electronic or other means.’ Rather than to say ‘collection of works’, the German legislator choose to say ‘a database … is a collection’. From the outset, the database looks like a subset of collections in Germany as well. Davison also acknowledges that database is defined as a type of collection but with a word by word comparison concludes that database and collection are in fact have same standard of originality.[935]

In Ireland, CRRA inserted a new type of work called ‘original database’ which is defined in CRRA sec. 2. Original databases are not required to be a literary work and defined in a similar way to the Directive.

In the United Kingdom, the difference between database and collection is much more definitive. CDPA s. 3(1)(a) counts ‘a table or compilation other than a database’ as a literary work, while CDPA s. 3A(1) defines what a database is. It is clear that the United Kingdom accepts collections as a subject matter outside of the database.

[935] Mark J Davison, *The Legal Protection of Databases* (Cambridge University Press 2003) 120.

According to Derclaye, there are also some circumstances where a collection is not a database. Such as a collection arranged in a purely personal manner.[936] It will not be a database, because it is not systematic or methodical.

Also, according to a study commissioned by the European Commission, Germany found to be offering two different protections; work of collection and database. France, on the other hand, found to be in compliance with the Database Directive. Finally, the report noted the United Kingdom's exclusion, however did not found any concerning case law.[937]

Therefore, in this chapter, the Database Directive is going to be used as a regime different than the collection. The differences will be pointed out to show the differences.

### 2.3. Criteria

Collections are different from co-authored works because co-authors do not create isolated contributions but instead they contribute by a division of labour. According to Nordemann and others, the author of a collection of works does not engage in creating content, they engage in selecting or arranging.[938] Collections are also different from connected works in Germany.

While both works go through an assembly process, connected works are assembled by their authors but a collection of works is assembled by a third party. At least, one of the contributors should not be in the process of arranging or selecting. Otherwise, it would be a connected work.

Nevertheless, according to the Frankfurt Higher Regional Court, a collection of works can be done with co-authorship or the individual contributions can be done with co-authorship.[939] In France, the Court of Cassation also accepts collaboration between authors in preparing a collection of works.[940]

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[936] Directive Recital 17
[937] Kristina Karanikolova and others, *Study in Support of the Evaluation of Directive 96/9/EC on the Legal Protection of Databases Annex 1, Annex 1,* (2018) 9.
[938] Nordemann and others (n 794).
[939] *Taschenbuch für Wehrfragen* (n 378).
[940] *Cour de Cassation, Chambre civile 1, du 22 février 2000, 97-21320, Publié au bulletin* Bulletin 2000 I N° 59 40, 200.

The Database Directive also allows joint authorship even ownership by a legal person if national legislation permits.[941]

The basic requirement for a collection is originality in selection or arrangement. Selection process deals with materials gathered, whereas arrangement focuses on presentation and classification systems.

The Database Directive, as mentioned above, adds three more requirements; 'independent works', 'arranged in a systematic or methodical way' and 'individually accessible'. Germany also requires independent works.

In Germany, Nordemann and others define the term arrangement as assembly of previously selected materials.[942] Furthermore, Regional Court of Cologne, in a judgment, defines selection as 'collection, recording, viewing, rating and composing items on a particular topic with respect to particular selection criteria' and the term arrangement as 'classification, presentation and making available of the selected elements according to one or more classification system'.[943]

In France, Pollaud-Dulian defines the selection as a choice of materials and arrangement as the way of presenting them in the composition of the collection.[944] Lucas and others, additionally, argues that selection or arrangement reveals the author's preferences, conceptions and ideology, therefore it is personal.[945]

In *Football Dataco v Yahoo!* case, the CJEU decided originality is the only criteria for determining the eligibility of a database according to the Database Directive.[946] This criterion is applied to selection or arrangement.

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[941] Database Directive Art 4
[942] Nordemann and Fromm (n 559) ss 4–12.
[943] LG Cologne ZUM-RD 2010, 547, 549
[944] Pollaud-Dulian, *Le droit d'auteur* (n 574) s 294.
[945] Lucas and others (n 235) s 131.
[946] *Football Dataco Ltd and Others v Yahoo! UK Ltd and Others* [2012] ECR (CJEU).

The author of a collection is the one who made the selection or arrangement.[947][948] In Germany, according to Dreier and others, originality could be in the selection and arrangement or in one of them.[949] It is the same in France. For instance, on the one hand, the Court of Cassation decided that an annual is original due to its presentation and composition[950] and a catalog of stamps is a protected collection, because the author's arrangement is original.[951] On the other hand, the Court of Cassation ruled that an organization chart of principal world-wide automobile construction companies was original because of the author's selection and composition of the companies.[952]

Nevertheless, if the selection and arrangement are merely manual, schematic or routine then it is not original and the collection is not protected by copyright. The CJEU denied copyright protection to football fixtures, due to lack of originality and because it is dictated by technical considerations.[953] Hamburg Higher Regional Court decided on a case regarding the collection of biographical data and concluded that without a design or composition the collection does not merit copyright protection.[954] BGH also denied copyright protection to alphabetically ordered telephone dictionary due to lack of original selection or arrangement.[955] In France, the Court of Cassation decided that a collection of football fixtures, the composition of teams and name of their trainer is not original. It is simply a work consisting of a juxtaposition of three separate elements.[956]

The collections can include both protected and unprotected works. In Germany, BGH accepted that compilation of decision timelines of financial courts, despite the fact that they are official

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[947] *Zeitungszeugen* [2009] OLG München 29 U 2462/09, ZUM 2009 965.
[948] CA Paris 4ch 5 avr 1994 RIDA 4/1994 p. 301
[949] Dreier and Schulze (n 540) ss 4–11.
[950] *Cour de Cassation, Chambre civile 1, du 16 juin 1998, 96-20309, Inédit* Legifrance.gouv.fr.
[951] *Cour de Cassation, Chambre civile 1, du 7 mars 2006, 04-13971, Inédit* Legifrance.gouv.fr.
[952] *Cour de Cassation, Chambre civile 1, du 2 mai 1989, 87-17657, Publié au bulletin* Bulletin 1989 I N° 180 120.
[953] *Footbal Dataco Case C-604/10* (n 946).
[954] *Personalbibliographie Hubert Fichte* [1996] OLG Hamburg 3 W 53/96, ZUM 1997 145.
[955] *Tele-Info-CD* [1999] BGH I ZR 199/96, GRUR 1999 923.
[956] *Cour de Cassation, Chambre criminelle, du 2 juin 1982, 81-92330, Publié au bulletin* Bulletin Criminel Cour de Cassation Chambre criminelle N 138.

works, is protected.[957] In France, the Court of Cassation's decision regarding compilation of football fixtures, team composition and trainers also consists of unprotected elements.[958] After recognizing that they are information and not protected, the court stated that it is irrelevant in terms of collections.

In addition, a collection can also contain real objects such as applied arts or photographs. For instance, in France, the Court of Cassation accepted that collection of stamps could be protected as a collection.[959] In Germany, Dusseldorf Higher Regional Court decided that a collection of museum items are protected by copyright.[960] However, according to Dreier and others, collections often lack personal creativity when it comes to real objects.[961] According to Torremans, Stamatoudi and Davison, in the Database Directive, materials may contain tangible objects if they are protected works.[962]

### 2.4. Regime

#### *2.4.1. Economic rights*

The beneficiary of the economic rights in a collection is the author/s who made the selection and/or the arrangement of the work. It is important to state that the scope of the protection is the selection and/or the arrangement. Therefore, another author can also benefit from the collected works without infringing. In other terms, the content can be re-used, but the selection or the arrangement cannot.

In Germany, according to UrhG Article 34(2), author of a collection can assign the rights of the collected work with the collection. This is beneficial because a collection only protects the selection and/or arrangement, therefore when the author of a collection agrees to license the collection the author can normally license its own contribution which is selection and/or arrangement. However, with this assignment, licensee would have to seek to the authors of the

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[957] *Leitsätze* (n 695).
[958] *Cour de Cassation, Chambre criminelle, du 2 juin 1982, 81-92.330, Publié au bulletin* (n 956).
[959] *Cour de Cassation, Chambre civile 1, du 7 mars 2006, 04-13.971, Inédit* (n 951).
[960] *Wanderausstellung über Ostdeutschland* [1996] OLG Dusseldorf Schulze 3 W 53/96, OLGZ 246 1.
[961] Dreier and Schulze (n 540) ss 4–10.
[962] Irini Stamatoudi and Paul Torremans, *EU Copyright Law: A Commentary* (Edward Elgar Publishing 2014) s 9.04; Davison (n 935) 73.

collected works and acquire respective rights to use in order to exploit the collection. UrhG Article 34(2) resolves this issue and allow the author of a collection to also include the exploitation rights for the collected works as well. With this way, it would be possible to exploit the work without finding and getting permission from authors of collected works. It is significant that the author of a collection must have the rights (using and publishing the work inside a collection) in order to assign them.

Furthermore, in regards to unknown types of exploitation, the author of a collected work may withdraw later according to UrhG sec. 31a. France does not have similar rules in CPI.

*2.4.2. Moral rights*

In collections, contributors and the author/s of the collection can benefit from moral rights. However, it is some time the case that the author/s of a collection infringe the moral right of a contributor. According to Paris Court of Appeal, including a work into a collection can damage the moral right of the author. In a judgment, the court decided that it is an infringement of the right to integrity to sub-license a work into the collection without asking the permission of the author.[963]

*2.4.3. Term of protection*

Duration of copyright protection in both Germany and France is not different from the original term of protection. It is calculated as 70 years starting post mortem.

**2.5. Article 38 Regime**

In Germany, UrhG Article 38 deals with the legal relationship between a publisher and an author in a collection. It is significant to point out that the article's subject is not the author of a collection but the publisher. The publisher is not defined in the article. However, according to Dreier and others, the publisher is determined based on economic criteria (investment) rather than copyright criteria.[964] Hamburg Higher Regional Court, describes the publisher as the one who has decision-making power over the presentation, planning and division of labour.[965]

[963] *Cour d'Appel de Paris, chamber 5, 27 mai 2011* JurisData 2011-010906.
[964] Dreier and Schulze (n 540) ss 38–15.
[965] *Deutsche Bauzeitschrift* [1965] OLG Hamm 4 U 99/65, GRUR 1967 153 155.

Lastly, Ahlberg and others argue that the publisher is the one who complies the collection and gives its form.[966] From these definitions, the publisher has managing, editing responsibilities during the preparatory stage and publication and distribution responsibilities during the commercialization stage.

The criteria are familiar with another type of work. In French example of collective work, the principal director is also defined as the one who initiates, plans, has decision-making power and gives the collective work its form.

The German legislator targets the investor not the copyright owner of a collection. Nevertheless, a publisher can also be the author of a collection, if the requirements are met. Finally, Article 38 does not apply to the legal relationship between the author of collective work and the publisher.[967]

There are four paragraphs in Article 38. First three paragraphs are relevant. The first paragraph defines the circumstances where the publisher receives the exclusive right to exploitation for one year in periodical collections. The second paragraph applies the first paragraph to the non-periodical collection under certain circumstances. The third paragraph focuses on the legal relationships in the newspapers.

### *2.5.1. Historical Development*

In 2014, minor modifications made to Article 38.[968] Instead of duplication, the acts of reproduction, distribution and making available is added. And the act of distribution changed to act of making publicly available. These modifications made the article's definition and borders clearer.

### *2.5.2. Criteria*

For the first paragraph there are two conditions. First, the author of a collected work must give its consent. According to Dreier and others, author’s permission allowing work to be included

[966] Ahlberg and Götting (n 541) ss 38–22.
[967] Wandtke and others (n 582) ss 38–4.
[968] Article 1 G. v. 01.10.2013 BGBl. I P. 3728

in a periodical collection is sufficient for the first paragraph to apply.[969] Wandtke and other also support this view.[970] However, Ahlberg and other argue that for the transfer of an exclusive right, there must be at least some supporting provisions in the contract. For instance, a high fee or a large circulation area with competitors is an indication. Also, if there is a statement 'reprints only with permission of the publisher' this may be an indication of an exclusive right.[971]

The second condition is that, there must not be a contractual clause stating the opposite of Article 38(1). In this case, the publisher gains the exclusive right of use by law for one year.[972] If there is no clause and the author argues that there should not be an exclusive right then the author must prove it.[973] Upon the expiry of the one year, the exclusive right is going to transform to simple right of use. In that case, the author can exploit the collected work outside of the collection.

The second paragraph concentrates on non-periodical works. Unlike the first paragraph, there is no automatic transfer of the right of use. This paragraph targets to protect the author/s who made a disadvantageous deal. According to contract, if the publisher acquired the exclusive right of use and offered nothing or a symbolic amount of fee in return to the author.[974] Then, the author has the right to use the collected work after one year of the publication.

In the newspapers, according to Article 38(3), even if the contract proposes an exclusive right to use. The author of the collected work can exploit the work right after the publication. Contrary to the first paragraph, if there is no clause Article 38(3) assumes a simple right of use.

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[969] Dreier and Schulze (n 540) ss 38–12.
[970] Wandtke and others (n 582) ss 38–6.
[971] Ahlberg and Götting (n 541) ss 38–3.
[972] Dreier and Schulze (n 540) ss 38–16; Wandtke and others (n 582) ss 38–8.
[973] Wandtke and others (n 582) ss 38–8.
[974] Dreier and Schulze (n 540) ss 38–18.

*2.5.3. Scope*

In Article 38 regime, the first paragraph focuses on periodical collections. According to Dreier and others periodical means that the collection intended to appear in regular or irregular successions.[975] This also extends to digital collections. These collections can be in electronic format. The significant thing is that the scope is constantly expanding. When updates to the collection are merely technical or insignificant, then it is not considered a periodical collection.

The term collection does not mean exactly the same in Article 38 regime and collections in UrhG. In Article 38 regime, collections do not need to be original.[976] In other terms, Article 38 regime extends to unprotected collections as well. However, according to Cologne Higher Regional Court, the elements must have a close external connection between works.[977] For instance, according to Nordemann and others, if in a continuation series, there is no more resemblance than mere similar characters then there is no close external connection.[978] In the end, it is safe to say that Article 38 regime spans more than just original collective works, it also applies to compilations including calendars, yearbooks.[979] This maybe intentional to broaden the scope and involve as many works as possible. Because, the purpose of Article 38 mainly is to protect the author/s against the publisher/s.

Furthermore, unlike original collections, Article 38 regime also covers musical and audiovisual works.[980] Additionally, while original collections can be formed by single author's works, in Article 38 regime this is not accepted. In other words, the collection of an author's complete work is protected as an original collection, whereas it is not subjected to Article 38 regime. Finally, in order to benefit from Article 38 regime, the collection must have at least one protectable element.[981] This point is self-evident. The Article 38 regime deals with economic

[975] ibid 38–10.
[976] ibid.
[977] *OLG Köln, 03031950 - 4 U 317/49* [1950] OLG Köln 4 U 317/49, GRUR 1950 579.
[978] Nordemann and Fromm (n 559) ss 38–10.
[979] Wandtke and others (n 582) ss 38–7.
[980] Ahlberg and Götting (n 541) ss 38–17.
[981] Dreier and Schulze (n 540) ss 38–8.

rights between author and publisher. If the author has no protection then it is pointless to give exclusive rights to the publisher.

From the outlook, Article 38 regime is significantly different from the general understanding of collections. There is no need for a collection to be original. It means that Article 38, in fact, does not deal with collection, its subject matter is something else entirely. It is a collection of works in which the selection or arrangement do not need to be original, there must be a plurality of authors and at least one of the contribution must be protected by copyright. It is quite similar to the French concept of collective works. The publisher is similar to the principal author. The missing part is the impossibility to assign undivided rights in the collective works. Also, the subject matter is limited in Article 38 regime and they differ on one year rule.

In the second paragraph, the significant point is that a symbolic amount of remuneration is as same as receiving no remuneration at all.[982] For the third paragraph, there are some undefined terms. For instance, what is a newspaper? How would one distinguish a weekly magazine from a daily newspaper? Is publishing daily sufficient? According to Dreier and others, the newspaper is more about daily events and carry the purpose of informing the public, while magazines could have specific purposes or scopes that would not include every daily event.[983]

### *2.5.4. Differences from other regimes*

Article 38 Regime is not exactly an exception to general collections rules. Its scope is different and the beneficiary of the regime is different. However, it must be noted that the contract between the publisher and the authors can change the entire regime. The Article 38 regime is designed to act as non-mandatory. Unlike, French collective works, parties can agree on the points contrary to the UrhG.

[982] ibid 38–18.
[983] Dreier and Schulze (n 540).

Furthermore, all of the provision in Article 38 is limited by the comparatively short amount of time (one year), whereas collective works and collections are subject to the general rule of duration (seventy years post mortem).

## 3. Conclusion

This chapter analysed collective works, collections and a unique regime in Germany. Collections differ from others by virtue of being addressed by the European Union. While collections remain a slightly larger than its constituent of database, the difference is not significant. The Database Directive, on the other hand, avoids touching the issue of collective work. In Article 4, the Database Directive recognizes the possibility of a legal person as the owner and also accepts the existence of collective works within the European Union.[984]

As collections are mostly harmonised by the Database Directive, this research is not going to propose any improvement on current European Union's position. Collective work is an exception to copyright and Article 38 Regime is a series of assumptions that can be changed with a contract. This research is going to treat them as two options of the same issue; convenience with multitude of contributions in a single work.

While collective works evolved to serve purpose of protecting investment, this thesis argues that such purposes are best achieved by creating tools outside of the current copyright regime, such as the sui generis right in the Database Directive, or the film right in United Kingdom. For this reason, the purpose of convenience is going to accepted as the sole purpose of any proposal by this research for this chapter.

Convenience is significant when there is a multitude of rights that need to be cleared before exploitation of the work. Such clearance of rights can hinder the process of publishing periodicals or daily newspapers. However, is there a need to declare the initial owner of these copyright someone other than the author to resolve this issue? This would be a significant derogation from the author's own intellectual creation principle.

[984] The existence of collective work is also recognized in the Software Directive as well.

On the other hand, introducing a set of assumption of rights with a limited time frame (one or two years) which is sufficient for periodicals and newspapers is a much less intrusive solution. The problem, however, remains at the definition of the scope. For instance, what is a periodical or how should we distinguish a magazine from a newspaper? These question remains unanswered in Article 38 Regime and it is important to be as clear as possible for the principle of legal certainty.

For this point, the proposed directive is going to include an article to define who is a publisher. The definition is going to borrow elements from collective work. It is obvious that in Article 38 Regime, publisher is not the author of the collection. A publisher is the one who discloses and publishes the collection under his name. A publisher can be a legal person or a natural person.

This research is going to propose that works in a periodical collection can be published individually by its authors after one year of exploitation. Until the expiry, the publisher has the exclusive right to publish the contributions. The contractual agreement between a publisher and authors can change the provision stated in the proposed directive.

In collections that do not publish periodically, when an author does not receive any renumeration for their contribution, the author can publish their contribution after one year of publishing. This proposed provision based on the principle of proportionality. The publisher's right is protected, but it is essential to protect the right to enumeration for the contributor.

The time limit of one year is intentionally kept brief. In a digital world, the exploitation of a work reaches its peak in a rather small frame of time. The one year even may be seem lengthy for some instances.

In the end, this thesis is going to formulate an article to deal with the issue of contributions to collections. This article is going to aim at establishing principle of proportionality in practice and provide a degree of convenience for publishers.

# CONCLUSION

Copyright works with multiple contributors are frequently found in several creative sectors. In the music industry, a song is often written by more than one person, and computer programs are often the product of several coders. In the European Union, the question of authorship in co-authored works does not have one answer. Each jurisdiction has their understanding of co-authorship and what should be the legal consequences of co-authorship. This fragmentation entails controversy about the term of protection, ownership and exploitation of these works.

While moving freely in the European Union single market, co-authored works are subjected to a different set of rules in each Member State. This, in return, harms the creative sector in the European Union. To solve this issue, this research, in its chapters, compares different formulations for multiple authored works and, based on this comparison, recommends a harmonized approach under EU copyright law. Previously, some limited studies focused on this topic, but they are either limited in scope or depth. The review of previous attempts on the subject by the directives and CJEU jurisprudence demonstrates patchwork remedies. A recommended reform on this subject can also benefit the development of any unitary European Copyright Code.

This thesis, before getting into normative chapters, draws attention to traditional justifications for copyright legislations, constitutional influences stemming from EU law and the overarching aim of the functioning of the internal market. Coupled with general principles of EU law, these normative influences offer tools to help shape the normative recommendations of the thesis. These normative influences sometimes require compromise among each other. For instance, there should be a balance struck between the EU's purpose of expanding the internal market and the rights holders and users' interests or between the right to protect intellectual property and freedom of expression. These balances are also observed by this research in its normative contributions.

This thesis is the first attempt in the literature to formulate a harmonized approach for co-authored works in the EU. When it comes to the basic formulation, this thesis suggests that

collaboration is essential and common goal among authors is a meaningful reference to determine collaboration. The process of collaboration can take place in stages, authors can divide their workload and participate in the work during different times. Searching for intentionality during collaboration should be avoided because intent is hard to determine and makes the judicial review more complex. Secondly, based on the CJEU's originality requirement, every contribution must be an 'author's own intellectual creation'. This thesis does not suggest putting another layer of requirements such as the significant contribution test. Thirdly, in terms of indivisibility of contributions, this thesis follows the intellectual indivisibility principle, with an intention to broaden the scope of the basic formulation and avoid unpredictability of other indivisibility choices. For partnership rules between co-authors, this thesis assumes the consensus of common property and suggests that distributions should be divided if shares are calculable, otherwise the distribution should be done equally. Courts should be involved when there is a disagreement between authors and authors should be able to act individually against third party infringements while asking remedy on behalf of all co-authors.

Regarding secondary formulations, this thesis investigated adaptations and connected works. Adaptation is widely accepted in the European Union. However, there is no consensus on the terminology. Foremost, the thesis suggests a classification of the terms and opts to use lengthier references to provide clarity. Adaptation as an action, adaptation as a separate work and right to adaptation are used. There are number of references to adaptation in international treaties and in the directives. The main uncertainties revolve around the scope of the aforementioned three terms. About the right to adaptation, its scope within the Information Society Directive is discussed in light of several CJEU decisions. This thesis suggests that instead of absorbing acts of adaptation into right to reproduction, the right to adaptation should be separate and distinct from the right of reproduction. An articulation of the right is better served rather than an interpretation of the right of reproduction. Another aspect regarding the right of adaptation is the authorization. This thesis supports to forgo an authorization requirement during the development stage of adaptation. However, there may be proportionate exceptions to this rule including production of audiovisual works. Additionally, any further adaptation of a work should require the original author's consent.

Regarding adaptation as an action, definitions in the national laws, international treaties and EU copyright directives try to describe this term with actions like transformation, arrangement, alteration. However, each definition includes a vague term such as other alterations or adaptation to capture any unforeseeable way of adaptation. The thesis suggests that this is intentional and should be kept when defining adaptation as an action. With this approach, including a vague inclusive term would diminish the selection of other terms in the definition. Therefore, rather than proposing a new way to define, the thesis is content to use the definition found in the EU directives.

For adaptation as a separate work, the issue is whether or not to classify the final product as a new type of work. Classifying as a new type suggests that these works require an explicit set of rules for their exploitation, similar to the basic formulation. However, this thesis found that it is not the case. The emergence of adaptation is different from traditional authorial work, but it is not a collaboration and does not require special provision to govern the work. Therefore, the thesis suggests that there is no need for a new type of work to define adaptation as a separate work.

Connected works, on the other hand, is a joint exploitation scheme designed for works falling outside of the basic formulation in Germany. This thesis compares connected works to the proposed basic formulation and the French basic formulation. In the end, there is no need to advocate for a category of connected work where the proposed basic formulation is applied.

Concerning collective works and collections, the challenge is how to handle works with a large number of contributors fairly. Clearance of rights is crucial for these works. The problem is solved by providing ownership of the contributions to a single person or entity that is responsible for coordinating them. The Article 38 Regime defined in the German Authors' Rights Law proposes a number of assumptions to tackle the pressing issue of clearing the rights, while the authors retain ownership. From the outset, the Article 38 Regime seems less invasive and more compliant with author's own intellection creation principle. However, a regime of collective work gives simplicity and impartiality to its contributions while concentrating on the

coordination role. The Article 38 Regime must describe the types of activity that will be rewarded with assumptions and the individuals or entities who will be the recipient of the assumptions. According to the research, the assumption of transfer should be restricted to one year for periodical publications and some non-periodical publications in which authors do not get monetary compensation. This suggestion does not insist on the length of the assumption. The key is to legislate according to principle of proportionality.

As a result, this thesis presents a novel, comprehensive method to harmonizing multiple authored works in the European Union, ranging from the basic formulation and secondary formulations to collections and collective works, as well as a proposed directive demonstrating how the harmonization might be implemented in practice. This proposed directive is contained as an Annex to the thesis and cross-references to where the substantive analysis and recommendations have been made in the body of the thesis.

Once implemented, either in part or in their entirety, these proposed harmonizations to multiple authored works will have important ramifications for existing CJEU case law as well as the *acquis communitaire* of EU copyright law. Adopting proposed basic formulation will have effects on the Member States and EU copyright law. For instance, while the results would be the same, applying the basic formulation is going to affect provisions defined in the Term Extension Directive[985] for co-written musical compositions. Even though audiovisual works are outside of the scope of this thesis, they are going to be affected since in some jurisdictions, when there is no specific provision, the basic formulation is applied to audiovisual works. Additionally, due to the criterion of indivisibility, the proposed basic formulation has a broader scope than some of the Member States' basic formulations. Some existing works are going to be subjected to a new set of rules and term of protection. These issues must be addressed by transitional provisions.

Proposed secondary formulations assumes an independent right to adaptation. This is going to affect any discussion regarding the right of reproduction defined in the Information Society

[985] Term Extension Directive.

Directive. The relationship between right of reproduction and the right of adaptation must be addressed either by the Commission or the CJEU. Additionally, directives that reference adaptation, such as the Software Directive or the Rental Directive, should be updated. There is no effect on proposed reforms on collections because they do not amend existing provisions but rather complement them.

Addressing an unharmonized aspect of copyright law calls for significant alterations to every national copyright law existing in the European Union. While these proposals are not without flaws, they are based on extensive study. Numerous ways may be taken in light of this study; the study's recommendation is not the only feasible conclusion. Nonetheless, the study's results are framed within a balanced normative framework. The proposal as a whole may need more than one political push to get through. They may be separated into three parts and implemented in that order. As stated in the introduction, this research’s purpose is twofold; making an academic inquiry into multiple authored works and proposing a way to harmonize these works. While the first aim is needed to attain the second one, it has substantial standalone value as well and will supplement the efforts of achieving a unitary European copyright code.

# ANNEX: PROPOSED DIRECTIVE

(1) In a co-authored work, all co-authors should work for the same final work and should be aware of the collaboration and organization. It is not necessary for collaboration to exist in every part of the work. If collaboration exists before the completion of the work and towards a common goal, there is no need to test the substantiality or timing of the contributions. [986]

(2) Intention is not necessary for co-authored works. While concerted effort in a collaborative manner is a good indicator of intention, requiring intention to exist in every co-authored work would limit the scope of co-authorship.[987]

(3) Every contribution in a co-authored work must be eligible for copyright protection according to the test of author's own intellectual creation.[988]

(4) In terms of Article 2(2), Member States may introduce clauses to prevent abuse of rights such as estoppel or good faith principles.[989]

(5) In terms of Article 2(2), Member States may introduce clauses to allow emergency administration clauses. Under these clauses, one of the co-authors can take individual decisions regarding the work, if there is an infringement or a contracting party does not fulfill its obligations.[990]

(6) In terms of Article 2, the Member States may apply similar civil partnership rules vis-à-vis to co-authored works, unless there is a governing rule in the Directive.[991]

(7) In terms of Article 2(3), co-authors may ask for a injunctive relief without involving other co-authors.[992]

(8) In terms of Article 5(3), exceptions defined in the Information Society Directive and the Digital Single Market Directive are referred and protected.[993]

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[986] Chapter II – Section 1.2
[987] Chapter II – Section 1.5
[988] Chapter II – Section 2.1
[989] Chapter II – Section 5.2
[990] Chapter II – Section 5.2
[991] Chapter II – Section 5
[992] Chapter II – Section 5.4
[993] Chapter III – Section 1.5

(9) The principle of proportionality is essential when dealing with sub-adaptation as defined in Article 5(4). The original author cannot refrain from authorizing sub-adaptations without cause.[994]

**Co-authored work**

*Article 1*

(1) A co-authored work is a work where collaborative efforts and contributions of more than one natural person towards a common goal are required to exist in the same work.[995]

(2) Individual participations do not need to be equal or indistinguishable from each other.[996]

*Article 2*

(1) Co-authored work is the common property of its co-authors.[997]

(2) Co-authors must unanimously agree for exploitation of economic rights. In the event of failure, the co-authors can resort to the civil courts.[998]

(3) Co-authors may sue against infringement but must ask remedy on behalf of all co-authors. [999]

(4) Unless otherwise agreed, co-authors' shares are divided according to their respective contribution. If such distribution is not possible, then co-authors have equal shares.[1000]

(5) A co-author may waive his or her share only to the benefit of other co-authors.[1001]

(6) In a case where individual contributions are distinguishable and separately exploitable, unless otherwise agreed, the author of the contribution can exploit his or her contribution individually without jeopardizing the exploitation of the co-authored work.[1002]

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[994] Chapter III – Section 1.2.2
[995] Chapter II – Section 1.1
[996] Chapter II – Section 1.3
[997] Chapter II – Section 5.1
[998] Chapter II – Section 5.2
[999] Chapter II – Section 5.4
[1000] Chapter II – Section 5.3
[1001] Chapter II – Section 5
[1002] Chapter II – Section 4

*Article 3*

(1) The term of protection for a co-authored work shall expire 70 years after the death of the last of the co-authors to survive.

**Adaptation**

*Article 4*

(1) Translations, adaptations, arrangements of music and other alterations of a work which are the author's own intellectual creation shall be protected as original works without prejudice to the copyright in the original work.[1003]

*Article 5*

(1) The exclusive rights of the rightholder shall include the right to do or to authorise the translation, adaptation, arrangement and any other alteration of a work and the reproduction of the results thereof, without prejudice to the rights of the person who alters the work.[1004]

(2) The acts referred to in point (1) of this Article shall only require the consent of the author before exploitation of the adapted work for audiovisual works and conversion to audiovisual works, database, execution of plans and drafts of an artistic work.[1005]

(3) The acts referred to in point (1) of this Article shall not require authorisation by the rightholder where there is an exception recognised by the Member States for right to reproduction for the same act.[1006]

(4) Further adaptation of the works defined in Article 4 shall require another authorization in terms of point (1) of this Article from the original author. In the event of failure to acquire authorization, the authors can resort to the civil courts.[1007]

**Contributions to collections**

*Article 6*

(1) Where the author permits the inclusion of an original work in a collection which is published periodically, the publisher, acquire an exclusive right of reproduction,

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[1003] Chapter III – Section 1.3.7
[1004] Chapter III – Section 1.3.7
[1005] Chapter III – Section 1.2.2
[1006] Chapter III – Section 1.2.2
[1007] Chapter III – Section 1.2

distribution and making available to the public. However, the author may otherwise reproduce, distribute and make available to the public the work upon expiry of one year, unless otherwise agreed.[1008]

(2) Where the author permits the inclusion of an original work in a collection which is not published periodically and where the inclusion does not entitle the author to payment of remuneration, the author may reproduce, distribute and make available to the public the work upon expiry of one year, unless otherwise agreed.[1009]

(3) The publisher, included in point (1) of this Article, is a natural or legal person who publishes and discloses the collection under his name and direction.[1010]

[1008] Chapter IV – Section 3
[1009] Chapter IV – Section 3
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