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The Social Function of Copyright

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Abstract

This thesis deals with the need to recognize a balance between the individual rights conferred on authors in the copyright system and the common interests of society. It investigates the application of the social function to copyright. In this sense, this theory indicates that no individual right should be considered absolute and that there should always be a balance between individual rights and the common interests of society. This approach also goes through the concepts of common interest and what this balance of interests means.

The common interest refers to the general social interest, not the sum of individual interests. Furthermore, it is not necessarily the interest imposed by a government, but a social objective. The balance that must be made is between individual rights and the common interest, which can also be identified through individual rights that have been recognized based on common objectives, such as fundamental rights.

In the context of copyright, based on its justifications and the limits and exceptions already established in legal systems, we analyze its common interest in promoting the cultural development of society, as a way of contributing on a general and personal level to the construction of individuals' personal perception. Because of this common interest, there are two rights, the right of access and the right of creation/reuse, which must be balanced against the exclusive rights of authors of artistic and literary works.

Finally, let's look at the Pelham case, judged by the CJEU, as an example of the need for greater attention to be paid to the application of the social function to copyright, in the context of sampling techniques in the music industry.

Acronyms and Abbreviations

1971 Geneve Convention = Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms

BGH = *Bundesgerichtshof* / German Federal Court of Justice

BVR = *Bundesverfassungsgericht* / German Federal Constitutional Court

CJEU = Court of Justice of the European Union

ECHR = European Convention for the Protection of Human Rights and Fundamental Freedoms

EUCFR = Europe Union Charter of Fundamental Rights

GG = German *Grundgesetz* (German Basic Law)

ICESCR = International Covenant on Economic, Social, and Cultural Rights

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

Rental and Lending Rights Directive = 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

TRIPS = Trade-Related Aspects of Intellectual Property Rights

UDHR = Universal Declaration of Human Rights

UrhG = *Urheberrechtsgesetz* (German Act on Copyright and Related Rights)

WIPO = World Intellectual Property Organization

I. Introduction

The social function theory is based on the idea that there is no absolute right because the rules should comply with the common good.[1] This means that it must be considered a balance between the rights and the common interests of the community because the rights of an individual are not absolute, but it has their limits on the social aspect of our society.

The theory of the social function law has been developing throughout history and reinventing itself since Thomas Aquinas. Its main points are the concept of what would be the common good of society, which must be balanced with individual rights, and what this balance would actually be.

Moreover, there are two main stages of application of the social function theory to the law, when legislators create or edit rules and when the judges apply the existing rules for resolving disputes. Concerning this phase, one important tool for the balancing exercise is the application of fundamental rights, which are aimed at individuals, but have as their goal the promotion of collective values.

At the European level, internally, some hints referring to the recognition of the social function by Member States can be found in national legislation, such as in Germany. For example, *Sozialbindung des Privatrechts*[2] materialized the concept that the legal system within its social nature, regarding private law, must regulate the relations between society and individuals, and historically, even in the reasons for the German Copyright Act.

At the supranational level, there are yet some establishments to be made clear, since there is still not anything specific and explicit in the binding documents of the Union.[3] Nevertheless, the Charter of Fundamental Rights of the European Union presents some suggestions regarding the balance of rights and common

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[1] Christophe Geiger, 'Copyright as an Access Right: Securing Cultural Participation through the Protection of Creators' Interests' (2017).
[2] Section 242 of the German Civil Code (*Bürgerliches Gesetzbuch*).
[3] Christophe Geiger, 'The Social Function of Intellectual Property Rights, or How Ethics Can Influence the Shape and Use of IP Law' in Graeme B Dinwoodie (ed), *Methods and Perspectives in Intellectual Property* (Edward Elgar Publishing 2013) 15 <https://elgaronline.com/doi/10.4337/9781783470532.00013> accessed 28 July 2023.

interests, concerning the application of the general interests recognized by the European Union in the analysis of limitations to rights and freedoms.

Besides, the social function not only provides a balance between private interests and common interests but also permits the legal system to be in constant development according to the changes in social interests. Also, it prevents abuse of rights to the detriment of the community since it creates limits for the granted rights.

Furthermore, to understand in which extension this common interest can be considered when facing those rights, it's necessary to understand what this "common interest" could be, especially in the context of copyrights and the justifications for the existence of these protections in the legal systems.

Concerning the justifications for copyright protection, the assessment of the social function, there are the reward for the labor, personality, and utilitarian theories. The first two, labor and personality focus on the author's contribution as a creator for the ownership of the protection, but one is focused on the author's efforts while creating and the second is related to the author's own expression. Finally, a utilitarian approach would be more in favor of the promotion of social welfare by the development of creativity in our society.[4]

From those theories, it's possible to verify which are the common interests arising from the copyrights, such as the author's protection, and reward, to increase the creation and dissemination of artistic and literary works. Also, there is an interest in cultural and social development, from the amplification of access and the protection of the freedom to create.

There are two stages in which the social function of copyrights must be considered. The first one is during the legislation period, such as the creation or improvement of the laws. The second stage is in the application of copyright rules by the judges in concrete cases, when there is the possibility of applying the social

[4] Mitchell Longan, 'A System Out of Balance: A Critical Analysis of Philosophical Justifications for Copyright Law through the Lenz of Users' Rights' (2022) 56 Michigan Journal of Law Reform 4 <https://www.open-access.bcu.ac.uk/13177/> accessed 29 July 2023.

function through the balancing exercising concerning fundamental rights, such as the right to take part in cultural life, and the right to create freedom of creation.

The fundamental rights are recognized in international mechanisms such as the UDHR and ICESCR, and we can verify the essential balance of rights and interests, involving the private interests of authors and creators and the public interests of society.[5] In this sense, at the EU level, all the Member States are contracting parties of the ECHR, which sets standard protection for fundamental rights, such as freedom of expression, right to liberty, and security, among others.

It's important, also, to understand that the artistic expressions reflect, in reality, the creators' attitudes and understanding of life, their works (production and understanding) depend on exposure, insofar as the worldviews and meanings of life are the result of symbolic constructions elaborated from social interactions, exposure to artistic works is a condition for participation in the construction of this universe, of the meanings of these works and for their production.[6] This means that the artists benefit from the interaction between them and society and the other way around because cultural expansion is fundamental to society's general development.

As a result of the application of the social function of copyrights, we can identify access right to artistic works, as a user's right in opposition to the exclusive right of protection of the artists.[7] Moreover, it's important to also reflect on the critical role of the right to create and the freedom of artistic expression concerning already existing copyrighted works, which reflects on the right to create/reuse.

When exploring the development of our society, it's possible to verify the existence of a dichotomy between the protection of copyright and the freedom of creation, because sometimes, the protection of the authors is to such an extent

[5] Paul Torremans, 'Copyright as a Human Right' in Paul Torremans (ed), *Copyright and human rights: freedom of expression, intellectual property, privacy* (Kluwer Law International 2004) 10.
[6] Allan Rocha de Souza, 'Direitos autorais e acesso à cultura' (2011) 7 Liinc em Revista 416–436 <https://revista.ibict.br/liinc/article/view/3324> accessed 27 July 2023.
[7] Geiger, 'Copyright as an Access Right' (n 1) 94.

that it limits the artistic freedom to create new works, including derivative works, by other authors, like in the example of sampling.

Concerning the sampling technique, the CJEU held an important case, regarding the balance between copyright protection and freedom of artistic creativity, the *Pelham* case, which will be analyzed, to ascertain how the balance of interests has been conducted by the Court.

Moreover, much has been talked, about in European political discourse, about the necessity of finding a more balanced situation between copyrights and cultural, social, and economic progress.[8] So, the social function theory is an important factor that should be considered for the possible development of copyright legislation or interpretation of existing instruments, in other for the protection to match the social reality of the present, considering the common interest of the society.

II. The Social Function Theory

A. Historical development

Before going into the particularities of the social function theory, it is interesting to briefly analyze its historical development, so that we can better understand its relationship with the justifications for copyright and its fit in such a field of law. And, this analysis goes through the perspectives of Thomas Aquinas, Philosophy of Enlightenment*, Sozialbindung des Privatrechts,* and other scholars.

First, in Summa Theological, Thomas Aquinas presented the idea that a law may be unjust if it's contrary to the common good by itself, or when, even if considered the common good, it's beyond the power conferred on the lawmaker or when the burdens of the law are imposed unequally on society.[9]

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[8] Bernt Hugenholtz, 'Flexible Copyright: Can EU Author's Right Accommodate Fair Use?' in Irini A Stamatoudi (ed), *New developments in EU and international copyright law* (Wolters Kluwer 2016) 418.

[9] Thomas Aquinas, *Summa Theologica, Part. I-II (Pars Prima Secundae)* (Project Gutenberg 2006) art FOURTH ARTICLE [I-II, Q. 96, Art. 4] <http://www.gutenberg.org/ebooks/17897 Verlag Volltext>.

Thus, the law could only be considered fair and legitimate if it fulfills its social function of the common good of society.[10] Moreover, Aquinas established as a basic requirement for a law to be just, it must place the burden of it in an equal way among the individuals of the community.[11]

When facing a conflict between laws[12], Aquinas defended that should prevail the law that defends the greater goods, in opposition to the one that defends the minor goods.[13] Also, since the individuals are part of a whole, the law must always consider the common good, even if it concerns individual rights.[14]

This means that there must always be a balancing exercise, in the sense that there is no such thing as an "absolute" right that can be exercised regardless of any circumstances, because there must be a reflection on the consequences that the exercise of this rights involves, especially towards the society.[15] Thus, the social function of the law is a fundamental and essential part of its structure if it is to be considered fair.

In Germany, the theory of the social function of private law (*Sozialbindung des Privatrechts*) provided the idea that exists a limit that constrains private rights, and this limit is the interest of the community since the legal system shall find a balance between the interests of the individuals and the society. This theory was applied in case law developed based on Section 242 of the German Civil Code concerning good faith, which is a general clause that when used as a tool by the judges becomes a balancing instrument.[16]

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[10] Geiger, 'Copyright as an Access Right' (n 1) 76–77.
[11] Daniel Westberg, 'The Relation between Positive and Natural Law in Aquinas' (1994) 11 Journal of Law and Religion 1, 16.
[12] Laws from the same category, for example, two civil laws. Because Thomas Aquinas differentiated between divine laws, natural laws, and positive laws, as well as divine and human laws.
[13] Charles J (Charles Jerome) Callan and John A (John Ambrose) McHugh, *Moral Theology: A Complete Course Based on St. Thomas Aquinas and the Best Modern Authorities* (Edward P Farrell ed, 2011) para 291.
[14] Aquinas (n 9) art SECOND ARTICLE [I-II, Q. 90, Art. 2].
[15] Geiger, 'Copyright as an Access Right' (n 1) 77.
[16] ibid 78.

However, the application of the social function in copyrights has its origins in the philosophy of the Enlightenment. This philosophy was defined by a base of original thinking, which also was related to a systematic investigation of the understanding and the process of moral judgment. So, in the end, it was a combination of mental and moral philosophy, linked to political economy, in the historical context of the transition from the Middle Ages to the decline of feudalism, political centralization, and the formation of nation-states.[17]

On this view, since society has a necessity for intellectual productions – to safeguard its development and its progress concerning its social, cultural, economic, and technological needs, it grants the creators or rightsholders a reward in the form of an intellectual property right, which enables them to benefit from their works.[18]

In this sense, there are four general social functions, requisite to the survival of social systems, which are the pattern-maintenance, regarding socialization, integration, regarding conflict management, adaptation, which is the effective and economical action to eliminate problems, and goal-seeking, related to the allocation of values.[19]

Also, concerning general property rights, León Duguit presented, in opposition to the liberal concept of property, the idea of the social function of property, in which the property shouldn't be considered a right, but rather a social function on itself. He defended the conception of "solidarité sociale", which is the foundation of the law. Since man lives in society and can only live in society, it only exists because of the solidarity that unites the individuals who make it up.[20]

Moreover, he considered the social reality that recognizes solidarity as one of its pillars, thus, individuals should not only be recognized as isolated but as

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[17] James Schmidt, 'Enlightenment as Concept and Context' (2014) 75 Journal of the History of Ideas 677, 681–682.
[18] Geiger, 'Copyright as an Access Right' (n 1) 79.
[19] Eugene E Dais, 'General Social Functions of Law and Jurisprudential Perspectivism' (1973) 17 Anuario de filosofía del derecho 15, 16.
[20] Léon Duguit and Dominique Chagnollaud de Sabouret, *Manuel de droit constitutionnel* (Reproduction en fac-similé, Éd Panthéon-Assas 2007) 10–11.

interdependent.[21] This notion goes along with the social function, even if it pushes a little further, considering that when a law is made, it must be considered social solidarity, even if the rule is individual since it applies to the individuals.

Besides, Niklas Luhmann defended that the law should document the logic that individuals use to come together in a community as actors, rather than creating the limits in which individuals must act. In this sense, in a way, the law shouldn't be rigid, since it carries a malleable character that enables the social harmony of society.[22] Thus, the law must consider the social interactions at its core, which means that there must be a consideration of individuals and others in its design.

Hence, through the historical development of the social function theory, it's possible to verify that even in different perceptions and theories concerning what is and should be the law, the main idea concerning individual rights, no right is absolute, it must be balanced with the common interest of society.

Also, it's interesting to note that even when it comes to fundamental rights, which set individual society's goals concerning basic human needs and common goods, recognized by the European Union and internationally, under the European Convention on Human Rights, and European Union Charter, and the Universal Declaration of Human Rights, those rights should not be regarded as *atomistic*, *but intersubjective in their character*.[23] Those rights are not absolute, which means that there must be a dialogue among them and other rights, due to the pluralist characteristic of modern societies.

B. The concept of common interest

To analyze what is the common interest, it's important to make a preliminary distinction between common good and public interest since usually these

[21] Sheila Foster and Daniel Bonilla, 'The Social Function of Property : A Comparative Law Perspective' (2011) 80 Fordham Law Review 101, 102–103.
[22] John W Murphy, 'Niklas Luhmann and His View of the Social Function of Law' (1984) 7 Human Studies 23, 27.
[23] Tuomas Mylly, 'Intellectual Property and Fundamental Rights: Do They Interoperate?' in Niklas Bruun (ed), *Intellectual Property Beyond Rights* (WSOY) 193.

expressions are used as synonymous, but historically, they represent different concepts.

The common good emerged from an explicitly political idea, from Aquinas, as the goal of a state. In this sense, the purpose of the State would be to serve the common good, consisting of specific objectives for the general promotion of the welfare of humanity.[24] The common good was meant for everyone, meaning its benefits involved contributions to the well-being of all people, contributing to intellectual, moral, and spiritual development.[25]

Moreover, the responsibility for defining the common good was from the government, and, when facing a conflict between the common good and individual good, the first would prevail. Also, the concept was linked to the notion of justice and morality, enabling the experience of the fullness of life.[26]

Concerning this concept, society has a main role that is defining the structure for the development of individuals as humans, based on universal values. Furthermore, this notion of the common good has this notion of common interest related to fundamental rights.[27]

Besides, considering the Aristotelian conception of man, all members of society have a fundamental duty to contribute to ensuring the individual development and empowerment of each other. The good life of an individual is one in which one can participate socially and politically. It means that all individuals have this responsibility to support this reality. From this perspective, in the legal system would exist a general social obligation to respect and follow norms and legal institutions that exist for this purpose.[28] From this perspective, the common good

[24] Aquinas (n 9) SECOND ARTICLE [I-II, Q. 90, Art. 2].
[25] Bruce Douglass, 'The Common Good and the Public Interest' (1980) 8 Political Theory 103, 104-105.
[26] ibid 105.
[27] Geiger, 'The Social Function of Intellectual Property Rights, or How Ethics Can Influence the Shape and Use of IP Law' (n 3) 11.
[28] Lisa Franziska Lueg, *Teleologische Theorien des Urheberrechts: der angloamerikanische Urheberrechtsdiskurs zwischen Rechtfertigung und Rechtskritik* (Mohr Siebeck 2022) 315–316.

of society would be to create the proper environment for the social and political participation of all individuals.

On the other hand, the public interest, emerged in the mid-seventeenth century in England, bringing the concept of an individualist view of the public good. Society was giving more importance to property rights and private benefits, in the sense that the definition of well-being should be built individually.[29]

So, it would be like the interests of the public should be defined by the individuals, not by the government itself as it was understood in the common good approach. Also, the common good concept should be considered for everyone; in the public interest approach, it refers to the benefits more or less equal, the majority, not everyone.[30]

This means that the general interest is defined according to the *particular interests of the individual*, based on Bentham, Adam Smith, and John Stuart Mill's theories. Here, the general interest is the one that maximizes the profits of the majority of individuals.[31]

Moreover, the Benthamite ideal of the *greatest good of the greatest number*, like a *wealth-maximization*, in which the rules should present a maximization of welfare to all individuals in the society.[32]

Furthermore, there is also the issue of imprecision of expression "public", concerning the public interest, in a sense that what would it represent, if the whole society or a certain subgroup of it. Concerning the social function theory, when discussing the interests of society, is more logical to consider the general interests of the copyright system, yet it is important to be aware of the fact that often, general social interests are formed by the interests of smaller groups than the

[29] Douglass (n 25) 107–108.
[30] ibid 110.
[31] Geiger, 'The Social Function of Intellectual Property Rights, or How Ethics Can Influence the Shape and Use of IP Law' (n 3) 10.
[32] William Fisher, 'Theories of Intellectual Property' in Stephen R Munzer (ed), *New essays in the legal and political theory of property* (Cambridge University Press 2001) 176.

whole society since the copyright system contains more than just author's and users' interests.[33]

Since the legal system should be an instrument of social coexistence, national legal systems should be only established if they follow the public interest, or, at least, it must be assumed that when creating the laws, the legislator considered the society as a whole.[34]

For the analysis of the social function of the copyright system, it makes sense to consider as a conjunction of both concepts, as common interest, rather than just the common good or just public interest. Because it involves not only the idea of the social good, which will consider the majority of society, not every one of it, but, also, it considers the interest that the society has, not one imposed by the government. This means that the idea of the common interest is somewhat different from the idea that it is formed by individual interests, in the sense that it is formed by the general idea of the good for society.

Precisely because it is a balance of interests when there is a conflict between individual interests and social interests, sometimes the application of the common interest may not seem to be for everyone's benefit, just for the majority. In this sense, sometimes, one can think that there is no individual benefit from this common interest, because at a personal level doesn't represent a gain, but only in the view of society as a whole.

Yet, since there must be a balance between interests, to understand what the balance of interest between individual rights and common interest should be, it's it is essential to understand what this common interest is.

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[33] Thomas Dreier, 'Balancing Proprietary and Public Domain Interests: Inside or Outside of Property Rights?' in Rochelle Cooper Dreyfuss, Diane L Zimmerman and Harry First (eds), *Expanding the boundaries of intellectual property: innovation policy for the knowledge society* (Repr, Oxford Univ Press 2004) 297.

[34] Gillian Davies, *Copyright and the Public Interest* (2. ed, Sweet & Maxwell 2002) 5.

C. What is this balance of interests?

The law can be recognized as the collective effort to regularize individual behavior in a predictable mode by the legitimate use of the preponderance of coercive power.[35] It means that it is the instrument that shapes our society, imposing limits and conferring rights and guarantees.

In this sense, as individual interests are often not the same as the common interests of society, a balance must be made between them when a conflict occurs. This balance is made between private rights against other private rights or between private rights and public interest. Consequently, individual rights must always be confronted with other rights of equal value, and with interests of the community.

Balance is the main aspect of the social function and, if law is a question of balance, there cannot be an "absolute" right that can be exercised in isolation, without any consideration of its possible consequences to society. The only rights that can exist are the ones that can be balanced against other rights and the well-being of society.[36]

So, the social function can be seen as fundamental to the legal theory[37], since this exercise of weighing individual rights against common interests and the well-being of the society is inherent in law, both in the creation of laws and in their application. Hence, the prior balance that should be made concerning the application of social function is the one between private rights against the common interests of society.

Nevertheless, the notion of what the common interest is can be considered a little bit vague and causes obstacles for the balancing exercise, since it's difficult to oppose a concrete right against an idea or a goal such as the development of society through artistic and literary works, in the specific case of copyrights.

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[35] Dais (n 19) 16.
[36] Geiger, 'The Social Function of Intellectual Property Rights, or How Ethics Can Influence the Shape and Use of IP Law' (n 3) 5.
[37] ibid.

Because of this, one way of making this balance more concrete is to consider that it should be made between private rights and other private rights that have been recognized through the common social interest lens.

When analyzing it, it seems logical to involve fundamental rights, which are individual rights based on the common interest of society. They are aimed at individuals but have been recognized from the point of view of collective objectives and interests.

Moreover, they are concrete, since already established in rules and international legislations, such as ECHR, EUCFR, and ICESCR. Yet, fundamental rights are often used in the balancing exercise against individual copyrights, as an important tool for the application of the social function of the copyright system, as will be later developed in further sections of this work.

Either way, the balancing exercise proposed by the social function can be put into effect either through the opposition of individual rights in the face of the public interest, or through individual rights and individual rights that have been recognized based on the realization of the common interests of society. However, the way that brings greater concreteness and legal certainty is through the latter, especially when fundamental rights are used for this purpose.

This obligation of balancing rights and interests applies particularly to governments, both in terms of establishing public policies and creating rules and in the application of laws in concrete cases, as they are supposed to act in the common interest of humanity.[38] And, it is an important aspect for rulers, for whom it is an instrument of government[39], while the social function presents itself as a legal institute created to outline a legal situation, to *govern social relations, discipline behaviors, imposing sanctions, and restrictions*.[40]

[38] Torremans (n 5) 5.
[39] N Bobbio, *Da Estrutura à Função: Novos Estudos de Teoria Do Direito* (DB Versiani tr, Manole 2007) 105.
[40] Francisco José Carvalho, *Teoria da função social do direito* (Juruá 2011) 87.

III. The intersection between Copyright and common interests

A. Copyright and its Reasoning

Although copyright protection systems have convergences, within international treaties such as the Berne Convention and the TRIPS agreement, different social and political philosophies influence the emphasis on different arguments for the justification of copyright among the legal systems.[41]

Those theories of copyright justifications should be helpful for lawmakers when facing issues concerning copyrights, to guide legislators and judges. However, problems arising from internal inconsistencies and a lack of empirical information concerning the justifications restrict its normative power.[42] Given these limitations, it is essential to turn to the analysis of the common interests with the granting of copyright.

Moreover, those justifications can be found when looking into case law, constitutional provisions, national laws, and international instruments. When analyzing the justifications for the protection of copyrights, and looking at the development of legal systems, there are four basic principles found. These justifications can be referred to as (i) natural law; (ii) just reward for labor; (iii) stimulus to creativity; and (iv) social requirements.[43]

Generally, one can say that in the development of modern copyright laws, the economic and social arguments are given more weight in the countries of the common law tradition, whereas, in the countries of the continental civil law tradition, the natural law argument is stronger.[44] But, it's important to note that those justifications are usually blended when dissecting legislations, judicial

[41] Stephen M Stewart, *International Copyright and Neighbouring Rights. 1* (2. ed, Butterworths 1989) 4.
[42] Fisher (n 32) 175.
[43] Davies (n 34). P. 13; Stewart (n 41) 3–4.
[44] Davies (n 34) 17.

materials, and arguments of policymakers, in a sense that incentives, fairness, and culture-shaping overlap each other.[45]

First, considering the natural law justification, the reasoning for copyright protection is that the author has an exclusive natural right of property in the results of his labor. This justification is linked to the personality theory, shaped by Kant and Hegel's writings, based on the idea that private property rights would be fundamental for some fundamental human needs' fulfillment.[46]

Thus, the work is considered the expression of his personality, as the work would embody the author's personality or will. Also, authors should have the right to prevent any unauthorized modification or incident concerning this work's integrity.[47]

This approach is stronger in civil law countries, such as France and Germany, where the copyright law systems are considered more protective and grant "moral rights" to the authors. It means that the author, as the creator or maker of the artistic and literary work, should have control over the decision of whether and how his work is to be published.[48]

There is also the view that copyrights would be just a reward for the author's labor in creating the artistic or literary work. This justification considers the authors as any other worker, who are entitled to the fruits, or the economic reward, of such labor. In this sense, the royalties to which he is entitled are the earnings of his intellectual work. This means that, since the authors participate in enriching our lives, then they deserve to be remunerated when their work is exploited since society accepted that creating is worthwhile. [49]

This justification originated in John Locke's theory that whenever someone applies effort to something, to create, he acquires a property right excluding

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[45] Fisher (n 32) 175.
[46] William Fisher, 'Theories of Intellectual Property' in Stephen R Munzer (ed), *New essays in the legal and political theory of property* (Cambridge University Press 2001) 170.
[47] Stewart (n 41) 3.; Davies (n 34). P. 14.
[48] Fisher (n 32) 173.
[49] Davies (n 34) 14–15.

other's rights regarding that.[50] In this sense, a strong connection between Locke's labor theory and the copyright justification can be found in the basic limitations for rightsholders[51], in the idea/expression dichotomy, and in the expiration of protection. Because these represent the limit between the individual rights of the authors and the rights granted to society, in a sense that the authors would leave *'enough and as good' in common*.[52]

This approach acts on the assumption that the creator of intellectual works would face some sort of difficulties concerning the dissemination of the content, because of the intangibility of intellectual creations, which makes these works more susceptible to copying and wide dissemination at the same time.[53]

Furthermore, this economic argument of copyright as the reward for labor is the support for the recognition of the related rights, meanwhile, it considers the investment needed to create artistic and literary works. Since one of the main goals of creation is to make the works available to the public, the processes of the creative industry such as publishing, and distribution of books or records, which are expensive, are also considered when granting rights. The reason is that these investments are not made by the players without any reasonable expectation of recovery and profits.[54]

This kind of investment is extremely common in the music industry, for example, where we can find related rights granted to phonogram producers, and record labels, who put the effort for the phonogram recording, but also to performers, who are not entitled *per se* to copyrights for performing the songs but have the rights for the performance.

The theory of recompense for the work employed in the creation of works focuses on the past, and on the effort that the authors applied to create a given work.

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[50] Martin Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International 2004) 36.
[51] For the purposes of this specific research, it is going to be further analyzed only the copyright limitations, though the lens of the social function theory.
[52] Senftleben (n 50) 36–38.
[53] Fisher (n 32) 168–169.
[54] Stewart (n 41) 3.

Seeking for the future, there is the theory that considers the reward as an incentive to create new works, focusing on stimulating the creativity of the authors[55], from a utilitarian perspective.

This is based on the premise that the artistic and literary works produced by authors form a national treasure. The copyright system would contribute, even if indirectly, to the *creation and marketing of cultural goods*[56], hence, there is a common interest in rewarding creativity. The encouragement of creativity is seen as a contribution to the development of society's culture as a whole.[57]

Just as protection should be provided to authors to stimulate creativity, given the importance of artistic-literary works for cultural development, there is also justification for the conception of the social importance of copyrights. In this sense, the social utility of copyright is to offer an economic basis for creation[58], to encourage authors to make their works available, and to permit the dissemination of the works among the population.[59]

This dissemination of works is important in the sense that it reaches a large number of people, creating social cohesion by strengthening ties among different economic classes, racial and age groups, and classes.[60] Authors can contribute with one single work to a big advance, creating an impact on our society.[61]

This means that the dissemination of artistic and literary work has the power to enhance critical reflection, to contribute to the cultural process of development of society. Hence, copyright is a means of governmental policy, however, to develop its full potential, the policy instrument has to address the right point in

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[55] Davies (n 34) 15.
[56] François Dessemontet, 'Copyright and Human Rights' in Jan JC Kabel, Herman Cohen Jehoram and Gerard JHM Mom (eds), *Intellectual property and information law: essays in honour of Herman Cohen Jehoram* (Kluwer Law International 1998) 113.
[57] Stewart (n 41) 3.
[58] André Kerever, 'Is Copyright an Anachronism?' (1983) 19th year N. 12 Copyright: Monthly Review of the World Intellectual Property Organization (WIPO) 368, 370.
[59] Davies (n 34) 16.
[60] Paul Dimaggio and Michael Useem, 'Social Class and Arts Consumption: The Origins and Consequences of Class Differences in Exposure to the Arts in America' (1978) 5 Theory and Society 141, 151.
[61] Stewart (n 41) 4.

the cultural process[62], not only focusing on the perpetrators but also on the importance of protection for society as a whole.

Unfortunately, this social dimension of copyright is sometimes forgotten by legislators and policymakers, since we can notice a tendency, at least at the European level[63], of less flexibility of copyrights, and the view of an investment-protection mechanism rather *than a vehicle of cultural and social progress*.[64]

Moreover, recently, the well-being approach to intellectual property rights has been defended by some authors. It was developed in the context of the utilitarian justification, as an alternative to the Law & Economics theory, which focuses on the interpretation of utility as solely economical. Through this approach, the promotion of utility, determined based on the terms of well-being, is sought through various values, such as health, interpersonal and relationship development, and social justice.[65]

Is interesting to highlight, also, that those theories communicate with each other in the legal systems, in the sense that, for example, one may think that the best for society would be a copyright system with the notion of a world of abundance, that would require works freely available (public domain, not only works without copyright protection anymore, but also works that can be accessible by limitations). Nevertheless, in this scenario, authors wouldn't have the incentive to show their works, because they wouldn't be able to enjoy the fruits of their labor.[66]

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[62] Hajo Rupp, *Culture & Copyright: Towards an Integrated Justification of Copyright between Cultural Theory, Economic Theory and Reality* (1. Aufl, wvb Wissenschaftlicher Verlag Berlin 2013) 15.

[63] For example, the fact the list of copyright limitations in the InfoSoc Directive is considered to be exhaustive and does not offer much flexibility is a strong indication that copyright protection policies in Europe show more protectionist tendencies towards copyright holders.

[64] Geiger, 'Copyright as an Access Right' (n 1) 74.

[65] Tim Taylor and Estelle Derclaye, 'Intellectual Property Rights and Well-Being: A Methodological Approach' in Irene Calboli and Maria Lillà Montagnani (eds), *Handbook of Intellectual Property Research: Lenses, Methods, and Perspectives* (Oxford University Press 2021) 666–667.

[66] Senftleben (n 50) 36–37.

If everyone were allowed to use the results of innovative and creative activity freely, there wouldn't be investments in innovation or creation by the authors[67]. As mentioned, innovation and creation are essential for socio, cultural, and economic growth. So, in this protection, it's easy to recognize the common interest concerning the needs of society, especially regarding its development.[68]

Hence, there must be a *social element* within the rules concerning the regulation of access and use of literary and artistic works[69], to balance the fair incentives for authors, the possibility of real access to those works by society, and also the encouragement of cultural development. There is an obvious correlation between them, from the point of view of the need to balance the exclusive rights of authors and the common well-being of society.

Concerning this, if we consider the neo-Aristotelian approach, that private properties are an instrument for promoting social development, intellectual property rights should also follow the same path. If there is a common duty to ensure individual empowerment by access to cultural, social, and political life, this obligation should also apply to copyrights.[70]

Hence, the exclusive rights granted to authors can be seen, in some cases, as obstacles to the realization of the good life by individuals, while limiting access to artistic and cultural works and restricting creativity for new works. The social justification of copyright is what supports the need to apply the social function in the copyright system, from the perspective that is every individual's duty to contribute to individual empowerment by access to cultural, social, and political life.

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[67] Alison Firth, '"Holding the Line" - The Relationship between the Public Interest and Remedies Granted or Refused, Be It for Breach of Confidence or Copyright' in Paul Torremans (ed), *Copyright and human rights: freedom of expression, intellectual property, privacy* (Kluwer law international 2004) 142.
[68] ibid 143.
[69] Senftleben (n 50) 37.
[70] Lueg (n 28) 316.

B. The common interests arising from Copyright

Copyrights must be recognized only when promoting society's development, by protecting or encouraging individual and common interests.[71] In this sense, the system is 'conditioned' by the achievement of certain objectives and its use *must be* measured in the light of the results that it obtains for the protection and realization of common interests' purposes.[72]

It means that copyright regulation can be seen as a "messy" law because it directs its message to different individuals and aims to cover distinctive values, like the private interest of authors on one side, and the common interest on the other. So, when grounding its protection, the copyright systems need to balance between two common interests: the rights accorded to the copyright owner and society's needs.[73] Hence, it's indispensable to identify the specific needs or interests that are wished to be promoted.

Historically, in France, for example, even though the 1957 Law on Literary and Artistic Property didn't define what were the interests of the public nor start any discussion concerning the necessity of a balance between the author's rights and the interest of the public, the later legislation of 1985 has generated some debate about the need for a balance between the needs of many parties, including the common interest.[74]

Moreover, this balancing exercise is not limited to the legislation process when granting exclusive rights. The common interest runs at four stages in the determination of copyrights: (i) during the establishment or recognition of a private right; (ii) the common interest can be the grounds for exceptions and limitations to copyrights. Also, (iii) common interest can provide a defense to a claim concerning copyright infringement[75]. And, lastly, (iv) the common interest can be the basis for judicial review of the application of an exclusive right. This

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[71] Fisher (n 32) 186.
[72] Geiger, 'Copyright as an Access Right' (n 1) 79.
[73] Stewart (n 41) 5.; Firth (n 55) 136–137.
[74] Davies (n 34) 152–156.
[75] In copyright systems such as the ones in civil law countries, this stage is less likely to exist since the copyright limitations tend to be specific and exhaustive in law.

means that the common interest analysis is a key tool to ensure that the copyright system is functioning reasonably and fairly.[76]

In copyrights, hence, the premise is that creating is worthwhile for society, so copyright would provide an income for creators, also stimulating creative processes, with the creation and dissemination of new works for the public, contributing to the common interest of cultural development.[77]

The function of artistic and literary works goes beyond the mere superficiality of entertainment, it shapes individuals, it contributes to the construction of individual and collective identities. It is not merely to provoke emotions, ideas, or volitions utilizing its symbols and patterns, but to validate them.[78]

Society needs intellectual productions since it's concerned with intellectual expression, an important instrument for cultural development. [79] In this sense, a rich artistic environment, concerning the shared language of a culture, creates more opportunities for members to flourish with creativity and refinement in communication and thoughts.[80] These create a more favorable environment for the development of old and the creation of new ideas.

From the users' perspective, the construction of identity is related to the constant search, consciously and unconsciously, for similarities and differences concerning others, and, therefore, culture is connected with this process at both collective and personal levels.[81]

Culture provides the means for individuals to structure their environment, develop their critical thinking, and create identifications with groups or other individuals. Therefore, it has the function of structuring society, serving as the basis for identities and structuring social conditions. It also contributes to individuals' construction of rewarding lives, since an attractive society is in

[76] Firth (n 67) 141.
[77] Davies (n 34) 5.
[78] Charles E Baker, 'The Social Function of Art' (1933) 8 Social Science 281, 291.
[79] Rupp (n 62) 36.
[80] Fisher (n 32) 190.
[81] Rupp (n 62) 12.

"communities of memory", when people feel identified.[82] Moreover, it promotes personal development, including intellectual skills, mental and physical abilities, and aggregating knowledge.[83]

The moment the work of an author enters the cultural landscape, for instance, through its publication, it must therefore be subject to the effervescent process of renewal inhering in the world of ideas and expressions.[84] Because of this, it is undeniable that copyrights also have a higher purpose of fostering culture and supporting the right to culture.

On the other side, it's also important to mention another perspective, from another author's side. In this sense, we can look at the common interest concerning the individuals' freedom of expression and also the freedom to create. Since artistic and literary works are important for the development of society, this process presupposes a considerable and constant flow of new production, which is linked to a common interest in promoting creativity.

From a cultural-sociology perspective, creativity refers to activities that fall under the labels "visual arts", "music", "design", "film", and "performance". It's part of this creative act the construction of verbal or sensory symbols into patterns that take hold, as it were, of the raw, unformed substance of the human spirit, to shape from it emotive, mental, or volitional sets.[85]

Also, it concerns activities that have the aim to produce arrangements of social meanings.[86] This means that when the author creates an artistic literary work, she not only inserts it in the external objective context but also the subjective context, of interpersonal experiences of society.

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[82] Fisher (n 32) 190.
[83] Taylor and Derclaye (n 65) 664.
[84] Senftleben (n 50) 38.
[85] Baker (n 78) 285.
[86] Vincent Bullich, 'Intellectual Property Rights and the Production of Value in a "Creative Economy"' in Ilya Kiriya, Panos Kompatsiaris and Yiannis Mylonas (eds), *The industrialization of creativity and its limits: values, politics and lifestyles of contemporary cultural economies* (Springer 2020) 3.

The way the work is presented and appreciated by the public is intrinsically related to the reality of society - which is formed by all individuals. It's part of the purpose of cultural works to demonstrate the relation between the author's feelings, set of information, and expressions with the individual and collective experiences of those who consume the works.

Moreover, it's important to make a distinction, because, nowadays, copyright rightsholders are seen as *large, impersonal, and unlovable corporations.* After all, usually are the ones with enough financial power to publish and edit artistic and literary works.[87]

In this sense, some could even argue there should be a difference between works considered with greater weight for cultural development from works made only for entertainment. For example, should a novel be treated with the same cultural importance as a reality TV show? To answer this question, it would be necessary to investigate who determines what art is, which is extremely arguable and controversial, but outside the scope of the present work.

However, what can be indicated is that the state should not determine that the social function of copyright should only apply to certain - culturally valuable - works and not to others. Both in the common law system and in civil law countries, there is no analysis of the quality of artistic and literary works to determine whether they should be protected by copyrights. What counts is the originality and the expression of the author's own creation.

Nevertheless, this kind of distinction in public policy could lead to greater segregation of already marginalized artistic and cultural social groups and prevent the development of future ones.[88] This differentiation generates social segregation, in which only certain "types" of artistic work are considered valuable to society, both culturally and economically. Therefore, only certain

[87] Jane Ginsburg, 'How Copyright Got a Bad Name for Itself' (2002) 26 Colum. J. L. & Arts 61, 61–62.
[88] Joe l. Kincheloe, 'Says Who? Who Decides What Is Art?' (2003) 212 Counterpoints 49, 53.

authors will have the necessary incentives to continue creating new works, and society will lose out on artistic and cultural plurality.

Thus, creating a distinction between culturally valuable works and every day works for mere entertainment conflicts with the social function of copyright to promote creativity and the development of individuals in society. It's important not to differentiate between "good art" and "bad art" at an institutional level. On the contrary, this distinction should be made only on a personal level, precisely because of individual experiences when accessing artistic and literary works.[89]

Furthermore, the common interest of the users doesn't mean that the public should be accessing and using works without any remuneration. The balance aimed by the common interest in the copyright system must provide meaningful incentives to authors, while allowing other authors to create their *predecessors' endeavors*, and also reasonable access for the users to enjoy the works.[90]

Hence, the copyright system is structured within the social context in which people live. It delimits what is acceptable in social relations concerning artistic and literary works; it models the interaction between authors, users, and society. It means that the way we interpret copyrights defines the kind of society we want to build.[91]

C. Copyright limitations: Is there room for malleability?

Copyright limitations are important to regulate industry practice and competition.[92] These exceptions are tools for the legislators to demarcate the scope of the rights, to maintain the balance of right holders' and user's rights. Also, these areas of freedom are a guarantee that the author can create freely, since for creating, he must use forms to reappropriate works creatively.[93]

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[89] ibid 51.
[90] Ginsburg (n 87) 63.
[91] Pekka Heikkinen, 'Communicative Approach to Copyright Law' in Niklas Bruun (ed), *Intellectual Property Rights Beyond Rights* (WSOY) 80.
[92] Senftleben (n 50) 23.
[93] Christophe Geiger, 'Les exceptions au droit d'auteur en faveur de la création dérivée' in International Literary and Artistic Association (ed), *Derecho de autor y libertad de expresión: actas de las Jornadas de Estudio ALAI: 19-20 junio 2006, Barcelona/ Droit d'auteur et liberté*

The balance between copyrights granted and their limitations is not permanent and immutable.[94] On the contrary, the technological development of our society the development of technology in our society instigates changes in this balance, with the creation of new limitations – such as the introduction of the text and data mining exception to the DSM Directive, or mechanisms to ensure statutory remuneration for copyright holders, like the levy's fees.

Moreover, copyrights, as general property rights, not only limit the opportunities for individuals to act, since they grant exclusive rights to authors, preventing third parties from passing on these rights, but they also define rights between the authors themselves.[95] For example, when internalizing the idea/expression dichotomy, it also draws a line between protection and freedom of creation.

From the civil law perspective, copyright conceives broad exclusive rights, in a way that it provides, however, some specific and limited exceptions or limitations for these rights.[96] But this natural law approach means a general lack of flexibility in the law of copyright, like in the EU and its Member States, preventing – unlike the United States – the permission of "fair use".[97]

Yet, this more rigid structure of civil law systems results in legislation often failing to follow social advances, creating a mismatch between rights and emerging social norms, in a sense that on one hand, we have the fact that the author's rights systems have gradually lost much of their openness, and on the other, there is the increased need for flexibility in copyright law.[98]

Also, the CJEU already stated in its judgment on the *Infopaq* case[99] as a constricting factor, that limitations and exceptions must be narrowly

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d'expression: actes des Journées d'etude ALAI/ Copyright and freedom of expression: proceedings of the ALAI Study Days (Huygens 2008) 340.
[94] Senftleben (n 50) 34–35.
[95] Heikkinen (n 91) 80.
[96] Senftleben (n 50) 22.
[97] Hugenholtz (n 8) 418.
[98] ibid.
[99] *Infopaq International A/S v Danske Dagblades Forening Case C-5/08* [2009] ECJ ECLI:EU:C:2009:465.

construed.[100] This restrictive interpretation is an obstacle to keeping copyright rules in line with social developments, as it constrains further any legal progress beyond the limits imposed by constraint legislation of copyright limitations and exceptions.

There is no denial concerning the need for a cohesive and secure copyright system, considering the interests it protects. however, a system that remains restricted and closed to changes in interpretation according to social needs represents an obstacle to the development of creativity and society as a whole.

Additionally, there is not much evidence concerning the future of this interpretation in the Court, whether it would be replaced or modified by greater flexibility concerning the balancing exercise between copyrights and fundamental rights. However, given other positions maintained by the CJEU on other aspects of copyright, even in the face of criticism from scholars and opinions from general advocates,[101] the chances of a modification leading to greater flexibility of copyright limitations beyond those contained in Art. 5 of the InfoSoc Directive, unfortunately, do not tend to be viewed with great hope.

On the other hand, it's important to mention that minimal flexibilities may be found in all elements of this rigid structure, in the general limits of copyright, like in the definition of the subject matter, in the scope of protection, and in the duration of the exclusive rights. Also, the statutory limitations (or 'exceptions') reflect a multiplicity of cultural, social, informational, economic, and political goals and desires.[102]

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[100] Hugenholtz (n 8) 428.

[101] As was the case of interpretation of "communication to the public" within the hyperlinking context, in which the CJEU maintained its concept of "new public", which emerged in the judgment of the SGAE case, based on an interpretation of the 1978 WIPO Guide to the Berne Convention, although it is an inadequate interpretation. this construction has been criticized, because this "new public" was part of the interpretation of Art. 11bis(1)(iii) Berna Convention, but it was used by the Court as interpretation of Art. 11bis(1)(ii) Berna Convention. In this sense, the interpretation of Art. 11bis(1)(ii) concerning the 1987 Guide contains the expression "new communicator" and not "new public". However, the Court has maintained its inadequate interpretation in subsequent cases, such as in the recent *VG Bild-Kunst* case. (Eleonora Rosati, 'When Does a Communication to the Public Under EU Copyright Law Need to Be to a "New Public"?' (2020) 45 European Law Review 802, 820.)

[102] Hugenholtz (n 8) 420.

Still, the inherent social dimension of copyright law has, hence, progressively been lost of sight by policymakers to the best benefit of strictly individualistic conceptions of individual protection.[103]

Regarding the EU law, the InfoSoc Directive provides grounds for the harmonization of some aspects of copyright and related rights in the information society. It's interesting to comment that this Directive was a concession to the entertainment industries, to create more incentives for the necessary investments of the digital age.[104] Thus, there is a need for political motivation to change the current copyright system, in a way that the law can accommodate the interests of both sides, rightsholders, and society, not only the interests of one small group.

Nevertheless, the InfoSoc Directive contains some issues, which make clear the need for flexibility in copyright limitations. The first one is that the list of limitations and exceptions is exhaustive, so Member States are not free to stretch the limitations and exceptions or create new ones outside those provided by Article 5. This represents an obstacle to solutions to new technologies and dynamics arising from the digital environment.[105]

It is no exaggeration to indicate that there is currently a crisis in copyright, with increasing social pressure to abolish exclusive rights and piracy, and one of the reasons for this is precisely this gap between current copyright rules and the social norms of today's society.[106]

Another deficiency of the InfoSoc Directive is that not only the list of limitations and exceptions is exhaustive, but also it is optional. Apart from, the exception of temporary acts of reproduction provided for in Article 5(1) InfoSoc Directive, the implementation of all other limitations and exceptions is subject to the discretion of each Member State.[107]

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[103] Geiger, 'Copyright as an Access Right' (n 1) 74.
[104] Reto Hilty and Kaya Köklü, 'Limitations and Exceptions to Copyright in the Digital Age. Four Cornerstones for a Future-Proof Legal Framework in the EU' in Irini A Stamatoudi (ed), *New developments in EU and international copyright law* (Wolters Kluwer 2016) 285.
[105] ibid.
[106] Hugenholtz (n 8) 417.
[107] Hilty and Köklü (n 104) 285.

These aspects, therefore, may represent an obstacle to the implementation, by judges, of the three-step test[108] incorporated in the InfoSoc Directive in its Article 5(5) and also Recitals 15 and 44, because it takes way the possibility of flexibility in judgments that deals with situations outside the limitations provided in Article 5.

The three-step test as a tool to achieve greater malleability concerning copyright limitations is recognized in the international sphere, under Article 9(2) Berne Convention, Article 13 TRIPs, and Article 10 WCT. It allows the compensation of an unreasonable prejudice to legitimate interests of the copyright owner, through a payment of equitable remuneration.

Precisely, it creates space for the implementation of copyright limitations at a national level.[109] At the 1967 Stockholm Conference, for example, the three-step test was explicitly recognized about the exemption of private copying.[110] Also, in a follow-up document to the Green Paper underlying the Information Society Directive, the European Commission had referred to the three-step test as a "guiding principle". [111] Moreover, the Max Planck Institute for Innovation and Competition published a declaration, concerning the need to balance interpretation of the three-step test in copyright law.[112] This means that there is a consistent international debate as to the appropriate balancing exercise in copyright law.

Even though the CJEU has not taken a clear position on the interpretation of the three-step test yet, the analysis from case law suggests a restrictive approach to copyright limitation. In the *Pelham* case, Art. 5(5) InfoSoc could be seen as a second stage of as a second phase of narrowing limitations, in the sense that the

[108] Meaning that exemptions for copyrights should be permitted in special cases, if it doesn't conflict with normal exploitation of the work and as long as it doesn't unreasonably prejudice the legitimate interest of rightsholders.
[109] Martin Senftleben, 'Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law' in Graeme B Dinwoodie (ed), *Methods and perspectives in intellectual property* (Edward Elgar 2013) 53.
[110] ibid 57.
[111] ibid 51.
[112] Christophe Geiger and others, 'Declaration A Balanced Interpretation Of The "Three-Step Test" In Copyright Law' (2010) 1 JIPITEC.

exemptions can be incorporated by Member States, in those specific cases and if it complies with the three-step test.[113]

Yet, the three-step test of Article 5(5) InfoSoc Directive can be understood more flexibly, from an interpretation based on international practices as suggested by the international provisions where this tool originated, on TRIPS, Berne Convention, WCT.[114] However, any attempt of considering the common interest in the copyright system will have to, necessarily, satisfy the three-step test, considering its establishment in the international scenario.[115]

Although the scenario described above may seem discouraging for the pursuit of greater malleability in copyright concerning the EU, there is some hope. Recitals 3 and 31 of the InfoSoc Directive provide that the harmonization effected by that directive aims to safeguard a *fair balance* between the interest of copyright and related rightsholders and, also, the interests and fundamental rights of users of the works and the common interest.[116]

In this sense, it can be stated that copyright limitations lie primarily in the application of fundamental rights and freedoms.[117] As recognized in the *Pelham* case, there must be a balance between copyrights and other fundamental rights, including freedom of the arts, freedom of expression, and cultural rights, provided by Article 11, Article 13 EU Charter, and Article 10(1) ECHR, to promote *the public exchange of cultural, political and social information and ideas of all kinds*.[118]

Concerning the relationship between intellectual property rights and fundamental rights, we often see some ways of analyzing it, as opposing or even complementary to each other. There is an approach in which the balance of

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[113] *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben Case C-476/17* [2019] ECJ ECLI:EU:C:2019:624.
[114] Senftleben (n 19) 57.
[115] Firth (n 67) 146.
[116] 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.
[117] Senftleben (n 50) 23.
[118] *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben Case C-476/17* (n 113) 8.

interests was already established by the legislator and interfering in this balance would be undemocratic. It would mean that fundamental rights shouldn't be used as a tool for interpreting copyrights and their boundaries. On the other extreme, there is the belief that intellectual property rights shouldn't even exist, because they are *per se* an infringement of fundamental rights.[119]

However, the approach that seems most appropriate is the one that considers both intellectual property rights and fundamental rights, in a complementary way. The balance of interests should be done by the legislator when codifying copyright and establishing the aims of the copyright system. Yet, this balance, sometimes, is not sufficient or adequate and must be done by the Courts, when applying and interpreting copyright limitations and exceptions based on fundamental rights.

Since copyright limitations are the tools to create the boundaries of the rights granted, they should be interpreted under their fundamental justifications. So, considering that copyright operates in the common interest of the creation of new works, to enhance cultural development, should allow enough flexibility for creativity.[120]

Hence, although there is a more restricted scenario at the European level, it can be said that there is flexibility in balancing interests in copyright, either by the limitations of the InfoSoc Directive or by the scope of fundamental rights. There is, of course, a political assertion in a more restrictive interpretation of copyright limitations, under Article 5 of the InfoSoc Directive.[121] However, this can be overcome through consideration of fundamental rights in copyright interpretation.

In Germany, the report of the Official Reasoning of the German Copyright Act indicated the public interest ("*Interessen der Allgemeinheit*") as a copyright limitation. In this report, it's recognized that copyright is subject to limits of the common interest, especially the access right to cultural goods, and the freedom

[119] Tuomas Mylly, 'Intellectual Property and Fundamental Rights: Do They Interoperate?', *Intellectual Property Beyond Rights* (Niklas Bruun) 186.
[120] Geiger, 'Copyright as an Access Right' (n 1) 102–103.
[121] ibid 102.

of intellectual creation, and this must be taken into consideration when establishing the limitations for those exclusive rights. In addition, it was felt that this assessment should be made so that copyright legislation keeps pace with the development of new technologies in society.[122]

Unfortunately, this approach was later modified, with the rise of copyright industries and the idea of a limitless copyright system. One example of this new mentality is the fact that Paragraph 24 of the UrhG was repealed with the harmonization brought by the InfoSoc Directive. This provision, which was the object of the dispute concerning the *Pelham* case later judged by the CJEU, provided the "right to free use" as a possibility of using copyrighted works without authorization, but under a proper remuneration.[123]

Yet, with the harmonization of the InfoSoc Directive, the implementation of the three-step test was made in a restrictive manner, which further undermines the exercise of the balance of interests, considering the social function. In this sense, the test has been applied in such a way as to excessively restrict copyright limitations and exceptions, without considering the public interest beyond copyright holders. Because of this, the test must be applied in such a way as to consider all three steps together, without limiting national legislations and courts to the limitations and exceptions contained in Art. 5 of the InfoSoc Directive.[124]

Hence, with all those developments, the public interest approach in Germany had to be reviewed.[125] Nevertheless, it shows that the idea of the social function of copyright and the need to balance the common interest when accessing the exclusive rights provided by the author's protections is not far from reality.

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[122] Deutscher Bundestag, 'Entwurf Eines Gesetzes Über Urheberrecht Und Verwandte Schutzrechte (Urheberrechtsgesetz)' BT-Drs. IV/270 30 <https://dserver.bundestag.de/btd/04/002/0400270.pdf>.
[123] *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben Case C-476/17* (n 113) 10.
[124] Geiger and others (n 112) 120.
[125] Senftleben (n 109) 42.

D. The Social Function applied to Copyright

Having established what are the copyright interests, justifications, and limits, it is possible to analyze how the social function theory can be applied to this system. In this sense, most rights are not absolute, as they tend to overlap and reinforce or limit each other's extent, and, also, they are self-limiting in nature, insofar as rights confer certain allowances within their boundaries.[126] So, considering copyrights, this logic shouldn't be different, in the sense that they shouldn't be regarded as absolute.

If it's understood that copyright has justifications beyond the natural right and the reward for the work of authors, also as a stimulus to creativity and from the perspective of the social importance of artistic and literary works, it is evident that the protected rights must be weighed from the perspective of the common interests of society.

Culture plays a crucial role in our society. It shapes the conceptions of the way individuals want to live their lives, and copyrights permit this, by contributing to the dissemination of different perceptions of the world.[127] The social importance of artistic and literary works for the construction of culture is evident. Because of this, copyrights shouldn't serve only the interests of the rightsholders or as an incentive to creativity and the production of more works, from the reward perspective, if society is not able to enjoy them.

The grant of protection conferred by the exclusive rights to rightsholders must be *insofar and inasmuch* as they enable cultural development. And here, is important to be aware that the interests of society are a reason for granting protection, under copyright justifications, nevertheless, the common interest is also a reason for limiting this protection.[128] The limits imposed by copyrights' exclusive rights are actually the limits of an exception to the rule of freedom.[129]

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[126] Mylly (n 23) 190.
[127] Rupp (n 62) 14.; Senftleben (n 50) 26.
[128] Geiger, 'Copyright as an Access Right' (n 1) 83.
[129] Geiger, 'Les exceptions au droit d'auteur en faveur de la création dérivée' (n 93) 342.

The legislator's purpose in granting protection is not just to command individuals directly, but to create the conditions for a good society through legislation.[130] Laws should create the framework for producing the best conditions for social development, just as culture structures social environments.

Furthermore, another assessment on copyright should be analyzed, from the point of view of creativity. The social function of copyrights is important not only to balance the interests of users in accessing protected works but also to other artists so that these works can serve to create new works. In this sense, there is a lack of clarity concerning the establishment of a priority of the artist who is active now regarding the artist (or his successors in title) who was operating before, because the current protection covers mainly the prior works.[131]

In addition, the authors themselves benefit from society, since they develop as beings within it, and seek inspiration in everyday life, in a sense that it is unfair to aim for protection that disproportionately protects their interests to the detriment of the public. The authors are affected by their social environment and heritage.[132] Thus, there is no reason for the authors to be the only ones enjoying their productions, without the appropriate balance to permit users and other creators to benefit from the works.

An important side of the social function is that the reasons and the rights granted under copyrights must be examined through the lens of the public interests and common well-being, to ensure that the conditions for the exercise of those rights are following the aimed balance.[133]

It must be emphasized that this balance of interests in copyright in no way presupposes that its social function should give greater weight to the right of users and other authors to create new works over the protection of investments made

[130] Heikkinen (n 91) 80.
[131] Dessemontet (n 56) 118.
[132] Baker (n 78) 283.
[133] Geiger, 'Copyright as an Access Right' (n 1) 79–80.

by authors.[134] What is intended with the application of the social function when analyzing copyright is precisely to seek a balance between these interests, given that, at least in the European context, we find that greater weight is given to the exclusive rights of authors to the detriment of other interests, such as those of users and society.

Copyrights and common interests can be seen as opposite sides, because on one hand we have the aim to protect the authors, to give them enough reward and incentive for their works, and, on the other, there is the common interest of providing greater access to works for cultural development. If there is too much power to only the rights granted to authors in the copyright system, the interests of the common good are suppressed.[135]

Furthermore, sometimes, there is a tendency to understand that an emphasis on the proprietary nature of intellectual property rights would neglect the conditions under which copyrighted materials are used; or that an emphasis on common interests would ignore the conditions necessary for the creation of works.[136] In other words, the perspectives are often seen as antagonistic and exclusive, when what is proposed is a balance between the two, not the total preponderance of one or the other.

Hence, concerning intellectual property rights, when the state grants a specific right to one individual, it imposes, simultaneously, a duty to the rest of the community, to respect that right conceded. Likewise, a duty to the public is imposed on the author of the protected work.[137]

Yet, historically, the need for balance has been present as a goal within intellectual property rights, when analyzing the goal of exclusive rights as an incentive to create and the exceptions and limitations of it concerning the public

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[134] François Dessemontet, *Intellectual Property and Information Law: Essays in Honour of Herman Cohen Jehoram* (Jan JC Kabel, Herman Cohen Jehoram and Gerard JHM Mom eds, Kluwer Law International 1998). P. 116.
[135] Mylly (n 119) 211.
[136] Dreier (n 33) 297.
[137] Geiger, 'Copyright as an Access Right' (n 1) 93.

interests for innovation, competition, and free expression.[138] Therefore, the pursuit of the balance between interests is inherent to intellectual property rights, which means that is also to copyrights.

In this sense, the inclusion of copyright within the protection of property at the constitutional level[139] often guarantees that the social function of property is extended to intellectual property[140], since historically, this need for balance between individual rights and common interests can be traced back to property rights.

From the international perspective, Article 7 TRIPs Agreement provides that the protection of intellectual property rights should take into consideration the balance of interests between authors and users. Besides, Article 8 of the same provision emphasizes the need for member states to prevent abuses by rightsholders. So, the rights in intellectual property can and/or must be developed in such a way that they realize social interests. Likewise, the preamble of the WIPO Copyright Treaty of 1996 recognized the need to keep a balance between the rights of the authors and the common interest.

Since there is this aimed to consider as common interest the cultural, economic, and social consequences of copyright, it should be conceived in such a way that it contributes as much as possible to the development of those interests.[141] So, ideally, the social function of copyright should be considered from the moment that the legislation is being constructed to the moment the law is applied by judges in concrete cases.

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[138] Michael A Carrier, 'Cabining Intellectual Property through a Property Paradigm' (2004) 54 Duke Law Journal 1, 4.

[139] For example, in Germany, Article 14 of the GG states that copyright is treated as "property" under German Law.

[140] For example, the Brazilian Federal Constitution contains in its Articles 1, 3, 5, 6 and 7 provisions concerning the recognition of the social function to property, contracts, civil liability. The US Constitution also recognizes the social function of copyrights in its Article I, Sec. 8, cl. 8. In Germany, In Germany, the social function applied to copyright can be traced in the case *Germania 3, 1 BvR 825/98* [2000] Beschluss der 2 Kammer des Ersten Senats Rn. 1-33, Richter Kühling, die Richterin Jaeger und den Richter Hömig.; in Brazil, in the Federal Constitution Article 14 of the GG states that copyright is treated as "property" under German Law.

[141] Geiger, 'The Social Function of Intellectual Property Rights, or How Ethics Can Influence the Shape and Use of IP Law' (n 3) 14–15.

For this, first, the legislator when drafting copyright protection legislation, should have clarified the reasons why these rights should be guaranteed, considering both individual and common interests. Hence, admitting that intellectual property law has a social purpose should, in principle, lead the legislature to check that copyright rules actually reflect their access aspect and, if not, correct them.[142]

However, in reality, this does not always happen, because there is pressure from certain interest groups.[143] Thus, the easiest way to ensure that copyright will be enforced under its social function and the common interest is through the balance between copyright and fundamental rights, when the law is applied by the judges in concrete cases, as the latter represents the limits imposed by society on individuals.

In this sense, fundamental rights should be used as a tool for ensuring the balancing exercise between authors' individual rights and the common interests of society when those are applied in practice. Judges when balancing fundamental rights with other rights are compelled to proceed with abstraction, inside the context of the proportionality test that the correct application of fundamental rights implies.

It means that fundamental rights create a balance between the different rights and verify if the situation of the case fits the purpose of the law. The advantage of this balancing exercise weighing fundamental rights with other rights is the possibility of using it as a defense, not merely an abuse or infringement.[144]

Hence, copyrights must be perceived in a broader context, also considering the expansion in its limits created by fundamental rights, in a sense that these are always interacting with other rights, in the balancing exercise.[145]

It means, in practice, that the results of this interaction between fundamental rights and other rights are derived from an analysis involving context, balancing

[142] Geiger, 'Copyright as an Access Right' (n 1) 90.
[143] Geiger, 'The Social Function of Intellectual Property Rights, or How Ethics Can Influence the Shape and Use of IP Law' (n 3) 14–15.
[144] ibid 19–20.
[145] Mylly (n 119) 203.

rights, and common interests of society,[146] what should be done when analyzing the rights conferred to authors of artistic and literary works. That's why the consideration of fundamental rights is extremely important and one of the most powerful tools to ensure the social function application to copyrights.

Moreover, in a first examination, it can be said that there is a dichotomy between the social function and the fundamental rights since it refers to the common good and the others to individual rights. Fundamental rights are human rights, and they represent the tools for individuals to make their own, autonomous, and independent life choices, essentials to guarantee human dignity.[147]

Although when one refers to fundamental rights, this relates to personal rights, the individual characteristic of these rights does not exclude the protection of the well-being of society. The reason is that, in addition to being connected to individual rights, fundamental values are also connected to the common interests of our society, which means that common interests are not the opposite of individual freedoms.[148] Individual rights, such as fundamental rights, serve as a boundary for the delimitation of common social interests.

Fundamental rights are not the result of the social function theory applied in copyrights; they must be perceived as a means to achieve the balancing exercise between the common interests of society and the rightsholders' interests.[149] In this sense, attaching intellectual property rights to fundamental rights can serve to guarantee that copyrights are respecting their social function.[150] Also, individual rights shouldn't be seen on their own, because they are always interacting with each other. Because of this, there is no dichotomy between the social function of copyright and fundamental rights.

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[146] ibid.
[147] Janneke Gerards (ed), *Fundamental Rights: The European and International Dimension* (Cambridge University Press 2023) pt Preface.
[148] Mylly (n 119). p. 190.
[149] Geiger, 'The Social Function of Intellectual Property Rights, or How Ethics Can Influence the Shape and Use of IP Law' (n 3) 19.
[150] Geiger, 'Copyright as an Access Right' (n 1) 93.

Concerning this, for example, Article 15 of the ICESCR provides the requirement for states to respect the necessary freedom for creative activity, like an *in-built obligation* to balance the rightsholders' rights with the common interest.[151] Because, in this provision, the reference to the development and the diffusion of culture is stated as a goal for the Member States at the same time that there must be moral and material protection for the rightsholders of artistic works. This means that even though we are facing an individual right, it also carries a common interest purpose. Furthermore, the diffusion of culture can be understood as the access right of the user to artistic productions, but also as the right to create and generate artistic works, as will be later exposed.

The classical foundations of IP are placed in a stable balance of the international human rights instruments, such as UDHR and ICESCR, that recognize fundamental rights concerning the common interest within the copyright context. In this sense, the natural law justification is respected with the admission of exploitation rights and moral rights for the creator; and the utilitarian justification also, because this acknowledgment contains the common interest of the promotion of creativity and dissemination spread of culture.[152]

In the *Metronome Music v. Music Point Hokamp* case, the CJEU assessed the compliance of the Directive on Rental and Lending right with the freedom to pursue a trade or profession, and the property right. On that occasion, the Court recognized the protection of literary and artistic works as a common interest of the EU under Article 36 TFEU, in a sense that it can be considered as a justification for restrictions on the free movement of goods and that the cultural development and encouragement of artistic and literary creation are an objective of the EU under ex-Article 151 (now 167) of the EC Treaty.[153]

However, in the *Metronome Music v. Music Point Hokamp* case, the Court and the Advocate General neglected the common interest of the provisions cited in

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[151] Mylly (n 119) 198.
[152] Geiger, 'Copyright as an Access Right' (n 1) 82–83.
[153] *Metronome Musik GmbH v Music Point Hokamp GmbH Case C-200/96* [1998] ECJ ECLI:EU:C:1998:172.

the decision and the opinion. As indicated by Tuomas Mylly, *cultural development of the Community and encouragement of artistic and literary creation is not all about creating new exclusive rights functioning as incentives*.[154]

It's undeniable that there is a recognition, within European Law, of the importance of the development of artistic creations, as provided in its Treaty, which can justify this balancing exercise between exclusive copyrights and access to culture and freedom of arts.

Within the EU perspective, a good example of the balancing exercise between exclusive rights and common interest comes from Germany, especially the provisions of the *Grundgesetz für die Bundesrepublik Deutschland*. In Article 14(2) there is the inclusion of the idea of *Sozialbindung*, meaning that all the use of the property must also serve the common good, being the legislator is expected to establish this balance between property rights and other parties' interests. [155]

Additionally, the BVR has already been stated as being the legislator's task for the determination of the social function of the rights guaranteed in the Basic Law, also meaning to stimulate the development of copyrights following the common interest.[156] Likewise, the idea of the application of this view in copyright law can be verified through the jurisprudence of the BVR[157], which implies that the common interest softens the strict alignment of German copyright law with the author and his interests.[158]

Nonetheless, it's important to note that from the German perspective, this analysis of the common interest shouldn't mean a copyright system that aims to distribute all the profits only among society, but only protection of some user's rights against the preponderance of rightsholders' exclusive rights.[159] Because of this, in the Official Reasoning of the UrhG, it was suggested that in many cases,

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[154] Mylly (n 119) 211.
[155] Senftleben (n 50) 28. Davies (n 34) 203.
[156] Davies (n 34). P. 232.
[157] See "Kirchen – und Schulgebrauch" BVerfGE 31, 229 (240-241); "Papier" 1994.
[158] Senftleben (n 50) 28.
[159] ibid 29.

when there is the necessity to override the author's exclusive rights in favor of common interest by securing the right to remuneration, for example.[160]

Identifying a social function for intellectual property rights would not be of much benefit if one could not draw consequences from it, either at the level of the contour of the rights or at the level of the application of the rights.[161] That's why it is so important to apply the social function to copyright in concrete cases, enforcing it through fundamental rights.

Also, one should not disregard the realization of the balance of interests, and the application of the social function, through other legal instruments, in addition to fundamental rights, such as legislation dealing with media, contracts, consumer, and antitrust laws.[162] The common interest concerning copyrights can manifest in other spheres outside the copyright system, shaping the application of copyright laws through other means.

However, those mechanisms are not as strong as the fundamental rights, which are generally not protected by constitutional norms or hierarchically stronger than ordinary legislation. Thus, they become a not a viable alternative when balancing the interests of authors and society.

Hence, the application of the social function to copyright recognizes two rights, the access right of the users and the right to create/reuse. They are the result of the interpretation and application of protection for authors, taking into account the common interests of the socio-cultural development of the community.

1. Access right

In this regard, the most common user right arising from the application of the social function to copyright is society's right of access to these protected literary artistic works, grounded in the right to culture.

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[160] Deutscher Bundestag (n 122) 30.
[161] Geiger, 'The Social Function of Intellectual Property Rights, or How Ethics Can Influence the Shape and Use of IP Law' (n 3) 14.
[162] Dreier (n 33) 309–312.

As exposed before, there is a common interest arising from the necessity of access to artistic and literary works for the development of society. This means that copyright protection has the task of facilitating access by users to cultural works.[163] From this perspective, limitations to copyrights are a means of raising *rights* for the users, not just their interests, as having equal value as the exclusive rights granted to the authors.[164]

Since culture contributes to the development of society and the delivery of goods, and being these a common interest, the way of achieving it is by ensuring that the population is exposed to literary and artistic works, through their access to such works.[165]

So, we have on one side the necessity of the definition of the private exclusive right to be granted for authors, to secure enough incentives for continuity creating works and also as a recognition for what they have done. And, on the other side, there is the broader interest of society that the public must be able to have adequate access to the fruits of the author's efforts.[166]

In this regard, the access right is much linked to rights of cultural life participation, based on human rights instruments. Article 27(1) of the UDHR protects everyone's right to freely participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement and its benefits. Also, Article 22 of the UDHR provides the protection of economic, social, and cultural rights that are considered indispensable for the development of their personality.[167] Likewise, Article 15 ICESCR provides the recognition of the right of everyone to be part of the cultural life, enjoying its benefits.[168]

The discussion on the need to ensure limitations to copyright to facilitate access to protected works and, consequently, socio-cultural development - provided that

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[163] Davies (n 34) 231.
[164] Geiger, 'Copyright as an Access Right' (n 1) 94.
[165] John R Clammer, *Cultural Rights and Justice: Sustainable Development, the Arts and the Body* (Palgrave Macmillan 2019) 21.
[166] Torremans (n 5) 2.
[167] United Nations, Universal Declaration of Human Rights.
[168] United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights.

it does not result in abuses against authors - has taken place since the establishment of the Berne Convention.[169]

At the EU level, in the previously mentioned *Metronome Music v. Music Point Hokamp* case, Advocate General *Tesauro* referred to Article 128 (now 151) EC Treaty in his analysis, referring to the access right concerning the right of every person to enjoy contact with cultural productions, as being recognized in international instruments concerning human right.[170]

Furthermore, the access right does not mean by any chance "free access" to copyrighted works, nor the abolition of any remuneration or exclusive right of authors because of the right of individuals to have guaranteed access. It raises the importance of the possibility of accessing artistic and literary works in adequate and fair means, without monopolization of prices or unjustified barriers to access.

A copyright system that tends to present a stronger protection of author's exclusive rights, can limit the circulation of works, in a sense that it may give the creators more power to choose to whom and when to put their works in the market.[171] Because of this, it has impacts on the user's access to the works, since it provides rules for the transactions by which the works reach users, such as licensing, and distribution agreements.

Although the general logic of copyright would be that the exclusive rights granted to authors create the incentive for new works, thus wider dissemination of artistic and literary works, if considered from the economic rights point of view, when there is a big range of prices varieties for the access, it can create a restriction of access for those who cannot afford to access the protected works.[172]

Copyright's law of dissemination, which compasses all the regulations and rules applicable to the market and consumption of copyrighted works, can be a legal base for the access right, expanding and enhancing the user's possibility of

[169] Senftleben (n 50) 23.
[170] Mylly (n 23) 210.
[171] Jacob Noti-Victor, 'Copyright's Law of Dissemination' (2023) 44 Cardozo Law Review 1769, 1810; 1815.
[172] Dimaggio and Useem (n 60) 142–144.

access.[173] One way of achieving this is through compulsory licenses or levies, establishing a price setting for the use or access of works since the high costs of licensing and access can be a barrier to access to artistic and literary works.[174]

Therefore, considering that access to culture contributes to the construction of individualities, as well as to the capacity for abstraction and the formation of critical thinking, if only a portion of society has the conditions to access artistic and literary works, only this portion will be able to exercise the process of cultural participation, and, hence, social development, effectively.

It means that, from a sociological point of view, guaranteeing access to artistic and literary works is also a mechanism for reducing inequalities.[175] The right to access copyrighted works facilitates cultural participation and social development. It is related to the distributive justice concept of Aristoteles, in the sense that as many individuals as possible should have access to sources of information and arts.[176] If this is guaranteed in the copyright protection system, through the application of the social function, there is the security that most of the population can participate in cultural construction, without this being a privilege for a minority.

Moreover, it's important to remember that copyrights are not simply preconditions, even when considering the natural law approach for its justification. Just expressions that are the result of a creational process in which the freedom of the author has been greater to imposed requirements and which neither interfere excessively with future creations nor cause unjustified harm to legitimate common interests, such as cultural participation, should be entitled to copyright protection.[177]

They are a guarantee recognized by law to facilitate cultural participation and access to the benefits of scientific progress. As other individual rights, they need

[173] Noti-Victor (n 171) 1773–1774.
[174] ibid 1789.
[175] Mylly (n 23) 215.
[176] Fisher (n 32) 190.
[177] Geiger, 'Copyright as an Access Right' (n 1) 101.

to be balanced with other common interests, under the light of international Human Rights instruments, fundamental rights, and common interests. In this sense, the rights granted to authors and creators should not only enable but also facilitate cultural participation and contribute to social development, rather than constrain it.[178]

2. Right to create/reuse

When discussing the social function of copyrights, the user's access right relates to the cultural participation of society and its access to copyrighted works. The access right provided by the application of the social function of copyrights represents a tool for the dissemination of artistic and literary works since it ensures the possibility of access by a greater number of individuals.

However, in a culturally rich society, access alone is not enough. The possibility of creating new works must be guaranteed. It means that it should go further, in the sense that the social function should provide the basis not only for the access right but also for a right of creation and reuse.

The same system that permits the author to profit from his works can also be the one that prevents other authors from creating if the copyrights are too broad in their scope and too strict concerning limitations.[179] Thus, excessive inflexibility can lead to the rejection by the authors of their rights when it can be in a conflict situation with the function of their creative process.[180] It means that it is at least necessary to ensure that copyright does not impede future creation.[181]

In a similar way to Lavoisier's law of conservation of mass, in which in nature nothing is created or destroyed, everything is transformed, in the creative industry it is practically impossible to create something completely innovative, without any inspiration. Not least because inspiration can often be subjective, as

[178] Torremans (n 5) 9–10.
[179] Christophe Geiger, 'Copyright and the Freedom to Create - A Fragile Balance' (2007) 38 International Review of Intellectual Property and Competition Law, v.38, 707-722 (2007) 707.
[180] ibid 714.
[181] Geiger, 'Les exceptions au droit d'auteur en faveur de la création dérivée' (n 93) 341.

we are exposed to so much information at the same time that we don't even remember the creative source of our perceptions.

As a result of the social function application on copyrights, it is important to consider the right of creation and reuse from the perspective of a right of the user of artistic works. There is a social interest in the abundance of artistic and literary works so that individuals are exposed to as much cultural diversity as possible. In this sense, since part of the intrinsic creative process relates to taking inspiration from already existing works, a copyright system cannot be so restrictive as to prevent the transit of creativity between artists and works.[182]

The right of creation and reuse has a connection with the interest of a later author in using the material of his predecessors when he depends on the use of such material for creating a new work.[183] When recognizing that copyright balance has two sides, the one from authors and the one from users[184], we must also consider the side of the users that are not only consuming the works but also creating new works.

References and allusions to already existing literary and artistic works are a feature of works of the intellect that track through the different eras of intellectual creation. The notion of intergenerational equity[185] underlines the paramount importance of exempting transformative uses of copyrighted material.[186]

Moreover, at first glance, there is a polarity between artists, on the one side those who created the previous works, and on the other side the users of today who will

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[182] Hayleigh Bosher, *Copyright in the Music Industry: A Practical Guide to Exploiting and Enforcing Rights* (Edward Elgar Publishing 2021) 151.
[183] Senftleben (n 50) 39.
[184] ibid 41.
[185] *The principle of intergenerational equity holds that, to promote prosperity and quality of life for all, institutions should construct administrative acts that balance the short-term needs of today's generation with the longer-term needs of future generations*, as defined in <https://publicadministration.un.org/en/Intergovernmental-Support/Committee-of-Experts-on-Public-Administration/Governance-principles/Addressing-common-governance-challenges/Intergenerational-equity> accessed 25 July 2023.
[186] Senftleben (n 50) 39.

be the authors of the future. But the concept of intergenerational equity, however, shows that these two 'poles', in reality, are the two sides of the same coin.[187]

There is a slight recognition of the right to creation and reuse in the idea/expression dichotomy, enshrined in international copyright protection instruments. However, the idea/expression dichotomy is inefficient in fostering creativity more broadly, as it limits the possibility of using a protected work only in terms of its concept, considering that sometimes it's needed more for new works. When the freedom of one author to create means that she should take an excerpt (recognizable) from the work of another author, the conflict cannot be solved by the idea/expression dichotomy.[188]

Yet, it is essential to emphasize that the right of creation and reuse arising from the application of the social function of copyright in no manner means permitting the infringement of copies of protected works as a rule. It should rather be a contribution to the balance of interests, so that copyright is improved, and its abusive use restrained, ensuring that the system fulfills its purpose of being an instrument for economic, cultural, and technological development and not as an end in itself.[189]

It proposes a flexibilization to accommodate the reality of the creative industry and maximize the possibilities of creation, contributing to the circulation of works in cultural development. It means that a balance must be found between the interests of two authors, the one who created the previous work and the other who wants to create new works and should have its creativity process respected.[190]

The way to enforce this right of creation and reuse in concrete cases is through the application of freedom of creation and freedom of expression, stated in Article 10 of the ECHR, for example. In this sense, the French Supreme Court, when deciding the case filed by Victor Hugo's heirs, against the publication of a

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[187] ibid 41.
[188] Dessemontet (n 56) 118.
[189] Guilherme Carboni, *Função social do direito de autor* (Juruá Editora 2008) 240.
[190] Geiger, 'Copyright and the Freedom to Create - A Fragile Balance' (n 179) 708.

sequel to the work 'Les Misérables', argued it was an infringement of the author's moral rights, even though considering it was already in the public domain, applied Article 10 ECHR to the case, balancing the exclusive copyrights with the freedom of creation.[191]

In this sense, within the framework of the European Union, the CJEU recognized the freedom of expression and creation. In the *Eva-Maria Painer* judgment, the Court analyzed one of the limitations in the InfoSoc Directive, under the light of fundamental rights, considering the fair balance between the right to the freedom of expression of the users of the work and the exclusive right of reproduction granted to authors.[192]

In this specific case, the fair balance was assured by the Court by favoring the exercise of the interest of the users concerning the right to freedom of expression over the interest of the author, regarding his exclusive right to reproduction, since the work was already made available to the public in a lawful way.[193]

Furthermore, in the *Telekabel* case, the CJEU upheld that the *users* also had rights that the judge must consider based on the freedom of expression and the right to information.[194] Likewise, in other cases[195], copyrights were considered as an exception to freedom of expression, and as being a limitation, should be interpreted narrowly and restricted to specific justified situations.[196]

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[191] ibid 707.
[192] *Eva-Maria Painer v Standard VerlagsGmbH and Others Case C-145/10* [2011] ECJ ECLI:EU:C:2011:798 40.
[193] Christophe Geiger, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union' in Irini A Stamatoudi (ed), *New developments in EU and international copyright law* (Wolters Kluwer 2016) 444.
[194] *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH Case C-314/12* [2014] ECJ ECLI:EU:C:2014:192.
[195] *Stichting Brein v Ziggo BV and XS4All Internet BV Case C-610/15* [2017] ECJ ECLI:EU:C:2017:456.
[196] Geiger, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union' (n 149) 445.

In Germany, for example, Art. 5(3) of the German Basic Law provides artistic freedom as was already applied as the freedom to create by the German Constitutional Court.[197]

Another way of finding a balance between the author's rights and the right to create/reuse could be achieved, as previously mentioned as a tool in copyright laws of dissemination, by statutory licenses for the use of artistic and literary works to produce new works, like a meeting point between interests.[198] In this case, the creators who would like to reuse a copyrighted work for creating a new work would pay royalties for the use, without the need of prior authorization of the rightsholders for this use.

Thus, although not as widespread, the right to reuse and to create has a basis in the legal instruments of copyright protection. In this sense, there is a need to confer artistic freedom horizontally, aiming at maximizing cultural production, considering that it is a common interest of society.

IV. Sampling: The need for application of the Social Function of Copyright

A. Court of Justice of the European Union and the *Pelham* case

One of the examples of the need to apply the social function in copyright is related to the necessity of greater flexibility to allow the sampling technique in musical productions. An important case held by the CJEU that slightly hints at the idea of social function was a case concerning the use of sampling in new musical work. Even though the case deals mainly with related rights, since it concerns the use of a phonogram by the sampling technique to create a new work, it's possible to verify, even if in a modest way, the recognition of a need to balance the various rights between the rightsholders and other artists, especially concerning the right to reuse and freedom of arts.

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[197] *Germania 3, 1 BvR 825/98* (n 140).
[198] William F Whiting, 'Compromise to a Correct Result: Retention and Modification of the Compulsory License in Proposed Copyright Law Revision' (1965) 53 California Law Review 1520, 1521.

In this case, the legal issues originated from the use of an approximately 2-second rhythm sequence from a phonogram of the group called Kraftwerk in the creation of a new song, from the producer Moses Pelham. So the question addressed to the CJEU was whether this use could be considered an infringement, since only 2 seconds of a rhythm sequence were taken from a phonogram and then transferred to another phonogram and whether that amounts to a copy of another phonogram within the meaning of Article 9(1)(b) of Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property.[199]

To resolve the situation, the CJEU considered Recitals 3, 4, 9, and 31 InfoSoc Directive, which serves as a guide for the interpretation of the articles of such legal instruments. In those recitals, it is stated that the legislators intended to introduce this balancing of interests and rights exercise into the European copyright system, to ensure the development of creativity in the Digital context. In this sense, the Court noted that EU law has to be interpreted and applied in the light of fundamental rights, such as the ones provided in the EUCFR.

Regarding this, the CJEU assessed in which way the fundamental rights set out in the EUCFR should be considered when establishing the scope of protection of the exclusive right of the phonogram producer to reproduce (Article 2(c) of the InfoSoc Directive) and to distribute (Article 9 (1)(b) of Rental and Lending Rights Directive) its phonogram and the scope of the exceptions of limitations to those rights, under Article 5(2) and (3) of InfoSoc Directive and the first paragraph of Article 10(2) of Rental and Lending Rights Directive.[200]

It's important to note that the InfoSoc Directive does not define the concept of what would be a “reproduction in whole or in part”, considering the phonogram case. So, for the Court checked the meaning and scope of those words, it reflected on their usual meaning in everyday language, considering the context of the

[199] *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben Case C-476/17* (n 113) 6.
[200] ibid 7.

provision, following its understanding in *Deckmyn* case[201]. Moreover, the CJEU did a balancing exercise between the exclusive rights provided in the Directives and other fundamental rights, as previously done in *Renckhoff* case[202].

Hence, for the Court it was evident that from the interpretation of Article 2(c) of the InfoSoc Directive, the reproduction of a phonogram, even if is short, should be considered an act of reproduction 'in part', therefore, such a reproduction falls within the exclusive right granted to the producer of such a phonogram under the provision. However, where a user, while exercising the freedom of the arts, takes a sound sample from a phonogram to use it in a new work, in a modified form unrecognizable to the ear, it's not considered an act of reproduction under that provision.[203]

With this understanding, the CJEU recognized that the technique of 'sampling' when used to create a new work constitutes a form of artistic expression, protected by the freedom of the arts, which is considered a fundamental right under Article 13 of the EUCFR. However, to enjoy this prerogative, the user of a sound sample and author of a new work has to modify the piece of the already existing phonogram in the sense that it becomes unrecognizable in the new work.[204] With this process, a new and distinct work is created.

Furthermore, Recital 7 of the InfoSoc Directive establishes that one of the goals of that Directive is to harmonize the national legislations of the Member States without creating any conflict with international conventions concerning copyrights and related rights.

Because of this, the Court remarked that a phonogram that contains sound samples transferred from another phonogram does not constitute a 'copy' of that

[201] *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others C-201/13* [2014] ECJ ECLI:EU:C:2014:2132.
[202] *Land Nordrhein-Westfalen v Dirk Renckhoff C-161/17* [2018] ECJ ECLI:EU:C:2018:634.
[203] *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben Case C-476/17* (n 113) 7.
[204] ibid 8.

phonogram, within the meaning of Article 1(c) of the Geneve Convention, because it does not reproduce all or a substantial part of that phonogram.[205]

According to Article 1(c) of the Geneve Convention, a 'duplicate' means a work containing sounds extracted *directly or indirectly from a phonogram and which embodies 'all or a substantial part' of the sounds fixed in that phonogram*.[206] Even though the Geneva Convention is not part of the EU Law, it's part of the international copyright system and, therefore, under Recital 7 of the InfoSoc Directive, must be considered when interpreting the provisions of that Directive.

The Court also mentioned Paragraph 24(1) of the UrhG, which was recently revoked. This German provision was used to permit the "right to free use", that set out a limitation to the scope of copyright protection, considering the inherent inspirational process of cultural creation. In this sense, the German legislator introduced a limitation outside those permitted under Article 5 InfoSoc Directive. And, as already held by the Court in the *Renckhoff* and *Soulier* cases[207], that list of exceptions and limitations of that provision is exhaustive.

Hence, the CJEU was categorical in stating that a Member State cannot, in its national law, create new categories of exception or limitation outside the ones provided for in Article 5 of InfoSoc Directive nor to the phonogram producer's right provided for in Article 2(c) of that Directive.[208] The reason is that wouldn't ensure *consistency in the implementation of those exceptions and limitations* if the Member States could freely provide ones beyond those expressly set out in Article 5 InfoSoc Directive.

Moreover, the CJEU stated that the fair balance would be achieved by the three-step test provided by Article 5(5) InfoSoc Directive, under which the exceptions and limitations provided for in Article 5(1) to (4) should be applied only in certain special cases when it does not conflict with a normal exploitation of the work,

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[205] ibid 10.
[206] ibid 9.
[207] *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication C-301/15* [2016] ECJ ECLI:EU:C:2016:878.
[208] *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben Case C-476/17* (n 113) 11.

and when it does not unreasonably prejudice the legitimate interests of the rightsholders.

Yet, the possibility of considering a sample as a quotation, a limitation under Article 5(3)(d) InfoSoc Directive was ruled out, concerning the concept of "quotations" wouldn't extend to a situation in which it is not possible to identify the work concerned by the quotation, like in the case of an unrecognized sample.[209] This means that, if the sound sample corresponds to an unrecognized piece of previous work, it cannot be considered a copy for infringement, however, it cannot be considered a quotation.

This approach of the CJEU in this judgment was important concerning the recognition of the necessity of balancing the copyrights and related rights with fundamental rights and other common interests. However, in reality, it does not leave room for the malleability of the limitations and exceptions of copyrights concerning the balance between interests.

One could say there is an inconsistency in the arguments presented by the Court on one side limits the creation of limitations to copyright beyond those already exhaustively provided for in Article 5 of the InfoSoc Directive, as already decided in the *Infopaq* case[210], however, on the other side, it refers to the freedom of the arts, regarding its Recital 31.

Consider as exhaustive the list of limitations and exceptions of Article 5 InfoSoc Directive represents an obstacle to the application of the social function of copyright in concrete cases, engulfing the possibility of weight to fundamental rights when analyzing it with copyright and related rights. The breathing space that the law should present is crucial for the social function when that is not well applied in the legislative process.

[209] ibid 11–12.
[210] *Infopaq International A/S v Danske Dagblades Forening Case C-5/08* (n 99) 10–11.

B. What is sampling?

In the music industry, there are several creative methods used to produce new works. Precisely, music sampling has been fundamental to many genres like rap and techno music. In this sense, sampling is the use of part or fragment of a phonogram for the creation of a new musical work.

The sampling technique goes beyond the mere utilization of a fragment of a song and using it in a new creation, it embraces the concept of transformation, re-contextualization, and converting *aspects of culture from one context into another*.[211] It was fundamental for the hip-hop culture and also for the development of techno music.

Because of this, the discussion concerning the legality of the sampling technique has close relations to the social function of copyright, since it represents a common interest concerning social groups that use this method of creating music, and society as a whole because the use of sampling contributes for the creation of new and diverse artistic works.

In the EU context, its use is still not completely permitted, since in the *Pelham* case[212], it was held that sampling is only allowed if the excerpt used is up to 2 seconds and distorted in such a way that it is not possible to recognize the musical production from which the sample was taken. However, such permission excludes other sampling uses, maintaining, to a large extent, the exclusive protection of copyright and phonographic rights to the detriment of the possibility of creating several other musical works.

The legal discussion about the need for a more equal balance between the rightsholder's protection and the common interest in the context of musical samples is important since this method of creation had (and still has) a crucial role in the development of musical genres and cultures that are already often

[211] Bosher (n 182) 157.
[212] Case C-476/17 *Pelham a.o*. [2019] EU:C:2019:624.

marginalized.[213] In this sense, it can be argued that the prohibition of this method of music creation can create a barrier to the development of creativity and new musical works, perpetuating the marginalization of social groups that culturally use the technique for new creations in their history.

C. The rights involved in the issue

a) Music and phonogram rights

There are two different main rights involved concerning music, because there are two objects, as well. There is the musical work, which refers to the composition, core, lyrics, and melody of the musical work. The authors are the composer, songwriter, and lyricist. In this sense, what the author does is create a word that's an individual creation, which is also always unique. The authors of the musical work have copyrights concerning that work.

Also, there is the phonogram, which is the recording of the musical work, also called the phonogram. From this recording, besides the copyrights from the musical work, there are related rights, concerning the performers, producers, and record labels.

Thus, regarding the use of sampling technique, there are two different rights involved, concerning the two parts of a musical work. So, using the sample of the sound recording would require the permission of the copyright holder in the sound recording, as well as the permission of the copyright holder in the musical work.[214]

Yet, when assessing whether the use of a sample would be an infringement, it's necessary to verify if the sample can be considered a substantial part of the original work.[215] This was assessed by the CJEU in the *Pelham* case, when analyzing if the use of a 2-second phonogram could be considered "a substantial part", to be characterized as a copy by the 1971 Geneva Convention. And, in the

[213] Isabella Chuecos, 'The Importance of Music Samples' (*The Aggie*, 25 May 2020) <https://theaggie.org/2020/05/25/the-importance-of-music-samples/> accessed 27 July 2023.
[214] Bosher (n 182) 160.
[215] ibid 159.

Pelham case, it was considered that the 2 seconds were not enough to be considered a copy in a substantial part of the original phonogram.

Thus, to use a sample of another song, it's necessary to obtain licenses from the musical work's rightsholders and from the phonogram's rightsholders if the user-author intends to use the musical work and the phonogram. If the user-author wants to create his version of the sample, he will need only the license from the musical work and not from the phonogram.[216]

b) Right to create/reuse

Besides the rights granted to the authors, performers, producers of the previous musical work, and the phonogram, it's possible to analyze the legal issues from the perspective of the ones creating new works using the sampling technique, the user-authors. Hence, through the social function lens, there is also the right to create and reuse of the authors using the sampling technique to generate new works.

There are two perspectives from the same individual because the ones using the sampling technique are considered at the same time users and authors. The author using the sampling technique is using his creativity, by adding something that makes the new song distinct from the original.[217]

Beyond the cultural role of sampling, it is interesting to reflect on the fact that there is naturally a limitation regarding the creation of musical works. When comparing the finite number of notes and musical arrangements with the number of musical works, originality in music is probably on the verge of extinction.[218] It would be mathematically impossible to expect total originality infinitely when one has a limited number of tools for its creation.

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[216] ibid 162.
[217] Carl A Falstrom, 'Thou Shalt Not Steal: Grand Upright Music Ltd. v. Warner Bros. Records, Inc. and the Future of Digital Sound Sampling in Popular Music' (1994) 45 HASTINGS LAW JOURNAL 359, 371.
[218] Bosher (n 182) 156.

Furthermore, it's interesting to mention that examples of creative appropriation can be also found in abundance not only in the music industry but also in the visual arts and other spheres of creativity. In a sense, that's the way art has been progressing, and how new movements are born, with artists *borrowing* from others, and adding their own expression to it.[219]

D. Common interests in the sampling technique

It's undeniable that existing musical works have been used by other authors to develop new works. Historically, we see new musical styles appropriating existing styles, with modifications that differentiate them, creating new musical genres. It was like this, for example, with "rock'n'roll" that used the blues as a base, but played it in a faster way, which in turn influenced punk, and so on. [220]

So, in this sense, it's impossible to analyze the common interest in the sampling technique, through the social function lens, without considering the social relevance of it, especially for marginalized groups of our society.

Concerning this, the sampling technique has its origins in the Hip Hop movement, specifically in the African American communities in New York in the 80s and 90s. The creation of this technique had a strong influence on the public policies implemented at the time, which reduced the funds allocated to education and music programs in public schools in the region.

And, as a result, black students were more marginalized and deprived of access to instruments.[221] So, not having access to instruments, artists began to create techniques in which they took part of an existing phonogram and added their own creativity, through distortions, repetitions, or additions.

Hence, the sampling technique has its origins in the organization of social movements based on the development of artistic and creative movements.

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[219] Geiger, 'Copyright and the Freedom to Create - A Fragile Balance' (n 179) 711.
[220] Geiger, 'Les exceptions au droit d'auteur en faveur de la création dérivée' (n 93) 340.
[221] The Other Map, 'The Story of Sampling' (*Broken Time Machine*, 25 July 2022) <https://medium.com/broken-time-machine/the-story-of-sampling-35bdaf5692b1> accessed 11 August 2023.

Sampling did not emerge only as a method of copying existing works, on the contrary, it was used to create new artistic works, the result of the creativity of the authors.

In the past, it is also interesting to point out the selectivity, and even a racial bias, of the infringement lawsuits regarding the use of sampling, since they are often brought by major record labels against independent artists and the marginalized hip-hop movement.[222]

Furthermore, music sampling is fundamental to rap music, and the artistic value of rap music cannot be questioned. To argue for substantial similarity of a rap recording to the recordings and the original music from which its samples would be arguing that rap music has no independent artistic value.[223]

The technique of sampling is to make something new out of something old.[224] It represents a multitude of possibilities created from a pre-existing unit of work. So it surely fulfills the common interests concerning the maximization of artistic productions, to enable great access of these works by the population. Still, the social role of the technique is evident, as the engine of the hip-hop movement.

On the other hand, it can be argued that the prohibition of the sampling technique would contribute to the enhancement of creativity, since the authors would be obliged to create new compositions and phonograms on their own, not using others' existing works. They could still be inspired by existing works since the idea-expression dichotomy can be used to permit the inspiration, but the copyrighted works would be intact.

Moreover, with current laws and legal interpretations, the use of sampling is only allowed when proper licenses are obtained from copyright holders and related rights. However, this system disregards the social reality that these licenses are often denied or conditioned on the payment of high royalties.

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[222] ibid.
[223] Falstrom (n 217) 372.
[224] Bosher (n 182) 161.

Considering that the use of samples became popular due to the impossibility of social groups having access to musical instruments, it cannot be disregarded that, even today, a large majority of users are unable to obtain such licenses. Since it is part of the common interest to ensure access to culture, participation in cultural life, and the right to create, it seems contradictory to exclude such an important creative tool for marginalized social groups.

Also, the prohibition of sampling didn't stop authors and producers from using it, since it represents a considerable part of their cultural expression and history. An alternative to this situation is the creation of compulsory licenses for the use of sampling, with a royalty amount to be paid by those who wish to use the excerpts of the protected works.[225] In this way, authors and producers of the original work could have proper remuneration – considering that if the illegal use they obtain nothing and have to proceed with lawsuits if they want compensation – and the users-authors would have the recourses to continue creating new works.

Thus, it is important to apply the social function in copyright and related rights when dealing with the use of sampling. The issue goes beyond just protecting the interests of authors of musical works and phonograms but also looking at the social interest of not marginalizing portions of society, ensuring their participation in cultural life and their right to create.

Only the prohibition of the technique does not result in its extinction. Just in 2019, 15% of the songs on Billboard contained samples[226], and the number is just increasing, since in 2022 studies show that 1 out of 5 musical hits used the technique.[227] This demonstrates that the restrictions currently imposed by the copyright system are not effective, as authors of previous works are having their

[225] Christophe Geiger, 'Statutory Licenses as Enabler of Creative Uses' [2017] Remuneration of Copyright Owner, Max Planck Institute for Innovation & Competition Research Paper 305, 4.
[226] 'Tracklib Presents State of Sampling 2019' (*Tracklib.com*, 31 December 2019) <https://www.tracklib.com/blog/tracklib-presents-state-of-sampling-2019> accessed 6 August 2023.
[227] 'The State of Sampling 2022 | Tracklib' (*Tracklib.com*, 13 December 2022) <https://www.tracklib.com/blog/state-of-sampling-2022> accessed 6 August 2023.

rights often infringed, and that the sampling technique remains an important source of creation for new works.

Moreover, concerning the problem of sampling, it is important to keep in mind that its prohibition serves as a form of social segregation since only artists who already have great influence and resources can have the bargaining power to obtain authorization for its use. Perhaps one solution would be to create a standard fee for sample use, where there is less room for negotiation between authors of previous works and new works.

Also, it can guarantee the authors and producers of the original works are going to obtain an adequate financial benefit from the exploitation of their works, which is at the same time fair for them and for the authors using the works for new creations. It may be a way of compromising the interests of authors, society, and authors of new works.

V. Conclusion

As quoted by Earnest Hemingway's “For Whom the Bell Tolls” from John Donne's poems, *no man is an i(s)land*[228], everyone is a part of a whole. In the same way, no right, even if it's exclusive, should be seen as being absolute, and in isolation, there always must be a holistic analysis of other rights that might be involved.

The common interest of society must be balanced with individual rights, so that there is no abuse of these rights and so that they also serve their function for society, not just for individuals. Besides, this common interest should not be understood as that imposed by a state alone, but as the object of socially constructed objectives.

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[228] John Donne, *Devotions Upon Emergent Occasions* <https://www.gutenberg.org/files/23772/23772-h/23772-h.htm#Page_1> accessed 23 July 2023.

Especially regarding copyright, the application of the social function both in the creation and improvement of legislation and in the application of the law by judges in concrete cases is necessary to ensure a balance between the individual interests of authors and the common interests of society. Moreover, it's important to question what kind of society should be promoted considering the development of copyrights.

The balancing exercise between exclusive copyrights and user's and other artists' rights is indispensable for ensuring access to culture and the development of civilization, in a more culturally rich and expanded society. In this sense, the social function of copyright compels us to consider the impacts of exclusive rights not only in the present but in the long term. Because the restriction of artistic works can lead to the impediment of their access, as well as the development of new cultural productions.

The interest of society is at the same time to reward authors, but also create means to incentivize the creation of more works in the future. That's why is so important to consider the social function when we are facing copyrights, both at the stage of creating or updating legislation and in the application of the law by judges.

In the example of the sampling technique, there is a cultural issue to be preserved when considering the application of the social function for its greater permissibility. It's necessary to look for ways of applying the social function of copyright in practice, to real problems that are not being solved efficiently by the current way of applying the protection of authors.

It's time to push for more effective public policing, which not only protects authors and their interest groups but also ensures cultural development. Social groups should not be treated in isolation in terms of legal systems but in line with society's general objectives and interests.

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