

Copyright Protection of Formats in the European Single Market

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The definition of the copyright protected work with respect to utilitarian copyright theories

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Abbreviations:

BGH	German Federal Supreme Court
CDPA 1988	British Copyright, Design and Patent Act 1988
Computer D	Directive 2009/24/EC of the European Parliament and of the Council of 11 May 1996 on the legal protection of computer programs (codified version)
Copyright D	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
Database D	Directive 96/9/EC of the European Parliament and of the Council of 11 May 1996 on the legal protection of databases
Duration of Copyright D	Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version)
ECC	European Copyright Code
EU	European Union
FRAPA	Format Recognition Association
FSF	Free Software Foundation
OLG	German District Court
RAM	Random Access Memory
RBC	Revised Berne Convention
Rental D	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 (codified version)
Satellite and Cable D	Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules of copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission
StGB	German Criminal Code
TFEU	Treaty on the Functioning of the European Union
UrhG	German Copyright law (“Urheberrechtsgesetz”)

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A. Introduction: Balance of interests on format markets

Should formats be copyright protected? The answer depends on the definition of the copyright protected work that differs amongst the 28 copyright regimes of the EU's Member States. Stakeholders of format markets – be it creators, producers, distributors, users or re-producers – which are in contact with formats circulating in the Single Market might complain about the legal differences and the uncertainty. But they can hardly say whether formats should be copyright protected or not. Especially format creators and producers know that copyright does protect not only their own formats but also other ones' and could hence hinder them in re-combining the format elements. Copyright must balance the divergent interests of the stakeholders of format markets. And the definition of the copyright protected work serves hereby as entry point: A broad definition of the copyright protected work might require a – re-balancing – narrow adaptation right. That means that right owners can forbid, at least, the slavish copy of their format but re-creators may be principally free in re-combining their elements.

This chapter introduces into how media theorists and critics explain the socio-economic change from “Culture Industry” to “Participatory aka. Remix Culture” and how that change today challenges current copyright regimes. It illustrates the relevance of formats for the discussion about copyright prescribed. The meaning of several important notions, such as “formats”, are explained and in which manner utilitarian theories serve as theoretical scale to answer the question about the right balance of interests by formats' copyright protection. Finally, the chapter leads the reader through the detailed structure of the following discussion.

I. Copyright between Culture Industry and Participatory aka. Remix Culture

The term “**Culture Industry**” means, dating from the end of the Second World War, commercial exploitation of culture. Pursuant to the critical theorists Max Horkheimer and Theodor W. Adorno, the commercial paradigm to produce culture for-profit turns recipients of art into consumers of cultural products.¹ Following the laws of economics of mass communications media such as print, film or broadcasting industries, these cultural products must be standardized. Thereby, original aesthetics of culture turn into formatted products serving what the audience expects. Horkheimer and Adorno argued that culture loses its aesthetic function to irritate, to challenge, to make recipients think: The Culture Industry's standardization process, in other words, its lack of inspiration would smother its audience in passivity. Today, only few critics still grapple with Horkheimer's and Adorno's Kulturkritik. If so, they stress especially the theory's negligence of the subversive elements of pop culture and its lack of possible solutions.²

Irrespective of its theoretical validity, the actual circumstances of the Kulturkritik are fundamentally changing. Digital technologies and networked communications seem to turn the passive audience into active users enabling them to take part in a so-called **Participatory Culture**³ or, similarly, **Remix Culture**⁴. The digitization of pictures, videos and texts in combination with tools and platforms, let it

¹ http://en.wikipedia.org/wiki/Culture_industry, recalled the 14th May 2013.

² http://de.wikipedia.org/wiki/Kulturindustrie_-_Aufkl%C3%A4rung_als_Massenbetrug, recalled at the 14th May 2013.

³ Jenkins/Ford/Green, *Spreadable Media*, p. 188.

⁴ Cp. the title of Lessig's “Remix”.

especially be for file sharing such as <http://thepiratebay.sx>, or social networks such as www.facebook.com, enhance users to easily copy, transform and upload, in other words, to remix and share any digitized content they want.⁵ This so-called Digital Revolution led to the situation in that not the mass communications media anymore are received to smother the audience in passivity but the restrictive provisions of the law, more precisely, of copyright law. Indeed, in view of Horkheimer and Adorno, the mass communications media itself was never object of their Kulturkritik but the socio-economic – capitalistic – structures.⁶ These structures seem to ground nowadays more than ever before on the legal playing field. Several critics stress the negative impact current copyright regimes have for “innovation, (...) creativity, and, ultimately, (...) freedom” in civic societies.⁷ Of course, there are many legal, economic and cultural experts who also defend the current legal situation. Amongst them, lawyers specialized on cease and desist letters against copyright infringement are possibly the most illustrative example.⁸

The clash of the opponent concepts with respect to Copyright law grounds in two different economies behind. Lessig describes these two as a “commercial economy”, on the one hand, and a “sharing economy”, on the other. Both economies constitute a “practice of exchange”. While the object of change of the former one consists in tangible goods with economic value, such as labor or money, the goods of the sharing economy are intangible.⁹ Jenkins/Ford/Green stress that in “many peer-to-peer exchanges, ‘status’, ‘prestige’, ‘esteem’, and ‘relationship building’ take the place of cash remuneration as the primary drivers of cultural production and social transaction.”¹⁰ For Lessig, the solution for the clash prescribed has to be found in the fusion of both economies what he names **Hybrid Economies**. Lessig classifies three basic categories of such hybrid economies: Community spaces, collaborations and communities. All of them build upon social economies, that means the free exchange of information, or better, social values amongst its users.¹¹ Commercial economies vary, in contrast, correspondently to which social economy they are connected. Community spaces, such as www.youtube.com www.flickr.com or www.craigslist.org/about/sites make profit with revenues by advertisement.¹² Collaborations such as <http://answers.yahoo.com>, www.last.fm or fan communities around bestsellers like J. K. Rowling’s “Harry Potter” or homonymous blockbusters by the Warner Brother’s Entertainment Inc. harvest the shared information itself. Yahoo, for example, profits from the help that its users give others for free. Last.fm exploits the information received from music fans to evaluate music hit lists or more complexly arisen appraisals within the social network. And bestsellers and blockbusters may incorporate the so-called User Generated Content created or produced by its fans into its story worlds.¹³ Last but not least, Communities are able to create own economic markets in which users can buy and sell virtual

⁵ Please, do not use the links to illegally upload or download digitized content!

⁶ [http://de.wikipedia.org/wiki/Kulturindustrie - Aufklarung als Massenbetrug](http://de.wikipedia.org/wiki/Kulturindustrie_-_Aufkl%C3%A4rung_als_Massenbetrug), recalled the 14th May 2013.

⁷ Amongst others, Lessig, Remix, p. XVI; Kreutzer, German Copyright law and Alternative Instruments of Regulation, pp. 364.

⁸ For example www.waldorf-frommer.de who promote on their landing page “New Awareness in Copyright law”, recalled the 15th May 2013.

⁹ Lessig, Remix, p. 117.

¹⁰ Jenkins/Ford/Green, Spreadable Media, p. 61.

¹¹ Lessig, Remix, p. 177 and 186.

¹² Lessig, Remix, pp. 186.

¹³ Lessig, Remix, pp. 196.

products how the virtual world <http://secondlife.com> or equally some Massive Multiplayer Online Games (MMOG) such as “World of Warcraft” http://en.wikipedia.org/wiki/World_of_Warcraft has shown.¹⁴

Given the assumption that Hybrid Economies will probably dominate the future of the web, the challenge for its development is to find out how to organize the interchange of goods between, both commercial and sharing, economies and to respect its logics, respectively:¹⁵

“The hybrid is either a commercial entity that aims to leverage value from a sharing economy, or it is a sharing community that builds a commercial entity to better support its sharing aims. (...) That link (creating the synergy effect) is sustained, however, only if the distinction between the two economies is preserved. If those within the sharing economy begin to think of themselves as tools of a commercial economy, they will be less willing to play. If those within a commercial economy begin to think of it as a sharing economy, that may reduce their focus on economic rewards.”¹⁶

The **Free Software Movement** gives an example of best practice how these hybrid economies can work. Pursuant to the Free Software Principles, Free Software means that the code itself of the software remains “free”, in other words, does not become “proprietary”: Users are not only allowed to simply run the software without any restrictions, but also to copy and distribute it, find out its functioning as well as to change and re-distribute it.¹⁷ Proprietary software, instead, is normally licensed under traditional copyright licenses that mostly restrict making copies, its distribution and, especially, prohibits finding out its functioning and changing it.¹⁸ The initial idea of Free Software was to get free of these boundaries in view of the fact that such proprietary software often did not appropriately work. Started by Richard Stallman in 1983 launching the GNU operating system to provide a replacement of the proprietary UNIX system,¹⁹ the idea of developing together with other programmers “free” and better software emerged quickly to a social movement – with thousands of programmers today. Nowadays, the Free Software Movement looks back at around 5.000 free programs with millions of users, entire governments included.²⁰

An important step toward the success of Free Software was the emergence of hybrid business models. Companies such as Red Hat Inc.²¹ or, recently, Canonical Ltd.²², started to offer “Free Software” – mostly based on GNU software – as starting point for further paid services customizing or maintaining such Free Software for the customers’ needs. One of the main factors for the acceptance of those hybrid models amongst the Free Software Movement was the respect of the Free Software licenses.²³ The license, mostly the General Public License (GPL), did – and still does – not prohibit profiting from free software. Its

¹⁴ Lessig, Remix, pp. 213 with regard to “<http://secondlife.com>”.

¹⁵ Jenkins/Ford/Green, Spreadable Media, p. 67.

¹⁶ Lessig, Remix, pp. 177/178.

¹⁷ www.gnu.org/philosophy/free-sw.html, recalled the 15th May 2013.

¹⁸ www.fsf.org/about/what-is-free-software, recalled the 15th May 2013.

¹⁹ www.gnu.org/gnu/initial-announcement.html, recalled the 15th May 2013.

²⁰ www.fsf.org/about/what-is-free-software, recalled the 15th May 2013.

²¹ <http://se.redhat.com>, recalled the 15th May 2013.

²² <http://www.canonical.com>, recalled the 13th May 2013.

²³ Lessig, Remix, p. 183.

famous **Copyleft** clause only requires giving the transformative software again, under the same license, “free”. The Free Software Movement, hence, uses copyright law to maintain its own understanding of “freedom”. The Free Software Foundation (FSF) explains it in its own following words: “The FSF holds copyright on a large proportion of the GNU operating system, and other free software. We hold these assets to defend free software from efforts to turn free software proprietary.”²⁴

Software industry may be different to mass communications media. At least, it provides the technical infrastructure for it today. But the examples illustrate how far some industries developed within hybrid economies – and how precisely they draw in their legal licenses the line between both entities. So, does Remix Culture replace Culture Industry? At least, the technical changes, or in more striking words, the Digital Revolution basically turns passive audiences into active users. In view of the foresaid, the answer today depends on how much social economies are allowed to take place beside commercial ones. That means with regard to the stakeholders – creators, producers, distributors, users and, of course, re-creators –²⁵ who is allowed to do what with copyright protected works? Given that allowance is a legal matter, the essential question is: Does or how does Copyright law balance all these interests – and how should it do?

II. Relevance of formats for the discussion about copyright

The prescribed cultural concepts are especially interesting with regard to formats. In terms of the Kulturkritik, formats seem to neatly fit to the description of standardization of cultural products: It is the “conditio sine qua non” for formats to be standardized, in other words, formatted. But in contrast to the pessimistic picture that Horkheimer and Adorno draw with respect to the enforced passive audience, formats such as non-fictional TV Shows or transmedia formats consist, in fact, in the **participation and adaptation** by the stakeholders, that means, the audience and users, too. For example, with regard to viral advertising concepts – another sort of formats – the participation of users essentially decides on their success.²⁶ And adaptations thereby play such an important role because they allow to adapt the format to the participants’ languages, prices/currencies as well as other aesthetic, social or political references of the respective culture.²⁷ In the games industry, user participation is well known especially regarding Massively Multiplayer Online Games²⁸ and adaptations start to play a role, at least, with respect to so-called retro-games, where “older games (are) reprogrammed for emulators or new games based on older aesthetics”.²⁹ Finally, user participation and adaptation is doubtlessly relevant for online platforms. Most illustrative examples showing how to earn money by adapting such kind of formats are the Samwer brothers who are, meanwhile almost billionaires,³⁰ well known as “Copy Cat Kings of Europe”.³¹ Given

²⁴ www.fsf.org/about/what-is-free-software, recalled the 15th May 2013.

²⁵ Kreutzer, *ibid.*, p. 259 who stresses the increased importance of Copyright law because of its, by means of the Internet, broadened scope.

²⁶ http://en.wikipedia.org/wiki/Viral_marketing, recalled the 17th May 2013.

²⁷ Heinkelein/Fey, Protection of Television Formats in German Copyright law, GRUR Int. 2004, p. 379 with reference to Moran, Copycat Television. Globalization, Program Formats and Cultural Identity, pp. 8 and pp. 19.

²⁸ http://en.wikipedia.org/wiki/Massively_multiplayer_online_game, re-called the 13. December 2013.

²⁹ Jenkins/Ford/Green, Spreadable Media, p. 99.

³⁰ www.forbes.com/pictures/mel45fdmi/samwer-brothers/, recalled the 17th May 2013.

³¹ www.economist.com/node/21525394, recalled the 17th May 2013.

the social and economic importance of participating in and adapting these formats, the question about their copyright protection is highly relevant.

In terms of cultural development, copyright protection leads principally in a “**dilemma of innovation**”.³² As more intellectual creations, such as formats, are copyright protected as less re-creators are allowed to develop them to new ones, at least, they are not allowed to do so without the corresponding licenses. The definition of the copyright protected work hence functions as entry point for the balance of interests between, on the one side, creators, producers, and distributors seeking to protect their formats and, on the other side, users and re-creators who want to use it without restrictions.³³ There are other points to balance such interests, too. Limitations of copyright, such as “free use”³⁴, “quotations”³⁵, the duration of copyright³⁶ or limitations of second liability, can narrow the broad scope of copyright protection in a later step again.³⁷ But as prescribed, as more stakeholders are involved by the Internet as broader the impact of Copyright protection is.³⁸ Broadening the definition of the copyright protected work means to involve more participants whose interests must be balanced by the limitations.

The definition of the copyright protected work as entry point for the balance of interests prescribed divides intellectual creations into two basic categories: **Public domain** and private – copyright protected – property. There are several criteria in use to describe the public domain but they all pursue one common reason why the public domain shall be free: The cultural exchange.³⁹ That is why cultural heritage, facts, methods, styles, and ideas must not be monopolized.⁴⁰ Thus, cultural heritage such as fairy tales, legends, myths or artistic works whose term of protection has expired can be freely used by anybody.⁴¹ Facts as such are, in comparison to the prescribed works, not even products of intellectual creation and can be freely reported in the media.⁴² Equally, methods and styles shall not be copyright protected. Even if they might be innovative, subsequent creators shall be free in using and adapting them as ways for their own expressions.⁴³ The latter leads to the most prominent criteria: The dichotomy of idea and expression. Only expressions of the idea should be, principally, monopolized. Ideas themselves have to remain free.⁴⁴ And finally, even if the idea is expressed, the expression has to be original – whatever this might mean. In view of that, copyright protection of formats might belong to the public domain because of many reasons. Formats may solely reproduce facts, for examples in cases of reality or scripted reality shows, alternate

³² Kreutzer, *ibid.*, p. 364/365.

³³ Kreutzer, *ibid.*, pp. 46/47.

³⁴ In German Copyright law, Art. 24 UrhG.

³⁵ In German Copyright law, Art. 51 UrhG.

³⁶ In German Copyright law, Art. 64 UrhG.

³⁷ Cp. Barudi, *Author and Work*, pp. 246/247.

³⁸ See above at point I “Introduction: From Culture Industry to Remix Culture, footnote 27 with reference to Kreutzer, *ibid.*, p. 259.

³⁹ Kreutzer, *ibid.*, p. 46/47.

⁴⁰ Loewenheim, § 2 *cip.* 49.

⁴¹ Loewenheim, § 2 *cip.* 51.

⁴² Heinkelein, *ibid.*, p. 51.

⁴³ Cp. Kreutzer, *ibid.*, p. 47, *esp.* Footnote 112.

⁴⁴ Loewenheim, § 2 *cip.* 51; Lessig, *Remix*, p. 290, quoting Jefferson, ancient President of the USA, in a letter from 1813: „If nature has made one thing less susceptible than all others of exclusive property, it is the action of thinking power called an idea, which an individual may exclusively possess as long as it keeps to himself; but the it is divulged, it forces itself into the possession of everyone (...)”.

reality games, flash mobs or happenings. It could be possible that formats, especially those with game structures or role-plays, mainly consist in styles and methods. Furthermore, formats are often said to be more idea than expression, especially with regard to so called concepts. And even if they are expressions, it could be arguable if they are sufficiently original.

In terms of legal technique, there is another point that makes formats difficult to classify. Formats are principally independent from single media and/or media platforms. This might be of advantage in times of convergent media because they are especially suited for future developments. Already today, the economic exploitation of formats extends from books to films to games and many media more without being limited to pre-known markets or economies.⁴⁵ But the convergence makes it more and more difficult to classify formats under the traditional categories of works how they are provided for by current Copyright regimes.⁴⁶ § 2 UrhG, for example, differs between musical, literary, photo- and cinematographic works. Indeed, these categories are not exclusive and allow – in opposite to the British Copyright, Design and Patent Act⁴⁷ – further kinds of works.⁴⁸ But albeit Copyright law promotes **technical neutrality**, it does not provide important legal facilitations, such as the presumptions for the acquisition of economic rights by the producer of cinematographic works (Art. 89 UrhG). Producers of formats that do not fit into the corresponding categories have hence to purchase the rights being cautious that they do not forget anyone of them they need.⁴⁹ Hence, formats challenge also the legal systematic that is given within the law.

Finally, there are economic reasons, too, which let doubt about the **necessity of a format's copyright**. As mentioned, copyright protection of formats differs amongst the EU Member States. In summary, there may be more copyright regimes denying the protection than those affirming it. Nevertheless, the creation, production and trade of formats are an expanding business. The trade of television formats was booming in the beginning 2000.⁵⁰ German video gaming industry is still growing with 7,7 % per year.⁵¹ The growth of the German Internet Economy has an annual average of 10,13 %.⁵² The global advertising industry is growing and in Germany, at least, online.⁵³ Pursuant to the definition of formats prescribed, all these businesses deal with formats and grow despite the legal uncertain situation. This allows the question whether copyright protection is necessary, anyway.

⁴⁵ Cp. Point I „Introduction: From Culture Industry to Remix Culture“.

⁴⁶ Cp. Kreutzer, *ibid.*, p. 260, with regard to multimedia works.

⁴⁷ Aplin, *Subject matter.*, pp. 54 and 74.

⁴⁸ Cp. Aplin, *ibid.*, pp. 72.

⁴⁹ Kreutzer, *ibid.*, pp. 262, who stresses the importance of such legal presumptions with regard to works with many authors – which formats normally are.

⁵⁰ Heinkelein, *ibid.*, pp. 4.

⁵¹

www.pwc.de/de/pressemitteilungen/2012/milliardenspiel_hart_umkaempftes_wachstum_auf_dem_deutschen_videogames_markt.jhtml, re-called the 17th July 2013.

⁵² www.bvdw.org/medien/studienband-die-digitale-wirtschaft-in-zahlen-von-2008-bis-2014?media=4795, re-called the 17th 2013.

⁵³ http://www.wuv.de/agenturen/werbemarkt_alle_zeichen_stehen_auf_wachstum, re-called the 17th July 2013.

III. Definition of “formats” and other terms

The examples prescribed illustrate how diverse formats are. Correspondingly, there is, so far, no common definition for the notion “format”, especially not in German or European Copyright law.⁵⁴ Here, **formats shall be defined as any media content and/or platform whose elements, may they be fictional or non-fictional, such as music, picture, video, text and graphics, characters, roles as well as action and/or gaming (patterns) are selected, arranged, and presented in a linear or non-linear way so that the audience/user recognizes it as one unity.**⁵⁵ Formats in the prescribed meaning hence not only are television formats, online platforms, video games or advertising concepts. Nor are they reduced to be sort of so-called multimedia works in which several media elements converge, in digital form, to one.⁵⁶ Formats can also be transmedia, so that several not formerly connected media elements such as flash mobs or performances can build, in the user’s view, one story world, or within the former words, one unity.⁵⁷

But also with regard to terms that are legally defined, few clarifications are necessary for this work. The different languages bare the risk of so called false friends, that means, words that change their meaning while they are literally translated from one language to another. Thereby, the term “**copyright**” has firstly to be defined. The term refers here to both the Anglo-Saxon copyright system as well as to the Droit d’Auteur systems in Continental Europe. The term “copyright” is also used for the existence of copyright in general and, equally, for the concrete copyright belonging to the right owner.

Another term to clarify is “**originality**”. In contrast to the British Copyright, Designs and Patent Act 1988, the German Copyright Code does not use this notion. Pursuant to Art. 1 sect. 1 lit. a) CDPA 1988, copyright subsists in “original literary, dramatic, musical or artistic works”.⁵⁸ In German Copyright law, the term finds its equivalence in the word “Individualität” that is used in literature and case law as criteria to differ copyright protected works from other intellectual creations.⁵⁹ In the following, only the term “originality” is used. The term does not, so far, refer to any further defined meanings such as author- or work-centric ones.⁶⁰

It is thereby necessary to clarify a potential misunderstanding based on the notions used in the German and in the English version of German Copyright law, respectively. Art. 2 sect. 2 UrhG states that copyright protected works are only “persönliche geistige Schöpfungen”. Although the official English version of the German Copyright law translates this term into “**own intellectual creations**” (underlining by the author), its actual meaning shall be translated here with the English term “**personal intellectual creations**”. The difference is essential: While the term “own intellectual creation” allows principally both

⁵⁴ Cp. Heinkelein/Fey, *ibid.*, p. 380, referring to German Copyright law.

⁵⁵ Cp. Kreutzer, *ibid.*, p. 268, esp. footnote. 1193 with regard to multimedia works, and Schricker, Advertising concepts and TV formats, GRUR Int. pp. 923 (926) concerning the necessary unity of a copyright protected work: “Einheitlich ist, was der Adressatenkreis als einheitliches Werk empfindet” (“Unitary is what recipients conceive as unitary.”).

⁵⁶ Cp. Kreutzer, pp. 264/265, esp. footnote 1174.

⁵⁷ Cp. Jenkins, *Convergence Culture*, pp. 95.

⁵⁸ www.legislation.gov.uk/ukpga/1988/48/section/1; recalled the 28th April 2013.

⁵⁹ See at Barudi, *Author and Work*, pp. 23.

⁶⁰ Cp. point C. I. 4. “Personality vs. originality: Author- or work-centric copyright protection”.

a creator-centric as well as a work-centric meaning of the notion “originality”, the term “personal intellectual creation” has a clear tendency to the creator-centric understanding.⁶¹ In the following, the term “own intellectual creation” is used to keep both interpretations; the term “personality” refers exclusively to the author-centric meaning.

In the following, also the terms “**intellectual creations**” and “**works**” refer to different meanings. The term “work” – and equally “copyright protected work” – refer to the situation that the intellectual creation in question is definitely a copyright protected work or, at least, assumed to be so. The term “intellectual creation” refers, in contrast, to creations that are not assumed or, at least, not yet clearly assumed to be copyright protected works. Correspondingly, the terms “**creator**” and “**author**” are used. Pursuant to § 7 UrhG, the “author is the creator of the work.” Thus, while the term “author” is the official legal term in cases where the nature of the intellectual creation is clearly or assumed as copyright protected work, the term “creator” refers to situations where the nature of the intellectual creation is not assumed or is not yet clear. In view of the subject-matter here, that means whether formats are copyright protected or not, the text refers in the following mainly to creators of formats.

Last but not least, it should be clarified that this work mainly basis on German concepts of copyright protection. Even if the author attempts to broaden his understanding towards further, in other words, alternative copyright laws and systems, respectively, many of the criteria discussed refer to literature that is available in German libraries and are, thus, inevitably bound to **German discourses about copyright protection**.

IV. Utilitarian copyright theories as theoretical scale

For finding the right balance between the stakeholders’ interests of format markets, it is helpful to refer to **copyright theories** that underlie the copyright regimes, in other words, the philosophical concepts behind the current legal systems. Copyright theories have, for the following work, three functions: Firstly, they help to define the purposes why or whether copyright law, and more nuanced, for which kinds of works to which extent copyright protection should exist or not. The definition of such purposes helps, secondly, interpreting the law pursuant to them. And thirdly, they enable, given that adequate interpretation is not possible within the legal scope, to prove whether or in which way current copyright law does not reach them.⁶²

The idea of copyright can basically be categorized into two philosophical traditions, the so-called individualistic and utilitarian copyright theories.⁶³ While the former takes its origin in Continental Europe mainly developed by the German philosophers Hegel and Kant, the latter emanates from Anglo-Saxon philosophical traditions, especially initiated by the British philosopher Bentham.⁶⁴ Most copyright systems in Continental Europe base principally on **individualistic theories**. The classical function of Copyright law was thereby to protect the author who created artistic works, from which the public

⁶¹ Cp. Kreutzer, *ibid*, pp. 104.

⁶² Hansen, *Why Copyright law*, pp. 8.

⁶³ The succeeding categorization follows, in principle, the systematization of Leistner/Hansen, *Justification of Copyright in the Digital Age*, GRUR 2008, pp. 479.

⁶⁴ Cp. Leistner/Hansen, *ibid.*, pp. 481 and 482.

principally could profit with respect to its education, deeper enlightening or pure entertainment, while the artist had to carry the risk of its production and exploitation by himself.⁶⁵ In times of Cultural Industry these factual circumstances have fundamentally changed. Today, a major part of cultural goods is produced and traded on a big scale, rarely artistic than rather technical products such as computer programs and data bases take part of copyright protection that expanded pervasively into the Internet by covering actions of mere use such as ephemeral, but nevertheless for the usage necessary, copies in the random access memory (RAM). Hence, in view of many critics, copyright law pretends to protect artists but actually protects the industry.⁶⁶

Critics especially argue that the one-dimensional perspective of individualistic theories based copyright laws on the protection of the artist does not correspond anymore to the complex situation from today where interests of many market participants have to be balanced.⁶⁷ **Utilitarian theories**, instead, are promoted more and more to serve such balance. Thereby, it is important to differ between utilitarian theories and purely economy based approaches. While the latter pursues the improvement in efficiency, the former follows, especially in their origins by Bentham, the so called Greatest Happiness Principle, that means to reach the greatest happiness for the most people possible. In these terms, utilitarian theories do not serve pure economic efficiency – how many critics, especially in Continental Europe, criticize – but the principle of efficiency follows utilitarian aims.⁶⁸ Therefore, utilitarian theories may indeed serve as appropriate philosophical concept to take all kinds of market interests in the Participatory aka Remix Culture into account.⁶⁹

Of course, utilitarian theories are not free of doubt, neither. One critical point is that they, or more precisely, that the refined and nowadays prevalent economic analysis of law promotes to be empirically valuable because of their perspective on the consequences that its theoretical premises have. But despite their approach, all theories suffered in the end on empirical vagueness. This might ground in the lack of methodology hiding normative decisions or in the amount of data that results from the mere extent of the underlying models and that is, as such, hardly quantifiable. Therefore, not even utilitarian theories serve to find the right “**point of balance**” for the diverging interests. But at least, they serve to structure and, at best, to evaluate the criteria which are essential to find this point.⁷⁰

Another point of criticism is the difficulty that economic theories of law have to justify the **moral rights** of authors. Moral rights are mainly the right of publication and the right against distortion of the work as well as the right of attribution of the author.⁷¹ Indeed, there are several attempts to do so. Some argue, for example, that the economic value of an intellectual creation depends on the reputation of the artist that is, sort of, materialized in his works’ completeness and integrity.⁷² It belongs hence to him to publish it under his name and/or to decide on transformations. Another approach is the understanding of the credit right as incentive for the author to create the work. But these reasons for copyright protection do not

⁶⁵ Kreutzer, p. 201.

⁶⁶ Cp. Leistner/Hansen, *ibid.*, p. 479.

⁶⁷ Kreutzer, p. 402.

⁶⁸ Hansen, *ibid.*, pp. 109, esp. footnote 461.

⁶⁹ Cp. Leistner/Hansen, *ibid.*, p. 482, as well as Kreutzer, *ibid.*, pp. 404 and 408.

⁷⁰ Leistner/Hansen, *ibid.*, pp. 483/484.

⁷¹ See, for example, in Germany Copyright law Art. 12, 13 and 14 UrhG.

⁷² Hansen/Leistner, *ibid.*, pp. 488/489, referring to Hansmann/Santilli, 26 *Journal of Legal Studies* 95, pp. 103.

correspond to all kinds of moral rights, creators or situations. For example, it is difficult to interpret the right against distortions of the work as incentive for the author to create it. And not every author does always create to increase the value of his “oeuvre”.⁷³ Indeed, moral rights are much more associated to idealistic than economic matters. Consequently, the justification of moral rights seems to be much more appropriate on the grounds of idealistic copyright theories, while utilitarian theories serve better examining the necessity of **economic rights**, such as the right of reproduction, distribution or communication to the public.⁷⁴

Anyway, with regard to **European Copyright law**, only economic rights seem to be existent. Although copyright law is widely harmonized, there is no harmonization of moral rights at all.⁷⁵ The reason is that the opinions about the necessity of moral rights in European Member States are almost opposed: While there were always very strong moral rights in Continental European Copyright laws, especially in France, Anglo-Saxon Member States such as Great Britain only introduced them into national law because it was obliged to do so by international treaties. Correspondingly, moral rights in current British Copyright law are still the weakest in Europe.⁷⁶ Hence, observers hold any further European harmonization of moral rights to be unlikely.⁷⁷ In summary, economic rights seem to be European rights, while moral rights are still a national matter of the Member States. The result for European Copyright is a strict separation of moral and economic rights that allows, principally, examining the level of protection for the work only pursuant to the economic aspects.⁷⁸ Further moral aspects referring to the personality right of the author may not have to be necessarily taken into account.⁷⁹ This can be of advantage, especially, with respect to transformations of the copyright protected work because the corresponding adaptation right can be defined independently to the moral right against distortions.⁸⁰

V. Structure of the following discussion

Indeed, there is neither a European legal definition of the copyright protected work nor of the adaptation right – at least, not yet. From an economic point of view, how copyright law should define the copyright protected work striking the right balance between the interests of the different stakeholders is, here exemplified on format markets, the subject-matter of this work.

This work will firstly illustrate the functioning of format markets, better, of television and transmedia markets. The television market gives an illustrative example how markets emerge by format trade even if there is no correspondent and EU wide copyright protection. The stakeholders, their economic reasoning formatting and producing formatted shows as well as the moments in which formats can be principally “stolen” – with or without any consequences by copyright protection. Transmedia formats consist of many different types of media. They might be seen as consequence of converging media markets or just

⁷³ Hansen/Leistner, *ibid.*, pp. 488/489.

⁷⁴ Hansen/Leistner, *ibid.*, p. 489.

⁷⁵ Grosheide, *Moral rights*, pp. 256/257.

⁷⁶ Kreutzer, *ibid.*, p. 415.

⁷⁷ Kreutzer, *ibid.*, p. 200.

⁷⁸ Cp. Kreutzer, *ibid.*, pp. 401/402 who promotes a strict secession between moral and economic rights in German Copyright law, too.

⁷⁹ Kreutzer, p. 414.

⁸⁰ Kreutzer, p. 288.

as future trend, their economic functioning is basically the same to television formats, even if stakeholders involved and their cost-minimization-ratio gets more complex.

Even if European copyright law is widely harmonized, there is, indeed, no common definition of the copyright protected work. The thesis exemplifies, regarding television formats, to which opponent results this lack of harmonization leads. While the Dutch Supreme Court principally affirms copyright protection for the television format “Survived!”, the German Supreme Court denies it in the case “Kinderquatsch mit Michael” in general. Given circulating formats on the Single Market, the chapter finally illustrates the effects of such opponent levels of protection.

Willing to mitigate the, so far, presumed legal uncertainty, how should the copyright protected work be defined? Should formats be, EU widely harmonized, protected or not protected by copyright to strike the right balance between the interests of the different stakeholders? The work will illustrate utilitarian copyright theories that serve a structure to strike such balance. Indeed, all theories, be it the Incentive theory, the Transaction Cost Economics or the Democracy based Theory, base more or less on assumptions regarding the stakeholders’ logics or behavior. Therefore, the work includes a respective feedback, at least, from stakeholders of German format markets. This feedback might help evaluate the different purposes that copyright should have pursuant to its theories.

Finally, the definition of the copyright protected work and its relevance for the question about formats’ copyright protection is in detail examined. Since the different copyright regimes of the EU Member States provide a set of more or less varying criteria for its definition the European Court of Justice, recently, developed an own definition of the copyright protected work. The thesis firstly compares the criteria with the findings of the preceding chapter: Given the assumptions of the copyright theories and the feedback of the format markets’ stakeholders, certain criteria fit better than others for finding the right balance between their interests. Secondly, it illustrates the impact of the European Court’s of Justice definition on the criteria as well as on the question about format’s copyright protection. Does its definition affirm or deny copyright protection of formats? The chapter finally compares the purposes of European Copyright right with those provided for by the utilitarian copyright theories. Does European Copyright – and its interpretation by the European Court of Justice – strike the right balance between the different interests of the markets’ stakeholders?

B. Economics of format markets

Given the diversity of formats, there is no common market. It is not even clear if all kinds of formats are really “traded on a market”. In the following, the term market is differently used to the term economy as the former refers to certain goods and the latter describes the structures behind of trading or sharing them, respectively.⁸¹ Because of the double nature of economies, products can basically be traded and shared on both markets, simultaneously. Current markets of formats differently prioritize both economies. One market focuses on sharing goods, another, amongst others, on their sales.⁸² In the following, the first chapter gives a brief description of the television market that mainly focuses on the commercial economy. The second chapter illustrates an emerging, here, so called Participatory aka. Remix market that seem so far to take both economies into account.

I. Television formats between cost-benefit-ratio and risk minimization

The traded good on the television market is the so-called format, especially, for television series and shows. Three stages of format development emerged within the business: The “**paper format**”, the “**program format**” and the “**format package**”.⁸³ Beginning with the idea, the creators of the format develop and elaborate a concept that they finally write down within the so-called paper format. On the basis of the paper format, the production company often produces a test show or episode, called pilot. The pilot is a first improvement whether the format is principally feasible with regard to technical pre-conditions, dramaturgy, financial efforts and the target audience. Given the acceptance by the television channel, the broadcast of the pilot provides, by way of audience ratings, the first factual data about the possible success of the so far developed format. In case of convincing ratings, the format enters the stage of the program format. On its basis, the production company starts to produce (and the television channel to broadcast) the single shows or series, under further improvements and developments. If the program format turns out, in the middle turn, to be successful, it is disposed to be sold on the international market. On the grounds of all stages of development, the format package bundles the experiences: The paper format and the produced show or series, production plans and audience ratings, set designs, lightning patterns, visual graphics, music, sounds and jingles. The production package provides also marketing and distribution strategies beyond the actual broadcast, such as for merchandising or online distribution. Finally, a so-called Flying Producer is offered to provide the tacit knowledge that can be helpful for the adaptation of the format for another national market.⁸⁴

The **market participants** of the television format market are, so far, creators, production companies and television channels and, of course, the audience. Amongst them, there are two typical contact points creating or using formats: The first situation is the initial disclosure of the paper format. Creators develop and elaborate the idea but are often not capable to produce the pilot, much less succeeding entire shows or series. Therefore, they have to disclose the format idea presenting the production company or, in the case that creators and producers are the same (so called creative producers), the television channel with the

⁸¹ See at point A. I. “Balance of interests: From Culture Industry to Remix Culture”.

⁸² See at point I. “Balance of interests: From Culture Industry to Participatory aka. Remix Culture”

⁸³ The succeeding illustration follows the structure of Heinkelein/Fey, Protection of Television Formats in German Copyright law“, GRUR Int. 2004, pp. 380/381.

⁸⁴ Heinkelein/Fey, *ibid.*, p. 380.

paper format. Supposed weak bargaining power that creators and creative producers may have, they are often not able to “protect” the format idea, for example, by contractual agreements such as so called non-disclosure-agreements. Producers and television channels can basically use the disclosure of the format “stealing” it, which means here to adopt the idea without any payment. The second typical situation is the broadcast or publication to the public of the produced show or series. From then on, everybody is principally able to use the format. That might be actively by “stealing” the idea and producing own shows or series based on it. Or it might be passively by watching the produced show or series, regardless which one is the original and which one the adaptation. In the opinion of some critics of the current situation, only copyright protection could help against the use of formats without corresponding authorization.⁸⁵

There are important **economic reasons** to protect the format. The market of television series and shows offers, in view of its participants, a profitable cost-benefit-ratio on the basis of risk minimization.⁸⁶ Their production costs are relatively low compared to the potentially high audience ratings they are able to reach. Especially in view of television channels, television series and shows are interesting because they run, in cases of success, many years and are thus able to bind audiences on long-term. Formats finally promise additional profits on the international market. Here, trade fairs such as the MIPCOM in Cannes serve as globally known location where the participants of the television format markets annually meet.⁸⁷ Thereby, the essential feature of television shows – instead of most fictional series – is that the internationally traded product is mostly not the readily produced show but the format, in other words, the concept of the show. The buyer of the television format acquires hence the license to produce the format for its own national market. The reasons are important. Even if the re-production of the original format together with the license fees is more expensive than the development of a new format or the purchase of the readily produced foreign show, the re-production of the original format is likely to gain more profits.⁸⁸ One reason is that these re-productions can be adapted to the own cultural circumstances such as nationality of the participants or actors, language, currencies and prices as well as any further cultural reference: “Where national audiences have a choice, they usually prefer television programs produced nationally or in the national language as against imported programs.”⁸⁹ Another reason is the minimization of development risks. The success of a format in its original, or in even further markets, raises the chance to repeat this success on the own market. A new, untested format always contains the higher risk of ratings failure.⁹⁰ In summary, for the creator and producer of formats, especially of television shows, the license fee compensates not only the overall development costs of the successful format itself but also the sunken costs for the development of unsuccessful formats. Other market participants, who adapt successful formats without paying fees to the creator and producer of the original format, save hence both kinds of costs: Development costs of the adapted format as well as potential sunken costs for the development of own but unsuccessful formats.

The strict cost-benefit-ratio of television formats corresponds with the liberalization of the television market. With the abolishment of the public television monopolies, the arising of private broadcasting

⁸⁵ Cp. Heinkelein/Fey, *ibid.*, pp. 380/381.

⁸⁶ Heinkelein/Fey, *ibid.*, 179.

⁸⁷ www.mipcom.com/en/home/, re-called the 17th July 2013.

⁸⁸ Heinkelein/Fey, Protection of Television Formats in German Copyright law, p. 379.

⁸⁹ Moran, Copycat Television, pp. 5.

⁹⁰ Moran, *ibid.* p. 20.

companies, new, especially, digital technologies and the multiplication of television channels arouse the competition for content both attracting and binding audiences. Television formats emerged providing the adequate features to cope with the economic challenges of this highly competed television market.⁹¹ The figures of the **television format market** mirror their success. Pursuant to the Report “The Global Trade on Television” of the Format Recognition Association (FRAPA), the “home of international format business by providing protection and information for producers, creators and distributors all over the world”⁹², the worldwide turn-over of television formats reached, in 2004, 2.4 billion dollar. Three of the four leading countries with respect to the annual turn-over of format productions came from the EU Member States Germany, France and Great Britain, amongst them the latter had the highest volume of originally produced and sold television formats.⁹³

II. Franchise and user participation within transmedia formats

Beside, and within, the television format market, a new market is emerging. It seems to take both commercial and sharing economies into account. In the following, the product of this market shall be named transmedia formats. One of the first approaches to create this kind of format is called transmedia storytelling. First movers that are known were media productions such as “The Blair Witch Project”⁹⁴ and “The Matrix”⁹⁵. Both worked with a multitude of media platforms where the audience could “experience an immersive story world”, a term that seems to be essential from the creator’s point of view. The creators of the US fantasy-mystery series “Ghost Whisperer”⁹⁶ Kim Moses and Ian Sander describe their aims:⁹⁷

“First and foremost, we are storytellers, so everything we do, from ‘The Other Side’ webisodes to the interactive journey ‘Payne’s Brain,’ tells a story relative to *Ghost Whisperer*. (...) We test assets we’ve created online, and as they get traction, we team with department heads at the studios and networks and roll them out into various platforms that service our fan base. The aim is to make *Ghost Whisperer* a multidimensional experience which the viewer can interactive with in their own way on their own schedule. Go beyond what Melinda Gordon (the main protagonist who is able to communicate with ghosts) is experiencing in the spirit world on an episode by interacting online with all sorts of viral initiatives we’ve created.”

The format, or in this context more often used, the **story bible** of transmedia productions defines the story world, its characters and plots and, of course, the timeline for the media platforms into that the story shall be expanded. It explains which components appear in the comic book or in the novel, which characters have what kind of blogs or accounts on Facebook, which parts are shown in webisodes or what is reserved for television and/or an international feature film. The story bible explains which kind of experience is provided for by the mobile app or casual game and pursuant to what kind of marketing

⁹¹ Heinkelein/Fey, *ibid.*, pp. 378/379.

⁹² See at the introductive text on the landing page of www.frapa.org/, re-called the 27th May 2013.

⁹³ [http://de.wikipedia.org/wiki/Frapa_\(Verband\)](http://de.wikipedia.org/wiki/Frapa_(Verband)), re-called the 27th May 2013.

⁹⁴ <http://www.blairwitch.com/>, re-called the 29th 2013.

⁹⁵ Instructive [http://en.wikipedia.org/wiki/The_Matrix_\(franchise\)](http://en.wikipedia.org/wiki/The_Matrix_(franchise)), re-called the 29th May 2013.

⁹⁶ www.imdb.com/title/tt0460644/, re-called the 29th May 2013.

⁹⁷ Jenkins/Ford/Green, *ibid.*, pp. 137, referring to Kim Moses and Ian Sander, “Ghost Whisperer: Spirit Guide”, Titan Books 2008.

strategy which merchandising shall be licensed. As such, it serves not only as instruction book for the whole production process but also as communication document to get it financed by investors. To prove and illustrate how the format functions, transmedia productions often produce a so-called **prototype**. The prototype concentrates on the first media platform and is, as such, the starting point for the roll out of the story world over the remaining platforms.⁹⁸ Each new product, that means each subsequent media platform that is produced, serves as opportunity to improve the dramaturgy of the story world, the timeline and production process, the target audiences and their feedback as well as the financing plan how it was foreseen within the story bible. The story bible, the prototype as well as the subsequently produced types of media platforms are bundled together with the experiences that were made during the production process within the **production package** for the format. Although transmedia stories often contain fictional characters, the internationally traded good are both the already produced media platform(s) as well as the format. This is different to fictional television series that are mainly sold as already produce product. Often, transmedia formats also combine both kinds: Then, one single product might be internationally sold, such as an international movie, serving as leverage for the subsequent national formats that, of course, have to fit then to the internationally already existing movie.⁹⁹

Because of the diversity of media platforms, the situation with regard to the **participants of the transmedia format market**, involved might be more complex than the market of television formats. For financing transmedia productions, the story bible is often not only disclosed to broadcasters or production companies but also to newspapers, media agencies, network operators and/or internet platforms. The expansion of newspapers online and their start to charge readers for their content makes it, in view of some transmedia producers, likely to get them as buyers or financiers of transmedia content.¹⁰⁰ Similarly, as more media agencies shift their advertising models from television breaks to product placement and, even more important, to online advertising, as more they become the direct business partners of the producers themselves.¹⁰¹ Finally, network operators and/or internet platforms become more and more interested in buying content, too. Of course, each of them might be more interested in one media platform than in another. While mobile operators will predominantly interested in mobile content as mobisodes, apps and mobile games, internet platforms will rather purchase webisodes and online games just as video-on-demand-services prefer entire movies. Production companies, broadcasters, media agencies and, maybe, newspapers might be the business partners that are most open minded with regard to buy or finance transmedia productions as a whole. At least, on international level, they will be the ones who buy the format and not the already produced content. The latter may be rather prioritized by Internet platforms, network operators and video-on-demand-services because they lack the necessary production structures to produce the format on their own.¹⁰² Of course, in view of recent media productions by the video-on-demand-service Netflix, even this is changing.¹⁰³

⁹⁸ Bernardo, *The Producer's Guide to Transmedia*, pp. 21.

⁹⁹ Bernardo, *ibid.*, pp. 113.

¹⁰⁰ Bernardo, *ibid.*, p. 39.

¹⁰¹ Bernardo, *ibid.*, p. 144.

¹⁰² Bernardo, *ibid.*, pp. 116.

¹⁰³ www.bloomberg.com/news/2012-02-14/netflix-said-to-produce-second-original-series-in-growing-challenge-to-hbo.html, re-called the 31st May 2013.

The shift or the extension from mere television formats to transmedia formats is backed by several **economic reasons**. The first one is especially from the perspective of the right holder. In many cases of media productions today, production companies, television channels, studios or networks hold most, if not all, kinds of economic rights, for example to make and/or re-make movies, audio dramas, books or any adaptations, of the initial, copyright protected work(s). The concentrated ownership creates hence a strong incentive to monetize the intellectual property over several media platforms. Principally, all media from audio dramas to films to games serve hence to monetize the first production that, originally, just might have been a comic.¹⁰⁴

Secondly, the roll out of the intellectual property over several media allows, especially if it happens iteratively, to **lower sunk costs** of the production process as a whole. Users of Internet content often do not have the same expectations for high-budget productions as audiences of well-established media. Furthermore, the distribution of Internet content is, so far, much less costly than classic forms of distribution. Producers can start thus with media of lower production costs, then find out which elements of the story bible work orienting the subsequent production process pursuant to the ongoing feedback by the respective users. Compared to the production processes of television formats, transmedia formats can therefore be seen as the next step of risk analysis and minimization.¹⁰⁵

The orientation on the user's feedback leads to the third economic reason: **Audience measurement**. While, especially, the television industry builds on so-called audience ratings, these ratings are far from accurate results. The reason is the so-called invisibility of television audiences. Sitting in their private homes behind closed doors, television audiences are measured via rating technologies whose results are based on statistical representations. Those representation models segregate the mass audience into defined demographics. These appointment-based, quantifying rating systems are, compared to online rating systems, rather inaccurate. Audiences who might watch but do not fit into the expired demographics are treated as "surplus".¹⁰⁶ Instead, online platforms are able to continuously collect so many data that they can qualify the ongoing behavior of all users. Content can be directed much more precisely to the respective target audience. The shift in audience measurement enables producers to take not only potentially crucial surplus audiences into account but also to value the engagement of their users functioning as promoters, distributors and even multipliers, in terms of worth and value of the products crossing between different commercial and sharing markets.¹⁰⁷

Especially the last economic reason leads to a fundamental change on the established media markets what shall here be summarized as an **emerging participatory aka remix market**. One of the most important underlying mechanisms is discussed under two competing frames "lurking vs. peripheral participation" and focuses on the value of user engagement per se.¹⁰⁸ Skeptics often stress that the most active users represent only a very small percentage of the overall user base. But advocates underline that a higher

¹⁰⁴ Jenkins/Ford/Green, *ibid.*, p. 137.

¹⁰⁵ Jenkins/Ford/Green, *ibid.*, p. 197, with further references.

¹⁰⁶ Jenkins/Ford/Green, *ibid.*, p. 118 and 129.

¹⁰⁷ Cp. Jenkins/Ford/Green, *ibid.*, p. 152.

¹⁰⁸ The succeeding structure follows, not comprehensively, the classification by Jenkins/Ford/Green, *ibid.*, pp. 155.

percentage of engagement is often not necessary for a successful product. Bradley Horowitz illustrates how Yahoo! organized in its services audience participation:¹⁰⁹

“1% of the user population might start a group (or a thread within the group). 10% of the user population might participate actively, and actually author content whether starting a thread or responding to a threading-progress. 100% of the user population benefits from the activities of the above groups (lurkers). (...) We don’t need to convert 100% of the audience into “active” participants to have a thriving product that benefits tens of millions of users. In fact, there are many reasons why you wouldn’t want to do this. The hurdles that users cross as they transition from lurkers to synthesizers to creators are also filters that can eliminate noise from signal.”

Some even transfer these network mechanisms from a mere economic to a more political perspective. They “believe that ‘lurkers’ experience the content of these (political) conversations differently, even if they never actually contribute, because of their awareness of their potential capacity to participate and their lower barriers of contribution (...).”¹¹⁰ The conceptual message is clear: The enhancement of participation is not only a way to better monetize content but also an essential pre-condition for social interaction in the digital society. Critics of current copyright law compare hence the “quoting” of audiovisual content with that of printed material online: While the latter “has become an accepted form of the circulation (...) (blogs regularly quote from and then link back to one another, for instance), many companies are not yet equipped to embrace the value generated through audiovisual quotes or other forms of transformative work as a means of incorporating their material into a larger, ongoing conversation.”¹¹¹

Jenkins stresses, summarizing the aspects prescribed, the **significance of participation for the mass media industry**:

“Under the spreadability paradigm, mass-produced and mass-distributed content is often customized and localized for niche audiences, not by commercial producers but rather by other community members. (...) Audiences act as “multipliers” who attach new meaning to existing properties, as “appraisers” who evaluate the worth of different bids on our attention, as “lead users” who anticipate new markets for newly released content, (...) and as “pop cosmopolitans” who seek cultural difference and help to educate others about content they’ve discovered from other parts of the world. And producers must think about these various motivations as they design content and respond to audience feedback”.¹¹²

Taken these aspects into account, the formatting of current television formats seems to become even more complex. International media franchises might, in the future, not take only national markets into account by adapting re-productions to the respective cultural circumstances but also the diversity of sharing

¹⁰⁹ Jenkins/Ford/Green, *ibid.*, p. 156/157, with reference to <http://blog.elatable.com/2006/02/creators-synthesizers-and-consumers.html>, re-called the 29th May 2013.

¹¹⁰ Jenkins/Ford/Green, *ibid.*, p. 159, with further references.

¹¹¹ Jenkins/Ford/Green, *ibid.*, p. 188, with reference to Hartley, John, “Television Truths: Forms of Knowledge in Popular Culture, MA: Blackwell 2008.

¹¹² Jenkins/Ford/Green, *ibid.*, pp. 296/297.

markets amongst their audiences. The respect of those sharing markets might both enhance the commercial potential of bottom-up productions and distribution and empower users to – legally – participate on the exchange of ideas.

III. Conclusion – From television to transmedia formats

Transmedia formats might seem as an advancement of television formats or just as a future trend. Anyway, the succeeding **stages of development, the market participants and the economic reasons** behind the production – and distribution – processes correspond. Creators and producers, respectively, of both paper formats for television shows and series as well as of story bibles for transmedia stories have to disclose them toward production and/or broadcasting companies and, in the future likely more, media agencies, internet platforms, network operators and video-on-demand-services to get the financing for the production and further developments. In case of, for example, lacking negotiation power, the moment of disclosure of the formats is crucial not only because it may not only decide on the financing success but also enables the potential business partners to “steal” the format. A similar situation occurs when the first show or episode of series or the succeeding media platforms of the story world are produced and communicated to the public. In the moment of broadcasting, putting online and/or publishing the product, everybody else is, actually, able to re-produce it without paying corresponding fees to the creators and/or producers.

Thereby, the economies behind both kinds of formats are very similar. Television formats as well as transmedia formats build on strict cost-benefit-ratios. The former success of produced formats or even parts of it, like within the iterative production process of transmedia formats, serve as mechanism of an ongoing risk-minimization. Market participants who “steal” formats do not only save development costs but also, depending on the stage of the entire production process, the sunken costs of potentially unsuccessful own but newly developed formats. Copyright protection of formats would principally enable creators and producers to legally forbid such kinds of usage and to enforce the respective copyright infringements. But to find the right balance point of such **copyright protection** is already difficult with respect to commercial creators, producers and re-creators. It **becomes** even **more complex**, if also sharing economies are taken into account. The high cultural and commercial potential of incorporating them into existent or new business models let it seem essential for the future growth of markets of cultural goods. It is no simple task for the participants of the corresponding markets, and neither for the legislator.

C. European format markets under lacking legal certainty

The following chapter illustrates the functioning and level of European harmonization concerning national copyright laws. It exemplifies, with regard to formats, the main lack of harmonization consisting in the missing common definition of the copyright protected work. Two supreme courts, one from the Netherlands and the other one from Germany, serve with regard to television formats as best example: While the first one principally affirms copyright protection, the second denies it in general. The chapter closes with an illustration of the negative effects that such lack of harmonization, at least theoretically, has on the markets.

I. European harmonization of 28 copyright regimes

The Dutch and German Supreme Court, respectively, use different criteria to examine whether the format in question is copyright protected or not. These differences base on the fact that the European legislator did not, in contrast to the economic rights, harmonize the definition of the copyright protected work. Indeed, European Copyright laws are widely harmonized, except the definition of the copyright protected work.

1. Principle of territoriality

As mentioned in the preceding chapter, both the Netherlands as well as the German Supreme Court stated that national Copyright law was applicable, respectively. The common reason is the so called **principle of territoriality**. The principle of territoriality grounds in Art. 5 sect. 2 of the Berne Convention which binds, as international treaty, all Member States and is, with respect to the European Union, expressly confirmed by the European Court of Justice.¹¹³ It means that “the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed”, Art. 5 sect. 2 Berne Convention. Thus, the Berne Convention regulates international circulation of cultural goods not on the grounds of one universal Copyright law but by the cross approval of, mostly differing, national Copyright laws, the so called **principle of national treatment**.¹¹⁴ Pursuant to Art 5 sect. 1 Berne Convention, “authors shall enjoy (...) in countries of the Union (of the Berne Convention) other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals.”

Following these principles, copyright owners willing to claim the infringement of their right(s) have to choose the right jurisdiction where they are allowed to claim, on the basis of the respective national Copyright law. At least with respect to the European Union, both issues jurisdiction and applicable law are harmonized by European Law. The Brussels I Regulation regulates two main **jurisdictions for the infringement of copyright**: Firstly, natural or legal persons who are blamed for copyright infringement can be sued in the courts of the European Member State where they are domiciled or registered, where their central administration or principal place of business is, Art. 2 sect. 1 Brussels I Regulation.¹¹⁵ Art. 5 sect. 3 Brussels I Regulation states a second, special, ground of jurisdiction referring to the court for “the

¹¹³ Hugenholtz, Copyright without frontiers: the problem of territoriality in European copyright law, p. 18.

¹¹⁴ Dreier, Einl. (Introduction) cip. 44.

¹¹⁵ Kreuzer/Wagner, EU-Economy Law, Art. 2 sect. 1, cip. 420 to 425.

place where the harmful event occurred or may occur”. This place is either where the activity leading to the damage or the damage itself occurs.¹¹⁶

Given the right jurisdiction, the court has then to decide on the applicable law. Basically, there are several differing principles pursuant to that the applicable law can be chosen. The most prominent are the principles named “lex loci protectionis” and “lex originis”. While the latter forces the court to apply the Copyright law of the country from that the intellectual creation in question originates, the former allows the court to apply its own copyright law.¹¹⁷ Art. 8 sect. 1 Rome II Regulation decided for the “lex loci protectionis”-principle stating that “the law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.”¹¹⁸ This raises, correspondingly to the jurisdiction of the place of the harmful event, the question about the place where the infringement occurs. The question is especially difficult to answer in cases of so called ubiquitous infringements. The term means that one action leads to effects in many countries, such as is the case for the international distribution of tangible products or satellite broadcasting and internet transmissions of intangible goods. In all cases the question is if the infringement takes place in the country where the emission or where the reception takes place.¹¹⁹ In contrast to the self-explaining “emission theory”, the “Bogsch’ Theory” sees both the country of emission as well as of reception as places of infringement. While the “Bogsch’ theory” avoids the incentive for copyright infringers to move to countries where only low levels of copyright protection exist, it results in a **multitude of applicable copyright laws**.¹²⁰ Copyright owners have or are allowed, respectively, to enforce their rights country by country possibly leading to cumulative claims or differing results.¹²¹

This is why the European legislator and the European Court of Justice attempt to **consolidate the proceedings** with respect to multiple rights as well as multiple defendants. With respect to multiple intellectual property rights, the European Court of Justice decided in the case ECJ C-86/93 “Shevill vs. Press Alliance” that the claimant is allowed to claim in the court of the defendant’s domicile not only the damages occurred in the respective Member State but all damages caused around the world.¹²² Pursuant to ECJ C-509/09 and C-161/10 “E-Date Advertising vs. Martinez”, the same applies if the claimant sues the defendant in the court of the claimant’s “center of interests”.¹²³ Indeed, the former case relates to the claimant’s personality right infringed and not a copyright. And with regard to the second case, a French court applied the “center of interests”-doctrine to both the moral and economic rights of the claiming actress, Marion Cotillard, but explicitly stating that “a performer’s moral right (...) may be said to have a character that is close to that of personality rights”.¹²⁴ So far, it is hence unclear if copyright owners can really claim in the court of the Member State where the infringer is domiciled or where the center of the claimant’s interests is all damages of all kinds of economic rights and not only the damages that are caused in the respective Member State. At least with respect to multiple defendants, the European Court

¹¹⁶ Cp. Kreuzer/Wagner, *ibid.*, Art. 5 sect. 3, *cap.* 468.

¹¹⁷ Drexl, *International Immaterial Property Law*, *cap.* 66.

¹¹⁸ Matulyonite, *The Law Applicable to Online Copyright Infringements*, *cap.* 3.

¹¹⁹ Cp. Hoeren, *International Copyright Law*, *cap.* 11.

¹²⁰ Cp. Drexl, *ibid.*, *cap.* 251 and 252.

¹²¹ Matulionyte, *ibid.*, *cap.* 4 and 6.

¹²² ECJ C-68/93, *cap.* 21 to 25.

¹²³ ECJ C-509/09 and C-161/10 *cap.* 47, 48, and 52.

¹²⁴ www.legalis.net/spip.php?page=jurisprudence-decision&id_article=3514, re-called the 23rd 2013.

of Justice clarified the application of Art. 6 sect. 1 Brussels I Regulation in cases of copyright infringements. Art. 6 sect. 1 Brussels I Regulation states that “a person domiciled in a Member state may also be sued where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”. In the case ECJ C-145/10 “Painer vs. Standard”, the European Court of Justice made clear that differing national Copyright laws of the Member States do not preclude its application.¹²⁵ This is an important step to overcome, at least within the European Single Market, the territoriality of copyright.

Of course, territoriality of copyright has not only disadvantages. Especially with respect to the so-called **cultural diversity**, there are also advantages, too. As already illustrated with regard to formats,¹²⁶ marketing and distribution of cultural goods often, for example, require their customization to the respective cultural circumstances within the respective Member State. The customization depends, amongst others, on the legal pre-condition to license the cultural good for different Member States, separately. Furthermore, the territorial separation of rights enables the right holders to discriminate prices on the different markets. For example, a format may achieve a lower price in Estonia than in Germany. Finally, many cultural subsidies are funded by collecting societies that often depend on territorial mandates. Without the territorial separation of copyright based licenses it would be much more difficult to establish and/or to maintain those mechanisms.¹²⁷ Nevertheless, the European Commission attempts to – at least partially – further harmonize the divergent national Copyright laws with the aim to enhance the **circulation of cultural goods and services**.¹²⁸

2. Horizontal harmonization of exploitation rights

The **distribution right in Art. 4 Copyright D** harmonizes the distribution of physical embodiments of copyright protected works and can be seen as extension of the reproduction right, especially, when the physical fixation took place in another country or its origin is unknown. Pursuant to the “lex protectionis”-principle, the applicable Copyright law depends on the place where the infringement occurred. If the claimant cannot localize the origin of the infringing copies or if the reproduction took place in another State without respective copyright protection, he or she can still refer to the country where the act of distribution takes place and falls under the applicable copyright protection. Art. 4 sect. 1 Copyright D does not define the notion “distribution” but clarifies that the right applies to “any form of distribution by sale or otherwise”.¹²⁹ The European Court of Justice had meanwhile the opportunity to concretize the notion. Pursuant to ECJ C-5/11 “Germany vs. Donner”, not only the sale itself falls under the distribution right but also the offer (directing advertising in combination with a delivery and payment system) to the public from one Member State to another constitutes an act of distribution in this latter

¹²⁵ ECJ C-145/10, cip. 81.

¹²⁶ See at point B. I. „Format markets: From television to transmedia formats“.

¹²⁷ Hugenholtz, *ibid.*, p. 19 who also mentions, in contrast, the European Court of Justice stating that the copyright protected work shall not be abused to artificially partition markets.

¹²⁸ See at point B. II. „European Union: One Single Market“.

¹²⁹ Ohly, *ibid.*, pp. 219 and 220.

Member State.¹³⁰ More restrictive is the interpretation in ECJ C-456/06 “Cassina vs. Peek&Cloppenburg”, pursuant to that the term “distribution” requires a transfer of ownership. The mere use of copyright protected works, for example, in shop windows or rest areas constitutes no distribution in the meaning of Art. 4 sect. 1 Copyright D.¹³¹ Another important restriction is the so called exhaustion principle in the law itself, more precise, in Art. 4 sect. 2 Copyright D. If the first sale or other transfer of ownership of the physical copy within the Single Market is made by the right holder or with his consent, he cannot hinder anymore its free circulation between the Member States.

The right of communication to the public in Art. 3 Copyright D refers exclusively to the copyright protected work in its intangible form. Art. 3 sect. 1 InfoSoc grants both sub-categories the **broadcasting right** and the right of making available to the public, the so called **online right**, to authors of copyright protected works. With regard to performers and entrepreneurs, such as phonogram and film producers as well as broadcasting companies, Art. 3 sect. 2 Copyright D only provides for the latter right of making available to the public. The respective broadcasting right is already granted by the Rental Right D and harmonized by the Satellite and Cable D. The broadcasting right and the right of making available to the public are not further defined in the directives. This makes it difficult to distinguish them in cases of webcasting. Finally, the right of communication to the public does only cover communications to the public not present at the place where the communication originates. That means that public performances in which both the performer and the public are present at the same place are not harmonized so far.¹³²

3. No harmonization of the copyright protected work (and the adaptation right)

Concerning the definition of the copyright protected work, there are, so far, three EU directives harmonizing the subject-matter: The Software D, the Database D and the Duration of Copyright D. The scope of harmonization of these Directives is called “vertical harmonization” because it refers exclusively to the regulation of software and databases, respectively. The Duration of Copyright D regulates, beside the duration of copyright, also the definition of photographs as copyright protected works, even if the definition is not exhaustive.¹³³ Thus, the effect of such vertical harmonization with respect to the definition of the copyright protected work is that only these kinds of works are defined. The **copyright protected work in general is not harmonized**. In contrast, a horizontal harmonization of the copyright protected work would regulate its definition for all kinds of works. This is so far, in terms of European legislation, not the case.¹³⁴

As already mentioned, the question about the necessary “originality” of the copyright protected work is different to the question if the work is transformed or adapted by a subsequent one.¹³⁵ With regard to European harmonization, not only the first but also the second question is difficult to answer. While Art. 2 Copyright D harmonizes the reproduction right but not the adaptation right, it is **unclear how to**

¹³⁰ <http://curia.europa.eu/juris/celex.jsf?celex=62011CJ0005&lang1=de&lang2=EN&type=NOT&ancre=>, cip. 30, recalled the 16th May 2013.

¹³¹ <http://curia.europa.eu/juris/celex.jsf?celex=62006CJ0456&lang1=de&lang2=EN&type=NOT&ancre=>, cip. 41, recalled the 16th May 2013.

¹³² Ohly, *ibid.*, pp. 224.

¹³³ Aplin, *ibid.*, p. 58/59.

¹³⁴ Cp. Casas Vallés, *ibid.*, pp. 119/120.

¹³⁵ See at point C. I. 5. “Innovation vs. recreation: Level of originality and gap of transformation”.

distinguish between both (the reproduction and the adaptation) rights. Most Member States recognize a distinct adaptation right, others identify the adaptation as sub-category of acts of usage that are protected by the reproduction right. Hence, the question is if Art. 2 Copyright D also harmonizes the adaptation right or if the national legislators of the Member States have to find the right balance between the definition of the author's adaptation right and the free use of the precedent work by subsequent authors. So far, the mere copy of a copyright protected work falls, without doubt, under the reproduction right of Art. 2 Copyright D. But further definitions are, except the "in dubio pro auctore" principle,¹³⁶ not provided for by the directive. In view of critics, the European Court of Justice had not yet the opportunity to define the term "reproduction". Hence, the question is still open if the adaption of parts of a copyright protected work falls under the reproduction right of Art. 2 Copyright D or if its regulation belongs to the Member States.¹³⁷

Thereby, it is necessary to differ between **two kinds of reproduction rights** regulated in Art. 2 Copyright D: At the one side, there is the author's right of first fixation, and at the other, the producer's right to reproduce fixations. While the author is protected against each kind of reproduction of his work, the producer is only protected against the reproduction of the copies he has made. The difference is essential with regard to the legal pre-conditions of the respective copyright protection. The author's right of first fixation requires that the work or components of it is or are original. In contrast, the producer's reproduction right is wider because the fixation per se must not be original to be protected. Thus, despite the adaptation of an intellectual creation or components of it which is or are not copyright protected might be free, the reproduction of the fixation can be forbidden.¹³⁸

II. Opponent copyright protection of formats in the Netherlands and Germany

To illustrate the diverging definitions of the copyright protected work, the decisions of the Dutch and German Supreme Court, respectively, on television formats serve as best examples. While the Dutch Supreme Court examines whether a format is original by means of the criteria "combination of work's elements", the German Supreme Court denies copyright protection for formats in general.

1. Copyright protection of formats in the Netherlands

The Netherlands Supreme Court stated in the case "Castaway vs. Endemol – Survivor vs. Big Brother" from the 16th April 2004 that television formats can basically be copyright protected.¹³⁹ In the case in question, the court stated that the format "Survivor!" by the production company "Castaway" is copyright protected, while its economic adaptation right was not infringed by the production company "Endemol" producing its own format "Big Brother". The following summarizes the facts and reasoning of both decisions of the Netherlands Supreme Court as well as of the Amsterdam Court of Appeal.¹⁴⁰

¹³⁶ For example, recital 9 Copyright D proclaims that „any harmonization of copyright (...) must take as basis a high level of protection”.

¹³⁷ Ohly, Economic rights, pp. 217/218.

¹³⁸ Ohly, *ibid.*, p. 215.

¹³⁹ Hoge Raad der Nederlanden, 16 April 2004, No. C02/284HR.

¹⁴⁰ <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=AO3162> and <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=AE4818>, re-called the 1. June 2013.

a) Facts: “Survive!” vs. “Big Brother”

In the case, “Survive!” vs. Big Brother”, the claimants are mainly the Swedish production company Planet 24 Productions Ltd. (in the following “Planet 24”) which produced the format “Expedition Robinson” in Sweden and the American production company Castaway Television Productions Ltd. (in the following “Castaway”) that produced the format “Survivor” in the USA on the basis of the format “Expedition Robinson”. The defendants are mainly the Dutch production company “John de Mol Produkties B.V.” which produced the format “Big Brother” as well as the international distribution company “Endemol Entertainment International B.V.” that distributed the format all over the world (in the following both companies together “Endemol”).

Planet 24 finished in 1996 the development of a format paper under the title “Survive!”. The format paper was a four parted documentation: A summary of the format as a whole, a description of one series of the format, the presentation of one episode, the rules of the game as well as video material and recommendations. The format was described as combination of entertainment series, “documentary soap” and social experiment. On the basis of the Survive! Format, in summer 1997 a series was produced and broadcasted under the title “Expedition Robinson”. A second series as well as several series in other European Member States followed.¹⁴¹

Endemol developed during one year a format that was finally titled “Big Brother”. Based on this format, the private television channel Veronica broadcasted the show in Netherlands from September to December 1999. A second series of shows followed in 2002 under the title “Big Brother 2” a third one in 2003 under the title “Big Brother 3”. Endemol sells the format since 1999 internationally.¹⁴²

Castaway took Endemol to the District Court Amsterdam. Castaway claimed that its format “Survivor” is, pursuant to Dutch Copyright law, a copyright protected work because it is a unique combination of twelve elements that are, each as such, copyright protected. The “Big Brother” series infringed hence its economic right of adaptation as well, through the broadcast and international sales, its broadcasting and distribution rights. Endemol argued that the “Survive!” format is no copyright protected work and, given the copyright protection of the format, that the production of the “Big Brother” would not be an adaptation of it. The District Court Amsterdam approved the “Survive!” format as a copyright protected work but denied, after examining which of its twelve elements were adopted in the “Big Brother” format, that the latter did not infringe the adaptation right on the “Survive!” format.¹⁴³ The case came up to the Amsterdam Court of Appeal and, finally, to the Netherland Supreme Court.

b) Reasoning: “Combination of elements”

The Amsterdam Court of Appeal stated, first of all, that Dutch Copyright law was applicable. Then it proved the claim in two steps: Firstly, if the “Survive!” format is a copyright protected work and, given the affirmation, if the production of “Big Brother” infringes the corresponding adaptation right. To be a copyright work, the format had to be, pursuant to Dutch Copyright law, both sufficiently original and

¹⁴¹ Hoge Raad der Nederlanden, 16 April 2004, No. C02/284HR, sent. 2.

¹⁴² Hoge Raad der Nederlanden, 16th April 2004, No. C02/284HR, sent. 2.

¹⁴³ Hoge Raad der Nederlanden, 16th April 2004, No. C02/284HR, sent. 3, 5 and 6.

formed in sufficient detail. The Amsterdam Court of Appeal stated that none of the twelve elements in question were, as such, sufficiently original. Therefore, it was irrelevant if some of these elements were already used in precedent television formats. But the Court saw the difference to precedent works in the combination of the twelve elements and held the “Survive!” format as such for sufficiently original.¹⁴⁴ With respect to the form, the format had to be either sufficiently concretized or contain sufficient form giving elements. The format paper is worked out in detail. It describes the professions of the participants as well as the structure and the climax of the respective episodes. The document makes clear how the program will concretely function.¹⁴⁵

Regarding the infringement of the adaptation right in question, the Amsterdam Court of Appeal states: “For the question if the “Big Brother” programs infringe the format “Survive!”, the Court will take the overall impressions of the “Survive!” format and of the “Big brother” program into account in which the similarities between format and program are decisive. Thereby, the different elements on that the format is build on, naturally play a role. Especially, if a format consists of a combination of unprotected elements (as here is the case), an infringement is only possible if several elements are recognizable and in a similar way adopted. (..) If all elements have been copied, there is no doubt. In that case copyright infringement is involved. If only one (unprotected) element has been copied, the situation is also clear: in that case no infringement is involved. A general answer to the question of how many elements must have been copied for infringement to be involved cannot be given; this depends on the circumstances of the case.” In view of this, the Amsterdam Court of Appeal held the overall impressions of the “Survive!” format at the one side and of the “Big Brother” program at the other side for so decisive that the latter did not infringe the economic adaptation right of the “Survive!” format. The single elements that were adopted in the “Big Brother” format are not, neither separately nor in the present combination, copyright protected.¹⁴⁶

Castaway finally went to the Netherlands Supreme Court claiming that the Amsterdam Court of Appeal did not correctly weigh the single elements of the “Survive!” format that were adopted in the “Big Brother” program. Castaway argued that some elements expressed the core idea of the format. Thus, its adoption in another program must still lead, with respect to the overall impression, to an infringement of the original format. The Netherlands Supreme Court refused this argument: The claimant did not take into account “that the core or the essence of a certain element is not copyright protected”. The core or the essence belongs to the ideas or thoughts which are, as such, not copyright protected. Only the form in which the ideas, it may be the core or the essence of the format, are expressed can be copyright protected.

¹⁴⁴ Gerechtshof Amsterdam , 27th June 2002, No. 1026/00, sent. 4.11.

¹⁴⁵ Gerechtshof Amsterdam , 27th June 2002, No. 1026/00, sent. 4.12.

¹⁴⁶ Hoge Raad der Nederlanden, 16th April 2004, No. C02/284HR, sent. 8: “Bij de vraag of de Big Brother-programma's inbreuk maken op het Survive-format zal het hof de totaalindrukken van het Survive-format en van de Big Brother-programma's in zijn beoordeling betrekken, waarbij het hof beseft dat primair de overeenkomsten tussen format en programma's van belang zijn voor de inbreukvraag. Daarbij spelen de verschillende elementen waaruit het format is opgebouwd uiteraard een rol. Juist indien een format bestaat uit een combinatie van onbeschermd elementen (zoals in casu) kan van inbreuk slechts sprake zijn indien meerdere van die elementen herkenbaar en in een vergelijkbare keuze zijn overgenomen. Immers: als álle elementen zijn overgenomen, is geen twijfel mogelijk. In dat geval is sprake van auteursrechtelijke inbreuk. Als slechts één (onbeschermd) element is overgenomen is de situatie ook duidelijk: in dat geval is geen sprake van inbreuk. Het antwoord op de vraag hoeveel elementen overgenomen moeten zijn om van inbreuk te kunnen spreken, is niet in algemene zin te geven, doch hangt af van de omstandigheden van het geval.”

Thus, one single element cannot lead to copyright protection of the format even if it constitutes its core idea or essence.¹⁴⁷

2. No copyright protection of formats in Germany

In contrast to the Netherland Supreme Court, the German Supreme Court comes the 26th June 2003 in the similar case “TV Design vs. Südwestrundfunk – L’*école des fans* vs. *Kinderquatsch mit Michael*” to the conclusion that television formats are in general not copyright protected. The following reproduces the descriptions and reasoning in the decision of the German Supreme Court.¹⁴⁸

a) Facts: “L’*école des fans* ” vs. “*Kinderquatsch mit Michael*”

The claimant was the German production company TV Design which offered in 1990 the television format “L’*école des fans*” to the defendant, the German public broadcasting company Südwestrundfunk. The defendant refused the offer. The broadcasting company started in March 1993 to broadcast the television program “*Kinderquatsch mit Michael*”.¹⁴⁹

The German Supreme Court describes the format “L’*école des fans*” as in the following: “In the centre of the separate television shows that always run within the same basic structure are four children who are between four and six years old. The presenter J.M. presents the children and a famous singer as guest (of the show). Then he leads the first child to a little podium with a microphone and starts a brief interview with questions like “What does Daddy, what does Mommy, where do you come from, how did you come here, who drove, who joined you?”. The child sings then a song that was chosen by the invited singer. Piano and contrabass accompany the song. During the performance, the camera pans to the parents who are part of the audience. The performance gets grades. In a show block, the guest performs his own song. Finally, the guest singer gives out presents to the children”.¹⁵⁰

The television program “*Kinderquatsch mit Michael*” is described as it follows: “Three children who are between four and six years old perform a song. Parents, siblings and grandparents are part of the audience. After the presentation, the presenter Sch. leads the first child to a little podium with a microphone on the stage and poses questions about parents, domicile, journey, kindergarten or school etc. Then, the child performs, accompanied by a pianist, a rehearsed song. During the performance, the

¹⁴⁷ Hoge Raad der Nederlanden, 16th April 2004, No. C02/284HR, sent. 18.

¹⁴⁸ BGH, Urteil v. 26.06.2003, Az. I ZR 176/01.

¹⁴⁹ BGH, *ibid.*, pp. 2/3.

¹⁵⁰ BGH, *ibid.*, pp. 2/3: „Im Mittelpunkt der einzelnen Fernsehshows, die stets nach demselben Grundmuster ablaufen, stehen jeweils vier Kinder im Alter von vier bis sechs Jahren. Der Moderator J. M. stellt die Kinder und als Gast einen bekannten Sänger oder eine bekannte Sängerin vor. Er führt dann das erste Kind zu einem kleinen Podest, vor dem ein Mikrophon aufgebaut ist, und beginnt ein kurzes Interview mit Fragen wie "Was macht Vati, was macht Mutti, wo kommst Du her, wie seid Ihr hergekommen, wer ist gefahren, wer ist noch mitgekommen?". Das Kind singt nun ein Lied, das der eingeladene Künstler für das Kind ausgewählt hat. Der Gesangsvortrag wird am Flügel begleitet und durch einen Kontrabaß unterstützt. Während des Auftritts schwenkt die Kamera auch zu den Eltern des Kindes, die unter den Zuhörern sitzen. Der Beitrag wird später benotet. In einem Schaublock hat der bekannte Gast seinen Gesangsauftritt. Zum Schluß verteilt der Gastsänger an die Kinder Geschenke.“

camera also shows the parents. In the course of the show, a starring guest or a music band perform a professional song. Finally, presents are given, mostly by the guest, to the children.”¹⁵¹

The claimant brought the defendant to court for omission of broadcasting the show. TV Design argued that the format “L’école des fans” is copyright protected and to have acquired the rights from the French creator and producer. The program “Kinderquatsch mit Michael” is the plagiarism of the format “L’école des fans” what requires the respective licenses. All instances, including the German Federal Supreme Court, denied the claim because formats are in general not copyright protected.

b) Reasoning: “Fiction-model-dichotomy”

The Court of Appeal justified its decision on the grounds that neither the format nor the elements of it were sufficiently original. The format was composed by elements that belonged to the public domain and did not differ to pre-existent shows in which candidates got the opportunity to present themselves and their skills. The special feature of the show was that the candidates were children in the age between four and six – which was a trivial idea and as such not copyright protected. Only the performances of the children and the way in which the presenter led the conversation were original.

The German Supreme Court affirmed the sentence. At first, it stated that German Copyright law was applicable. Pursuant to the “state of protection” principle, the applicable law decides, amongst others, on the pre-conditions for copyright protection that means here, the definition of the copyright protected work. Pursuant to § 2 sect. 2 UrhG, the elements of the format “L’école des fans” as a whole do not constitute a copyright protected work. Thereby, the German Supreme Court defines the format of a television show as “unity of all its characteristics which define the basic structure of the episodes, irrespective of their differences, and enable the audience to recognize them as part of a series. From case to case, different elements can constitute a format. Beside the title and the logo of a program, also the common idea for all episodes, certain participants, the style of the presentation, (...) signal colors, decoration, the length of the show and components of it, the style of camera, lightning and cut. The format of the television show in which these elements are composed constitutes a unity that builds the common structure for all episodes. It is, normally, not the expression of a certain theme but serves, similarly to a plan, a bundle of directing instructions or to a framework for certain expressions, the development of separate but similar episodes. The single show can serve as pattern for further episodes.”¹⁵²

¹⁵¹ BGH, *ibid.*, p. 3: „Es treten jeweils drei Kinder im Alter von vier bis sechs Jahren mit einem Liedbeitrag auf. Eltern, Geschwister und Großeltern sitzen während der Sendung unter den Zuhörern. Nach der Vorstellung führt der Moderator Sch. das erste Kind zu einem kleinen Podest auf der Bühne, vor dem sich ein Mikrophon befindet, und stellt Fragen zu Eltern, Wohnort, Anreise, Kindergarten oder Schule usw. Das Kind trägt dann, begleitet durch einen Pianisten, ein einstudiertes Lied vor. Während des Auftritts zeigt die Kamera auch die Eltern des Kindes. Im Verlauf der Sendung treten ein Gaststar oder eine Musikgruppe mit einem Beitrag auf. Schließlich werden – meist durch den Gast – an die Kinder Geschenke verteilt.“

¹⁵² BGH, *ibid.*, p. 8: „(...) Gesamtheit aller ihrer charakteristischen Merkmale, die geeignet sind, auch Folgen der ungeachtet ihres jeweiligen unterschiedlichen Inhalts als Grundstruktur zu prägen und damit zugleich dem Publikum zu ermöglichen, sie ohne weiteres als Teil einer Sendereihe zu erkennen. Von Fall zu Fall kann ein Format durch ganz verschiedene Gestaltungselemente gebildet werden. Neben dem Titel und dem Logo einer Sendung können etwa dazu gehören ein den Gesamt Ablauf prägender Grundgedanke, bestimmte Mitwirkende, die Art und

In the following, the court clarified that the format of a television show is not copyright protected because it is not mentioned in the catalogue of types of work of Art. 2 sect. 1 UrhG. Furthermore, a format fulfilled the form requirement because the mere idea is already developed to a unity that is more than the sum of its elements. Finally, the format in question was original because the unity of elements provided a special climax.¹⁵³

The court finally denied copyright protection because not the story, like in fictional series, combines the episodes but the format that does, in general, not create a fictional world.¹⁵⁴ The format was just an instruction book explaining how to form or to express the idea. That means it is not the result of a creation process and therefore, even if it is original, not copyright protected.¹⁵⁵

3. Comparing “combination of elements” vs. “fiction-model-dichotomy”

In both cases, the courts declared, first of all, the application of national Copyright law that enabled them to interpret it on the ground of their respective legal doctrines. This was necessary because both cases were related to foreign (EU) countries. The format “Survive!” of the claimants was developed and firstly produced in Sweden, the format of the defendants, “Big Brother”, was developed, produced and broadcasted in Netherlands before it was distributed all over the world. The format “L’école des fans” was originated from France and then sold to the claimants, a German television production company, while the defendant’s television show “Kinderquatsch mit Michael” was developed, produced and broadcasted in Germany. Nevertheless, both came to similar results with respect to the requirements of form as well as originality which were in both cases, at least principally, fulfilled.

Indeed, the German Supreme Court nevertheless denied copyright protection not only for the format in question but also in general for formats of “television shows with an elaborated concept for an entertainment program with studio audiences”.¹⁵⁶ Thereby it is interesting that the German Supreme Court did not refer to the statement of the Court of Appeal pursuant to that the format itself was not sufficiently original but consisted of trivial ideas. Contrary, the Supreme Court explicitly acknowledged that the format was “a unite concept of individual originality”.¹⁵⁷ The main point was, in view of the court, that the format was not fictional. This criterion might astonish because non-fictional content such as

Weise einer Moderation, (...) Signalfarben, die Bühnendekoration und sonstige Ausstattung, die Dauer von Sendung und Beiträgen sowie ein bestimmter Stil der Kameraführung, der Beleuchtung und des Schnitts. Das Format einer Fernsehshow, in dem Gestaltungselemente dieser Art miteinander verknüpft und verwoben werden, bildet insofern eine gestaltete Einheit, als damit die Grundlage für immer neue Folgen dieser Show gelegt wird. Es ist in aller Regel nicht selbst Gestaltung eines bestimmten Stoffs, sondern, sondern ähnlich einem Plan, einem Bündel von Regieanweisungen oder einem Gestaltungsrahmen darauf angelegt, der Entwicklung jeweils neuer gleichartiger Folgen zu dienen. Die einzelne Fernsehshow, die das Format verwirklicht, kann Muster für weitere Folgen sein.“

¹⁵³ BGH, *ibid.*, pp. 9/10.

¹⁵⁴ BGH, *ibid.*, p. 9.

¹⁵⁵ BGH, *ibid.*, pp. 10.

¹⁵⁶ See at introducing summary in the beginning of BGH, *ibid.*, p. 1.

¹⁵⁷ BGH, *ibid.*, p. 9.

documentaries can be, without doubt, copyright protected.¹⁵⁸ Even compiled legal briefs that are, obviously, non-fictional are copyright protected.¹⁵⁹ At a second view, of course, the sentence let assume another reason for the courts denial. In contrast to the fable of fictional stories, the inner structure of a format that combines the different episodes is as method, like the instructions of a cookbook, not copyright protectable. The method belongs to the public domain. Therefore, the format can always serve as “model for similar programs”.¹⁶⁰

The Netherlands Supreme Court, instead, does not differ between the protectable fable of fictional stories and the method of non-fictional formats that is not copyright protected. It just examines the elements that constitute, in their combination, the required originality. Thereby, the court is well aware that the elements as such are, mostly, not copyright protected and, especially, not the idea behind, even if it may be the core or essence of the format. Finally, both courts attempt to find the right balance point between idea and expression with respect to adaptations, but use different kinds of legal instruments: The German Supreme Court refers to a, sort of, “fable-method-dichotomy”, while the Netherlands Supreme Court focuses on the “combination of elements”. Both instruments have their advantages and disadvantages. At the one hand, the focus on the “combination of elements” avoids differing between fictional and non-fictional content, a distinction that is not legally foreseen and seems, at a first view, contradictory. At the other hand, it actually obliges the court to compare the “combination of elements” in question with any already existent combinations. This is a consequence with that the Netherlands Supreme Court coped in a rather intuitive way stating “that older programs may already contain one or more elements of the twelve that are combined in the “Survive!” format. But that does not mean that the combination of the elements together, in which the “Survive!” format is different to older programs, is original. The Court will, therefore, not compare the “Survive!” format and/or the “Big Brother” format with older programs.”¹⁶¹ Indeed, the question about the originality of the combination actually obliges to compare it with precedent works. Probably the court simply assumed that the pre-existence of the identical combination is too unlikely having to proof it.

At least, the final outcome is in both cases similar: The defendants did not infringe the claimant’s (copy)rights.

III. Conclusion – Effects on European format markets

The lack of harmonization with regard to the definition of the copyright protected work as well as to the adaptation right has certain effects on the format markets. Principally, stakeholders involved in formats circulating amongst the Member States must prove the copyright regime in which their act of usage could infringe the rights of a copyright protected format. While this approval could be still controllable for commercially acting entities, these efforts seem to be out of control for end-users.

¹⁵⁸ Schricker, *ibid.*, p. 925.

¹⁵⁹ Heinkelein/Fey, *ibid.*, p. 385, with further references.

¹⁶⁰ BGH, *ibid.*, p. 11.

¹⁶¹ „Het hof stelt voorop dat het goed mogelijk is dat al eerder (vóór 1996) programma's zijn geproduceerd waarin één of meer van de twaalf door Castaway c.s. opgesomde elementen zijn terug te vinden. Dat betekent echter niet dat aan de combinatie van al deze elementen, waarin het Survive-format zich van eerdere programma's onderscheidt, tezamen geen oorspronkelijk karakter zou kunnen toekomen. Het hof zal dan ook niet verder ingaan op de vergelijking van het Survive-format en/of het programma Big Brother met andere programma's.“

With regard to formats, the prescribed diverging levels of harmonization are crucial. Firstly, as long as the European legislator or the European Court of Justice does neither harmonize the definition of the copyright protected work nor of the adaptation right of Art. 2 Copyright D, the legal treatment of **formats' adaptations** depends on the respective regulation of the Member State's copyright law. Pursuant to the "lex protectionis"-principle, it is upon the copyright law of the Member State in which the adaptation of the work takes place whether the adaptation can be forbidden by its creator or right owner, respectively. Given the right jurisdiction, the court will prove whether, firstly, the adapted format is copyright protected and, secondly, whether the act of adaptation falls under the adaptation right or is free use. The situation is different for the producer of the format, for example of the television show. In the moment the show is produced, the producer is protected against any **reproduction of the fixation of the show**, irrespective in which Member State, whether only single parts are copied and if those parts are original or not. Of course, as far as the producer of the show refers to the author's reproduction right, because the author(s) of the format licensed his/their rights to him, he is in the same situation as the author(s).¹⁶²

So far, the legal situation is still predictable. Especially creators and producers who work with elements of precedent formats have only to know the Copyright law applicable in the country where they create their own new formats. As long as the national copyright law does not protect the components that are overtaken from precedent formats or the kind of adaptation does not fall under the economic adaptation right, the new creation is allowed without any respective license. In the moment in which those formats are offered internationally, the situation becomes more complex. Given that the format takes part of a production package, it probably exist in a physical embodiment, may it be as paper format, pilot or an already existing series of shows. At **international trade fairs** specialized on formats, these format embodiments are offered for sale to any professional who might be interested, from creators to producers to broadcasting companies, network operators and media agencies. Even if those trade fairs take place in some specific Member States, the offer is directed to all national markets. Respective that even the offer is covered by the **distribution right in Art. 4 sect. 1 Copyright D**, it might be possible that the offer of the format infringes the national copyright law of at least one targeted market. If the right owner of a precedent format discovers a similar subsequent format, he could principally claim and attempt to prove the infringement of his copyright on the grounds of the most favoring copyright law.¹⁶³

Thereby, the claimant could basically pursue two aims. Firstly, she could attempt to get provisional measures to stop the sales of the format at the international trade fair. If the court applying the most favoring copyright law confirms the **provisional measure**, the court related to the trade fair must principally recognize the decision without any special procedure, Art. 32, 33 and 34 Brussels I Regulation.¹⁶⁴ Given the respective decision, the claimant could enforce the provisional measure clearing the stand at the trade fair. The second aim of the claimant could be to get the **damages reimbursed**. If the claimant is able to prove that the court belongs to the Member State as his center of interests, the court is principally allowed to sentence not only about the damages caused in this Member State but about all

¹⁶² Cp. point D. II. 3. "Format right: No European harmonization?".

¹⁶³ Cp. point D. II. 4. „Exploitation rights: Horizontal harmonization“.

¹⁶⁴ Kreuzer/Wagner, *ibid.*, c.p. 665.

damages.¹⁶⁵ There is no corresponding case law so far. But it would be interesting to test how far the court is willing to go on the grounds of the most favoring copyright law even if it recognizes that other States where damages are caused deny copyright protection of formats per se.

The legal situation becomes more complicated with regard to the **rights of communication to the public**. In cases of broadcasting and of online communication, one single broadcast or upload can be perceived in many countries simultaneously. Pursuant to the Bogsch' theory, the place of ubiquitous infringements is the place of emission as well as the place of reception. While the parallel application of several Copyright laws could still be argued in the case of distribution of formats at international trade fairs, illegal broadcasting and online communication doubtlessly result in a multitude of copyright infringements all over the world. Indeed, as far as **satellite broadcasting** is concerned, Art. 1 sect. 2 b) Satellite and Cable D solves the problem of conflicting laws and cumulative damages via the application of the emission theory stating that "the act of communication to the public by satellite occurs solely where (...) the programme-carrying signals are introduced". That means that the law of that Member State is exclusively applicable in which the emission defined takes place.¹⁶⁶ In view of the Dutch and German jurisdictions regarding formats prescribed, the emission of a show without respective license is legal in Germany but can be illegal in the Netherlands, if such show consists of copyright protected components of a precedent format.

But as far as **broadcasting** takes place **via cable or in the Internet** or in case of **online communication**, the problem of ubiquitous infringements remains. While the legality of the feed-in or up-load of the show exclusively depends on the Copyright law of one country, the perception of it basically occurs wherever users get access to the cable- or the Internet. This leads to the essential problem that the Bogsch' theory causes with respect to digitization. The wider the scope of copyright protection in the Internet becomes, the more users risk illegally downloading or copying content.¹⁶⁷ The problem is less severe with regard to cable transmissions. The mere reception of a formatted and, as such, copyright protected show carried via cable onto the television screen is not a copyright protected act of usage.¹⁶⁸ But if the transmission takes place via the Internet, end-users have to download the show to watch it. Nowadays, downloading constitutes an act of reproduction in the meaning of Art. 2 Copyright D. Even streaming, that means if the work is only temporarily copied in the random access memory (RAM), Art. 2 Copyright D applies.¹⁶⁹ The broadened scope of the digital reproduction right shifts the legal responsibilities to both commercial companies and end-users: While only companies which feed in or transmit the copyright protected work into the respective cable net are legally responsible, also end-users become liable for infringements because they receive content that is transmitted in the Internet. But in contrast to companies which feed in or transmit content, end-users are mostly not able to control if shows they watch, post or interact with contain components of precedent formats, if these precedent formats are copyright protected, and if there is any license deal between the copyright owner(s) of such precedent formats and the producer of the current show.

¹⁶⁵ See at point D. II. 1. "Territoriality: 27 national Copyright Laws" referring to Matulionyte, www.jipitec.eu/issues/jipitec-2-1-2011/2961/mat.pdf, cip. 4 to 6, with regard to online infringements.

¹⁶⁶ Cp. point D. II. 4. „, Exploitation rights: Horizontal harmonization”.

¹⁶⁷ Kreutzer, *ibid*, p. 344.

¹⁶⁸ See at ECJ C-403/08 and C-429/08 cip. 164.

¹⁶⁹ Ohly, *ibid.*, pp. 216 and 217.

The preceding chapter illustrates how difficult it is for participants of the European format market(s) to **control the legality** of their acts **of usage**. Indeed, the adaptation of preceding formats, the feed-in or transmission into cable networks and the broadcast via satellite exclusively depend on the copyright law of the Member State where the adaptation, feed-in, transmission or emission occurs. In contrast, distributing formats, as part of so called production packages, on international trade fairs and, even more, broadcasting and communicating shows based on formats within the Internet leads to the application of all Member State's laws where the offer might be directed to or where the show can principally be downloaded. Hence, the distributor or first up-loader of a show has to verify in which Member State these acts of usage could infringe the copyright of a preceding format and, if so, must purchase the respective licenses. While the situation might be still controllable for commercial companies, it seems impossible for end-users. Of course, end-users will probably not distribute formats on trade fairs, feed or transmit them into or via cable networks nor broadcast them via satellite. But they will take part of all forms of online communication.¹⁷⁰ With regard to transmedia formats, it might be even possible that end-users adapt formats, especially if the format builds on user generated content. These users have to trust that their participation does not infringe the copyright of precedent formats.

In summary, commercial companies have to verify for certain acts of usage the Copyright laws of 28 Member States. Correspondingly, end-users participating in shows based on formats have to trust that the producer of the show they watch, post or interact with cleared the necessary rights. If not, the owner of the format's copyright that is infringed by these acts of usage cannot only pursue, pursuant to the law of the corresponding Member State(s), the infringement of the commercial producer or distributor of the show but also the participating users. In this view, harmonization with regard to the definition of the copyright protected as well as of the adaptation right could mitigate the negative effects prescribed on format markets. But the main question still remains: Should formats European wide be copyright protected or should they fall out of the protection's scope? And with respect to the right balance point between the interests of the different stakeholders of format markets, which criteria should define in general the copyright protected work?

¹⁷⁰ Cp. Matulionyte,, *ibid.*, cip. 4 and 6.

D. Balance of interests: Utilitarian copyright theories and feedback of stakeholders

As mentioned in the introduction, utilitarian copyright theories help structure the criteria to find the right balance between the interests of the stakeholders, such as creators, producers, distributors, users and, of course, re-creators. Those criteria serve to define the purposes of Copyright law, to interpret it as well as to prove its efficiency.¹⁷¹ The stakeholders themselves of the, at least, German format markets will give a feedback on the theoretical assumptions about their logics and behavior.

I. Purposes of copyright pursuant to utilitarian theories

To examine the justification of the basic criteria for the copyright protected work prescribed it is necessary to summarize the purposes for copyright protection that are elaborated in utilitarian copyright theories. The following gives a brief overview and illustrates, simultaneously, why they cannot provide an empirical prove but rather serve to structure the justification for copyright protection.¹⁷² These copyright theories are classified here as so called Incentive Theory, Transaction Costs Economics theory, and Democracy based Theory.¹⁷³

1. Incentive Theory

The Incentive Theory focuses on the incentive effect that copyright protection shall have on the creation of works. The Incentive Theory attempts to balance, on the one hand, the risk of under-production of works in case of lacking incentives for the creators and/or producers and, on the other hand, the risk of over-protection of works with the result of too many people excluded from its use.¹⁷⁴ In terms of the Incentive Theory, this balance can be described as “dilemma of copyright”.¹⁷⁵

a) Dilemma of intellectual works as public goods

The dilemma consists of two theoretical concepts: The nature of intellectual creations as public goods and the public welfare. Thereby, the Incentive Theory focuses on the incentive that copyright protection shall have for creators and/or producers and bases, inherently, on two assumptions: The first one is of an economic nature. Pursuant to the economic model of **public goods**, these goods, such as intellectual creations, principally end up in a market failure because they are “non-rival”. Non-rivalry means that its use by one person does not hinder the parallel use by another person; in other words, the use is non exhaustive.¹⁷⁶ For example, one person sitting on a chair excludes its usage by a second person. In opposite to those physical goods, intellectual creations, such as a song, allow the parallel consumption by a principally unlimited number of people – only restricted to the existing number of copies. This non-rival nature of public goods results in the effect that more and more people use the work on the basis of

¹⁷¹ See at point A. I. 4. “Theoretical scale: Utilitarian theories as justification for copyright protection”.

¹⁷² See above at point A. IV. “Theoretical scale: Utilitarian theories as justification for copyright protection”.

¹⁷³ The subsequent illustration follows mainly the structure of Hansen, *ibid.*, p. 106 ff.

¹⁷⁴ Landes/Posner, *ibid.*, p. 11, warning of an oversimplified model.

¹⁷⁵ Cp. point A. III. “Copyright protected works: Formats between private property and public domain”.

¹⁷⁶ Hansen, *ibid.*, p. 129/130.

marginal costs for the copies but do not refinance the costs of its creation resp. production.¹⁷⁷ This leads to the second, more psychological, assumption. The Incentive Theory presumes that the main incentive for creating intellectual goods is the **financial incentive**: If users of a work cannot refinance the costs of its creation resp. production, there was no incentive for its creation and/or production, respectively.¹⁷⁸ Therefore, the creator and/or producer of the intellectual creation need certain legal instruments to force users to refinance the creation and/or production. The main legal instrument to do so is an artificial monopoly granted by the law that enables the creator and/or producer to exclude others from the usage of his work and, as consequence, to grant licenses to them for certain license fees.¹⁷⁹

Safeguarding satisfaction of the financial incentive of creators and/or producers by copyright protection bares the risk of over-protection, in other words, that a too high level of copyright protection excludes too many people from the usage. Thereby, the Incentive Theory describes the risk of over-protection by two different types of costs: Firstly, the number of potential users that do not use the work because the price given by the monopolist – that means the creator, producer or any other entity holding the rights – for the license is higher than users are able or willing to pay. This loss of potential users can, in terms of **public welfare**, be expressed as costs because the usage of the work by those people would not, due to its nature as public good, decrease its value for the paying users.¹⁸⁰ Secondly, the legal monopoly on intellectual works also increases the so called costs of expressions. Under costs of expressions fall such costs that a subsequent creator and/or producer has to make creating his own work on the basis of precedent works. The more extensive copyright protection is, the less a creator resp. producer can legally use precedent works or elements of it, and the higher are the efforts, especially, costs of re-creation, re-production, or simply spoken, of participation and/or re-mixing intellectual creations.¹⁸¹

The Incentive Theory attempts to cope with the copyright dilemma by finding the right balance of interests between creators and/or producers and, in the widest meaning, users. Pursuant to the Incentive Theory, the interest to refinance the creation or production of the intellectual work has to be weight with the loss that the exclusion of people from the usage causes for the public welfare. The Incentive Theory could hence serve as measure to balance the interests on the format market and to help answering the question whether, and if so, how formats shall be copyright protected.

b) Criticism of the “homo oeconomicus”

The Incentive Theory is not free of criticism. Critics focus mainly on the assumed function of the incentive paradigm itself as well as on the one-dimensional view on copyright law as necessary mechanism to guarantee the financial incentive. The former argument grounds mainly on the doubtful empiric validity of the “**homo oeconomicus**” on that the incentive paradigm is built on. Critics argue that persons do not exclusively orient themselves towards rational choices. Especially creators find their motivations not only in rationally financial driven issues. For example, some artists seem to create as an end in itself (and have no financial interest at all in it – Franz Kafka who wanted to let destroy his opus

¹⁷⁷ Landes/Posner, *ibid.*, p. 13, differing between static and dynamic benefits.

¹⁷⁸ Hansen, *ibid.*, p. 131.

¹⁷⁹ Cp. Landes/Posner, *ibid.*, pp. 11.

¹⁸⁰ Hansen, *ibid.*, p. 132.

¹⁸¹ Landes/Posner, *ibid.*, p. 66 and 68.

after his death might serve here as famous example). Other people may create because of social recognition or, at least, publicity and will therefore be more interested in the most extensive dispersion of their work possible than in excluding potential users by means of copyright law. Creators, producers or financiers may also want to promote certain cultural, political or religious ideas.¹⁸² The essence of these examples is that the financial aspect on that the Incentive Theory is built may not be the exclusive one.

The second argument of the critics accepts the financial incentive itself but doubts that copyright protection shall be the appropriate or, at least, the only mechanism that has to be taken into account to guarantee the satisfaction of the financial incentive. Principally, there are **several alternatives beside copyright protection**: Lead-time in the development, or rather, in the production and distribution process as well as so called gentlemen's agreements and the fear of losing reputation in case of being accused for "theft of ideas" or, simply, economic power amongst market players can serve as mechanisms as well to guarantee the effectiveness of the financial incentive.¹⁸³ Business models based, principally, on open content, such as advertisement, value-added services or bundles of intellectual and physical property, function in certain areas since decades for monetizing the product rather than license models based on copyright monopolies.¹⁸⁴ Critics take even public recoupment-mechanisms into account. The discussion about the so called cultural flat rate in combination with public fees or taxes can serve as one example. Legal licenses controlled and enforced by collecting societies are another.¹⁸⁵ At least, they illustrate that Copyright law has not to be the exclusive mechanism to guarantee the satisfaction of the creators' and/or producers' financial interests.

c) Conclusion – Copyright law without evidence?

The criticism prescribed draws the attention to the general lack of evidence of the Incentive Theory. Even if economists will develop one day a model that is complex enough to take various incentives and mechanisms of safeguarding these incentives into account, the empirical, especially, quantitative proof of welfare's costs and benefits seems, at least nowadays, impossible.¹⁸⁶ In contrast, it might be possible to compare, at least, some of the assumptions with the feedback given by **participants of format markets**. It could be, for example, asked whether the market participants themselves pursue the financial interest assumed and if they see in copyright law a necessary and/or appropriate instrument to safeguard it.

2. New Institutional Economics, esp. Transaction Cost Economics

In contrast to the Incentive Theory, the New Institutional Economics theory respects more the fact of limited rational choice and limited self-interest of creators as well as the lack of comprehensive information about the critical factors of proof. In its center does not stand the balance between financial incentives for the creator and/or producer by copyright law and its costs for public welfare but rather the

¹⁸² Hansen, *ibid.*, p. 150 ff. with further references.

¹⁸³ Hansen, *ibid.*, p. 135.

¹⁸⁴ Hansen, *ibid.*, p. 137 ff.

¹⁸⁵ Hansen, *ibid.*, p. 139 ff.

¹⁸⁶ Hansen, *ibid.*, p. 167 ff.

question about the appropriate **allocation of intellectual goods**.¹⁸⁷ The aim of the New Institution Economics theory is to guarantee the most efficient access to copyright protected works and, as consequence, the highest economic participation possible in its usage by both creators and/or producers as well as users.¹⁸⁸ Thus, both the Incentive Theory as well as the New Institutional Economics theory pursue the same objective of finding the right balance between the production and the distribution of copyright protected works. But their objects of investigation differ: While the Incentive Theory asks for the adequate balance of interests on the grounds of facts one has to assume but can hardly prove, the New Institutional Economics theory, more precise, its main branch, the so called Transaction Cost Economics theory, reduces the question about copyright law to its **cost lowering function**. It simply examines copyright law as an institution, that means a set of rules that the public sets up to reduce transaction costs.¹⁸⁹

a) Copyright law and costs

Pursuant to the Transaction Costs Economics theory, there are, basically, three different types of costs: **Search and information costs, negotiation and decision costs** and, finally, **controlling and enforcement costs**. Search and information costs incur by finding the potential contract partner. A creator and/or producer of formats may ask whether a pre-existing format that she wants to adapt is protected by copyright or not. Given the copyright protection of the format, she has to find the corresponding copyright owner to purchase the respective licenses. All these steps require time and money, such as hiring people who do the research, paying the rent for their office, Internet and telephone connection etc. Once the copyright owner is found, similar costs occur for the negotiation of the license contract, especially in case of legal consultancy. Given the own format is copyright protected, the owner of the rights of the copyright protected work has to spend additional costs for controlling and enforcement, especially if technical controlling falls together with legal enforcement.¹⁹⁰

The height of these types of costs depend on three further factors: The frequency of **transactions**, the **degree of uncertainty** with that potential licensors or licensees have to cope and the amount of **investment** that is specific **for the transaction** itself, that means mainly the license fees. The frequency of transactions is decisive for the recouping of costs that were or are necessary to set up and maintain the institution that regulates the transactions.¹⁹¹ Uncertainty serves as indicator for the efforts that have to be spent to cope with certain transactions. For example, uncertainty often comes up with regard to lacking information, such as the question whether formats are copyright protected or not and in which Member States copyright protection for formats exist and in which not.¹⁹²

¹⁸⁷ Hansen, *ibid.*, p. 170/171 with regard to the neoclassical Property-Right-Theory which functions as theoretical basis for the New Institution Economics.

¹⁸⁸ Instructively Hansen, *ibid.*, p. 200.

¹⁸⁹ Instructively Hansen, *ibid.*, p. 200.

¹⁹⁰ Hansen, *ibid.*, p. 203/204 with further references.

¹⁹¹ Hansen, *ibid.*, p. 205 with further references.

¹⁹² Hansen, *ibid.*, p. 205.

b) Criticism and conclusion – Only costs and economic efficiency?

Critics of the Transaction Cost Economics refer to the **one-dimensional view on costs** and, here again, on the general difficulties of validity. In their view, reducing copyright law to its function as a cost reducing institution does not take all interests between creators and/or producers as well as users into account. Furthermore, they argue that it is scientifically invalid to take costs of institutions, such as copyright law as a whole, into account that cannot be compared with alternatives, since such alternatives do not exist. Copyright law is, simply spoken, already established and, subsequently, cannot be compared with a situation in that copyright law does not exist. To allow the comparative proof of costs, it had to be abolished. Therefore, the assumptions of the New Institutional Economics theory remain hypothetical.¹⁹³

Indeed, it seems empirically impossible to measure the overall costs that the public has to pay for setting up copyright law. But even if it remains a mere hypothesis, **participants of the format markets** may, at least, estimate their costs incurring or being reduced, respectively, given that formats are copyright protected in one Member State and in another not. They also might estimate whether their transaction costs would be lower, same or higher if formats would be in all Member States equally protected or not.

Of course, the hypothetical estimation of transaction costs by the participants of format markets cannot take further aspects into account. The estimation refers solely to their costs. Further aspects such as cultural or political ones do not constitute the normative center neither of the Transaction Costs Economics theory nor of the Incentive Theory.¹⁹⁴

3. Social Planning Theories, esp. Democracy based Theory

More cultural or political aspects are taken into consideration by so called Social Planning Theories. Beside the economic-based theories prescribed, Social Planning Theories build the second branch of utilitarian copyright theories. Amongst these theories, the Democracy-Based Theory shall be described in the following.¹⁹⁵

a) Functions of Copyright law in a Democratic Civil Society

Pursuant to the Democracy based Copyright Theory, copyright law is an essential instrument to constitute a democratic civil society by enabling and maintaining the **public discourse**. In comparison to the New Institution Economics theory, copyright law provides an institution, that means a set of rules, which does not mainly pursue the allocation of economic resources but rather constitutes a market for the exchange of ideas, that means in terms of copyright law as part of civil law, without direct state influence.¹⁹⁶

In the understanding of the Democracy based Copyright Theory, the **democratic civil society** is “the sphere of voluntary, nongovernmental association in which individuals determine their shared purposes

¹⁹³ Hansen, *ibid.*, p. 206 ff.

¹⁹⁴ Cp. Hansen, *ibid.*, p. 246/247.

¹⁹⁵ Hansen, *ibid.*, p. 251 ff.

¹⁹⁶ Netanel, *Copyright and a Democratic Civil Society*, p. 341 ff.

and norms.”¹⁹⁷ In this sphere “citizens develop the independent spirit, self-direction, social responsibility, discursive skill, political awareness, and mutual recognition.”¹⁹⁸ It is “where policy and social norms were debated and determined, where preferences are aggregated, and where much of the political agenda is set.”¹⁹⁹ Thereby, the democratic civil society is, “despite its largely self-constituted character, (...) only partly autonomous from the legal and political institutions of government. Civil society requires from government massive material and institutional support.” Thus, interventions against market power or other events negatively affecting the public discourse may be justified to establish and maintain a democratic civil society in the prescribed understanding.²⁰⁰

To constitute such market for the exchange of ideas, norms, and preferences, copyright law has to fulfill a **production** and a structural **function**. Correspondingly to the Incentive Theory, the production function guarantees the financial incentive for creators and/or producers, firstly, to nourish civil society with aesthetics, cultural, social or political information and ideas via intellectual works, especially between people which are not in direct contact. Secondly, the production function serves to enrich the general knowledge of society. Both functions enable citizens to develop critical, independent thinking.²⁰¹

With respect to formats, it is interesting to emphasize Netanel’s considerations “that the constitutive role of copyrightable creative expression in a democratic civil society is (not) limited (...) to works of authorship that explicitly address matters of political or social importance”. Works of popular culture equally serve the production function prescribed: “To be understood by their audiences, films, songs, and television programs must deal in the currency of prevailing practices, ideologies, and stereotypes, and in so doing must either reinforce or challenge them.” “For that reason totalitarian regimes have prohibited styles of art and music that might be seen as politically innocuous in other contexts – and for that reason a democratic polity committed to the dialogic interchange of independent-minded individuals must protect them from official or private censorship.” Consequently, even intellectual works of “**pure aesthetics and entertainment** help to **support a participatory culture**.”²⁰²

The second so called **structural function** safeguards that neither the state nor private entities with market power take control over the production function. In comparison to the New Institutions Economics theory, it is, hence, the private market established by copyright law that enables participants to exchange intellectual works without, at least principally, public or further private control. Netanel stresses the importance of the structural function referring to former times when the creation and/or production of intellectual works depended on royal, feudal or church patronage. Pursuant to Netanel this had mainly changed in the 18th century because of the establishment of copyright laws.²⁰³ Indeed, it is nowadays not anymore the state that restrains the production function but rather private control. “Media entities typically exercise that control to prevent any controversial use that might run contrary to their corporate image or threaten the salability of their expressive products. In addition, in many instances prospective

¹⁹⁷ Netanel, *ibid*, p. 342.

¹⁹⁸ Netanel, *ibid*, p. 343.

¹⁹⁹ Netanel, *ibid*, p. 344.

²⁰⁰ Netanel, *ibid.*, p. 344/345.

²⁰¹ Netanel, *ibid*, p. 347 ff.

²⁰² Netanel, *ibid*, p. 350/351.

²⁰³ Netanel, *ibid*, p. 352 ff.

authors are unable or unwilling to bear licensing fees for creative, transformative uses of media-controlled expression. As such, expansive copyright owner control over existing expression may exacerbate the problem of market-based hierarchy.” Therefore, to fulfill its structural function today, copyright law has to **limit private control over existing intellectual works**. One example to do so is to limit the right of adaptation of copyright protected works.²⁰⁴

b) Formats for Democracy?

The main criticism refers to the constitutive role that intellectual works get in the framework of the Democracy based Theory. Critics consider that the **significance of even non-political intellectual works**, such as entertainment or pure aesthetics, have **for the public discourse is overstated**. Irrespective of its artistic merits, they doubt that all intellectual works have the same significance for democratic society, especially those of very high or very low culture. As consequence, those intellectual works should not be, at least in the understanding of the Democracy based Theory, protected by copyright law.²⁰⁵

Furthermore, critics argue that the Democracy based Theory grounds the production function of Copyright law on the **doubtful incentive paradigm**. The weak points of the incentive paradigm are the one-dimensional perspective on financial incentives although many other incentives seem to be existent for creators and/or producers, such as cultural, political or social influence. As also prescribed with regard to the Incentive Theory, the incentive paradigm does not sufficiently take alternative mechanisms into account that safeguard the satisfaction of the incentives beside copyright law.²⁰⁶ Correspondingly, the Democracy-Based Theory does not consider those alternative mechanisms such as mutual agreements or advertising based financing neither. Especially in the Internet, intellectual works do not need copyright protection for re-financing the creation and/or production of the work to the same extent as in analogue markets because of the lower costs of creation, (re)production and distribution.²⁰⁷

c) Conclusion – All types of incentives for a democratic civil society

Indeed, the assumption of the exclusively existent financial incentive for the creator and/or producer seems to be contradictory. At the one hand, the theory builds on copyright law as mechanism for guaranteeing financial incentives. At the other hand, this mechanism shall not only establish a market for the satisfaction of financial purposes but also a democratic civil society based on the creation and interchange of aesthetic, cultural, social, and political ideas. Why should copyright law not serve, beside the financial incentive, for these aesthetic, cultural, social, and political incentives as well? The Open Culture movement seems to illustrate that copyright law is indeed necessary for the creation, production, and/or distribution of intellectual works without, at least, direct financial incentives. **Open-Source- and Creative-Commons-Licenses ground on copyright law** safeguarding that other market participants can, at the one hand, use the software or other intellectual works licensed there under without having to pay corresponding license fees but must, at the other hand, respect the further conditions such as recognition

²⁰⁴ Netanel, *ibid.*, p. 362.

²⁰⁵ Hansen, *ibid.*, p. 265/266 with further references.

²⁰⁶ Cp. above point C. II. 1. b) “Criticism: „Homo oeconomicus“ and “his” Copyright law”.

²⁰⁷ Hansen, *ibid.*, p. 267 with further references.

of authorship and/or the so called copy-left-effect.²⁰⁸ Given the necessity of copyright protection to safeguard those conditions, the Democracy based Theory should broaden its theoretical approach from Copyright law as mechanism not only guarantying the satisfaction of financial but also other incentives, such as aesthetics, cultural, social and political ones. The acceptance of several incentives brings it, at least, in accordance with the wide range of types of intellectual works that, altogether, constitute the democratic civil society prescribed.

In contrast, the criticism differing between intellectual creations with direct political impact and those without seems arguable. As Hansen stresses, to differ between more and less politically important intellectual creations is impossible.²⁰⁹ But pursuant to its understanding of the public discourse's functioning, the Democracy based Theory must not differ. As already illustrated, copyright law establishes a market in that citizens are able to create, produce and distribute all kinds of ideas – aesthetics, cultural, social etc. Thereby, the production and the structural functions of copyright law safeguard the independence from direct state control and influence as well as from accumulated private market power, in other words, of meaning power. It is this **sphere of ideas, norms, and preferences** that constitutes the framework **for the development of political ideas** and structures.²¹⁰ It is not the intellectual work itself that constitutes democracy and has to be, subsequently, political. Given this theoretical approach, it is not necessary to differ between intellectual creations with direct political impact and such without.

Of course, these theoretical assumptions are worth to be questioned, or more precise, backed by the self-concepts of market participants themselves. Hence, the question is whether they consider formats as important for the public discourse, for freedom of state and/or private control and for democracy as such.

II. Feedback by stakeholders

The preceding chapter summarized the purposes that copyright theories elaborated to justify copyright protection. It also describes why these theories cannot, despite their theoretical approach, provide an empirical proof for the question whether intellectual creations shall be copyright protected or not. But the theoretical assumptions underlying the different theories can be compared with the self-concepts of the participants of the format markets. Such comparison allows, at least, estimating the importance that the different purposes should have as structure for defining the criteria of the copyright protected work: Do participants of format markets only pursue financial satisfaction? Do they consider copyright law as the exclusive instrument to safeguard their incentives or are there other mechanisms, too? How important is the exclusivity provided for by copyright? Do market participants estimate their transaction costs lower, same or higher, if formats would be copyright protected or if not? Do they think that formats take an essential part of the public discourse in a democratic civil society and/or for democracy as such? By means of an online survey, several participants of format markets were posed these questions. The following shall illustrate the questions as well as the corresponding answers.

²⁰⁸ Hansen, *ibid.*, p. 267 with further references.

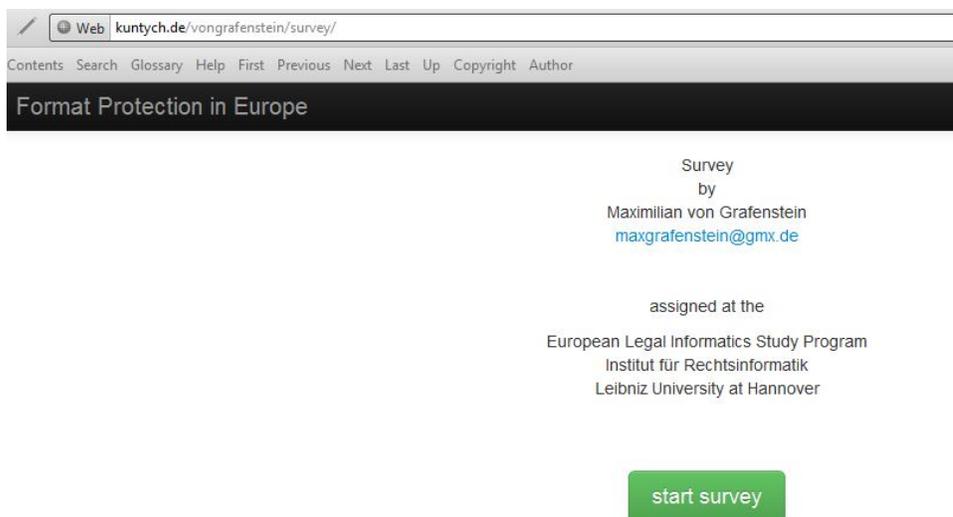
²⁰⁹ Hansen, *ibid.*, p. 265/266.

²¹⁰ Netanel, *ibid.*, p. 343 ff.

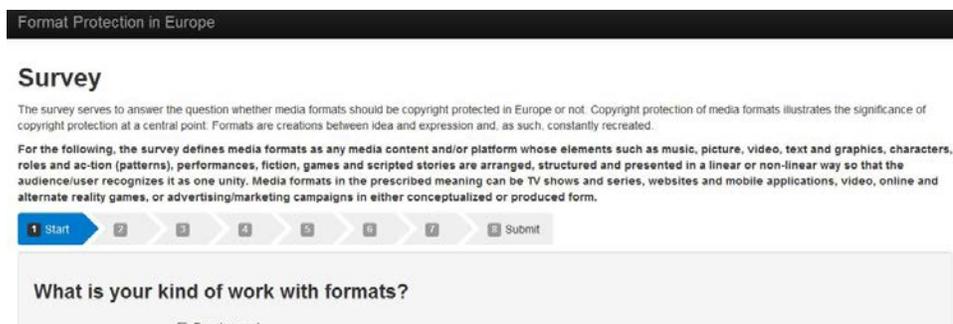
1. Survey's method

The online survey does not pretend to provide empirical prove for the copyright theories prescribed, neither quantitatively nor qualitatively. The online survey shall only give a **brief insight how few participants** of format markets **consider the importance of copyright** protection for their work. It could be seen as first step to evaluate the weight of the purposes of copyright law that are elaborated in the copyright theories prescribed.

The landing page of the online survey mentioned the name and the private email address of the author of the survey and the institute in whose educational framework the survey was organized.²¹¹ In the first email sent to the contact person, the creator of the survey explained that the survey also serves for the further research project “Circulation of Cultural Goods” at the Alexander von Humboldt-Institute for Internet and Society (www.hiig.de/en/project/zirkulation-von-kulturgutern/).



The survey started with a brief description of the survey's purpose and an explanation of linear and non-linear formats how it is defined above:²¹²



²¹¹ <http://kuntych.de/vongrafenstein/survey/>, re-called the 14th July 2013.

²¹² See at point A. II. "Definitions: Formats, originality and creations / copyright protected works".

There was no obligation to answer the questions of the survey. The participants were able to go directly to the next question and to go back. They were also allowed to submit the survey without any answer.

Each question offered several given answers. Most questions consisted, additionally, of one open answer. The participant of the survey could, hence, also freely respond to the question. Some possible answers were related to each other by percentages. The sum of all answers together was always 100 %. In one case, the program failed to provide the correct sum (the results oscillated between 170 % and 280 %). Therefore, the answers had to remain out of the scope of the survey.

Why have you chosen to work with format...

0% 100% To earn r

0% 100% To garne

0% 100% To expre

0% 100% To influen

0% 100% Others:

Please specify

Beside the related answers, there were check boxes which were not related to each other. Here, the participants had to choose exclusively one of the three possible answers:

Do you think transa components of it, s

Search and information:

lower same higher

Negotiation:

lower same higher

Control and enforcement:

lower same higher

Other:

lower same higher

Please specify

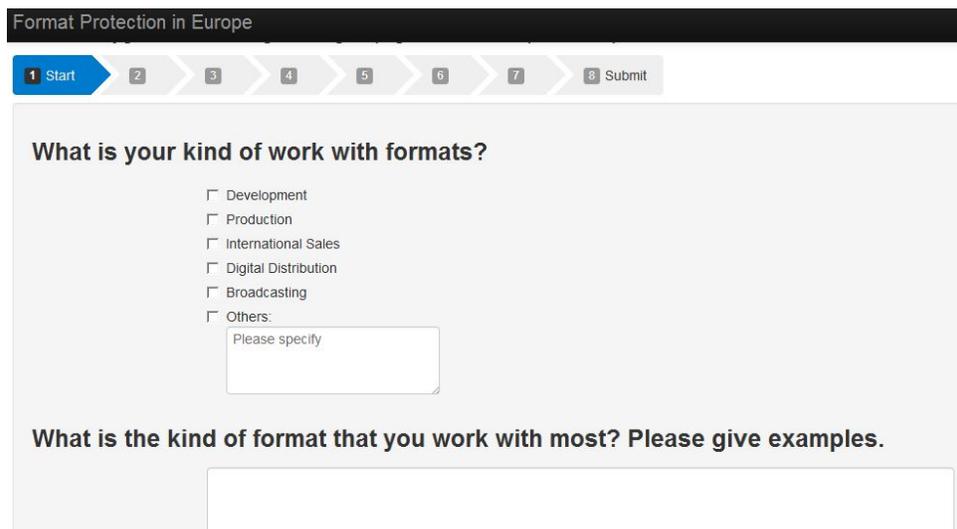
2. 10 participants out of 5 groups

The survey was sent to the following five groups of, mostly, German market participants each with, in average, four different contact persons:

- a) Creators and/or producers of television formats working with, more or less, both linear and non-linear formats;
- b) private and public broadcasters;
- c) creators and/or producers of advertising formats working with linear and non-linear formats;
- d) creators/participants of non-linear open source projects;
- e) traditional publishers extending their products into the Internet;
- f) educational institutions specialized in linear and non-linear format productions.

The survey was, principally, anonymous, even if some inferences were, in view of the few contact persons, possible. Finally, 10 persons participated at the survey, one person of an educational institution, one of the traditional publishers contacted and from the other groups in each case two. The answers by the contact persons do, principally, not represent the official statement of the respective companies albeit three persons contacted were (also) official spokesmen of the corresponding company. The other contact persons either worked as in house-lawyers or creative producer and/or company founder, respectively, or as creator.

At the beginning of the survey, the participants could describe the field and the kind of formats they work in/with:



The screenshot shows a survey interface with a progress bar at the top containing steps 1 through 8. Step 1, labeled 'Start', is highlighted in blue. Below the progress bar, the survey question is: 'What is your kind of work with formats?'. The answer options are: Development, Production, International Sales, Digital Distribution, Broadcasting, and Others: Please specify. Below these options is a text input field. The second question is: 'What is the kind of format that you work with most? Please give examples.' Below this question is a large text input area.

3. First feedback about kinds of incentives

The first question of the survey asked for the incentive that the participant has working with formats:

The screenshot shows a survey interface with a progress bar at the top containing steps 1 through 7, with step 2 highlighted. Below the progress bar is the question: "Why have you chosen to work with formats?". There are five radio button options, each with a 0% selection indicator on the left and a 100% label on the right. The options are: "To earn money", "To garner recognition", "To express yourself artistically/creatively", "To influence society / share your views with society (culturally, aesthetically, politically, socially etc.)", and "Others:". Below the options is a text input field labeled "Please specify". At the bottom of the form are "Previous" and "Next" navigation buttons.

The answers of all participants together resulted in the following average repartition (rounded up/down):

- a) To earn money: 49 %
- b) To garner recognition: 18 %
- c) To express yourself artistically: 12 %
- d) To influence society: 16 %

One contact person has chosen to answer in the free mode while valuing it with 38 %: “To make the special case of geographical data more available to common citizens.” The person declared his kind of work with formats as “Development, Production, International Sales as well as Promotion, Public Relations” and explained the kind of formats as follows: “I work with the various representations (XML, binary format, graphical representations e.g. as map tiles) of the OpenStreetMap database.”

The results illustrate that the financial incentive is, in average, the most important but not the exclusive incentive amongst the participants of the survey. Pursuant to the economic copyright theories, copyright law does not safeguard the satisfaction of these other incentives. Their theoretical approach only justifies copyright protection to give financial incentives for the creation of works. Not even the Democracy based Theory in the narrow meaning by Netanel is able to justify copyright protection for other incentives than financial ones. The explanation of the OpenStreetMap participant illustrates the contradiction within the Democracy based Theory. Although the participant wants to make geographical data available for “common citizens” and declares his incentive to influence society with 39 %, the Democracy based Theory by Netanel cannot justify copyright protection for his kind of format. This is even more irritating, since he/she declares his financial incentive with 1 %.

4. Second feedback about mechanisms to safeguard incentives

The second question of the survey asked whether the participant takes further factors into account which safeguard his incentive:

Format Protection in Europe

1 Start 2 3 4 5 6 7 8 Submit

Copyright law empowers the owner of the copyright to prevent other people from using the protected work. On the basis of this so-called legal monopoly, the right holder can grant licenses for specific uses, for example the adaptation resp. production, of the protected work via certain license fees.

There are further factors that prevent other people from adapting and/or producing the format, too. In your opinion, how important are the following factors compared to each other?

0% ● 100% Copyright
0% ● 100% Informal norms (e.g. format thief's fear of losing reputation)
0% ● 100% Economic power/pressure/dependence
0% ● 100% Lead-time (in production/distribution)
0% ● 100% Lack of practical Know-How
0% ● 100% Network effect (amongst users)
0% ● 100% Others:

Beside the exclusive copyright, there are further business models for financing formats. In

The answers of all participants together resulted in the following average repartition (rounded up/down):

- a) Copyright: 21 %
- b) Informal norms: 22 %
- c) Economic power: 10 %
- d) Lead-time: 13 %
- e) Lack of practical Know-How: 22 %
- f) Network effect: 6 %

One contact person has chosen to answer in the free mode valuing it with 30 %: “Non-disclosure agreement”. The person declared hi/hers kind of work with formats as “development” and explained the kind of formats of his work as “Concepts for commercials.”

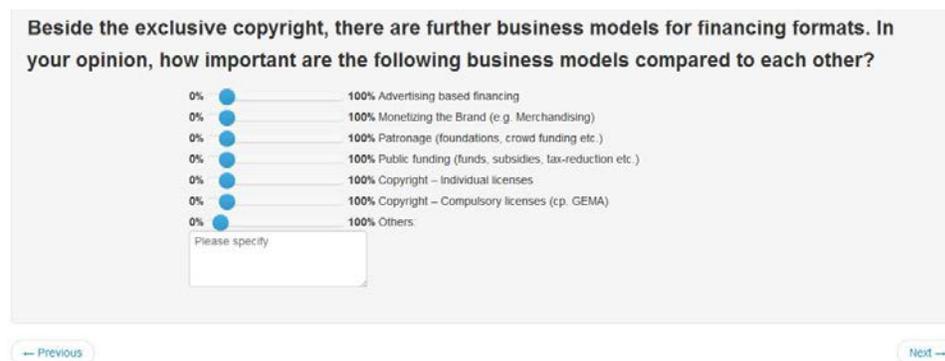
The results are, from a legal point of view, interesting. Copyright protection is considered less or equally important to grant licenses for the usage of intellectual creations/works for corresponding license fees than informal norms and lack of practical Know-How. At first view, this might result from the fact that television formats and concepts for commercials are not copyright protected in Germany and most participants of the survey are based in Germany. The participants might be used to trade their goods despite the uncertain legal situation. But at second view, this assumption becomes arguable. Indeed, the contact persons who declared to produce and broadcast “non-fictional show-formats, such as game shows, but also reality formats” and to develop, produce and sell internationally “TV formats like light entertainment shows, factual entertainment and comedy formats” as well as to develop and produce “TV formats” estimated the importance of copyright protection for their work only with 0 %, 9 %, and 10 %, respectively. But in contrast, the contact persons who declared to develop “concepts for commercials” and to develop, produce, digitally distribute and broadcast “Websites, Weblogs, Videos, Alternate Reality Games and other Transmedia Experience” considered the importance of copyright with 63 % and 37 %.

Although advertising and transmedia concepts are not doubtlessly protected, these participants adhere to copyright. Furthermore, the contact person who declared to publish “Text, video, pictures for journalistic purposes” in the Internet estimated copyright protection with only 15 % importance for his work, albeit the content of web publishing is, without doubt, copyright protected. In conclusion, the participants seem to build in general on many further factors, beside copyright protection, to trade their products.

All copyright theories seem to overestimate the weight of the artificial monopoly by copyright protection, at least, for these participants. Another interesting fact is that the contact person who declared to develop, produce and promote the OpenStreetMap database estimates the importance of copyright protection for his work with 31 %. While his incentive to influence society and to make geographic data available to common citizens is not covered by the economic theories,²¹³ he grounds his work, beside informal norms (45 %), essentially on copyright. At least for him, copyright serves, hence, less for satisfaction of financial purposes but rather to guarantee that other market participants respect the conditions of distributing and developing his format.

5. Third feedback about business models to monetize the product

The third question of the survey asked whether the participant takes further business models, beside the exploitation of the intellectual creation/work by granting licenses for license fees, into account which monetize his product:



The answers of all participants together resulted in the following average repartition (rounded up/down):

- a) Advertising based financing: 17 %
- b) Monetizing the brand: 18 %
- c) Patronage: 18 %
- d) Public funding: 17 %
- e) Copyright – Individual licenses: 20 %
- f) Copyright – Compulsory licenses: 9 %

Similarly to the preceding question, copyright based business models do not have a dominant position. Thereby, two aspects are worth mentioning: Firstly, the focus of the respective business models

²¹³ See at point C. III. 3. “First feedback: Different kinds of incentives”.

apparently differs between the companies in which the participants work with formats. While the business model of the publishing company bases mainly on advertising based financing with 55 % and, secondarily, on license fees (19 %) as well as returns from collecting agencies for compulsory licenses (17 %), the broadcasting company monetizes its brand with 47 % and sells the format rights with 49 %. In contrast, the company which develops, produces, and internationally sells TV shows builds on advertising (38 %), public funding (24 %), monetizing its brand (18 %), and fees for copyright licenses (16 %), and the company only developing and producing TV formats focuses on public funding with 50 % followed by returns from collecting agencies with 20 % and patronage with 18 %. Fees for granting licenses have, here, only 4 % importance. In contrast, license fees are of high importance for the company developing concepts for commercials (51 %) followed by patronage (17 %) and returns from collecting agencies (16 %), while the company working with weblogs, alternate reality games and other transmedia experiences primarily monetizes its brand (25 %) and gains money by patronage (24 %) and then by both license fees (13 %) as well as returns from collecting agencies (14 %). Pursuant to these results, there is no specific business model for a certain type of format market.

Secondly, the self-concepts are interesting with regard to the differing importance of copyright if the second and the third question are taken into account. While the person working for the broadcasting company considers the exclusivity of copyright as unimportant for granting licenses (0 %) but bases its main return on license fees (49 %), the exclusive copyright is of high importance for the contact person working with transmedia formats (37 %) albeit it only receives little returns based on license fees (13 %). In the former case, this might result from the importance that further factors have preventing others from the usage of the format, such as informal norms (34 %) and lack of practical Know-How (35 %). Licensees might purchase the license to get the necessary knowledge and/or to avoid a loss of reputation given he/she would “steal” the format. For the latter the reverse situation might be the result of using Creative Commons-licenses. In those cases, the exclusivity of copyright does not serve to grant licenses for license fees but to safeguard the acceptance of other compelling provisions such as the attribution of the creator or the viral Copyleft effect. This might be, at least, the case for the contact person working with the OpenStreetMap database. This person also considers the exclusivity of copyright as more important (31 %) than the return based on possibly resulting license fees (8 %).

The diversity of business models as well as the complex relations between the exclusivity of copyright and the resulting possibility to grant licenses for fees mirror the weakness of the financial incentive paradigm. There seem to be many other factors, beside the exclusivity of copyright, enabling the creator and/or producer to exclude others from the use of his intellectual creation. Furthermore, there seem to be many other business models, beside those based on copyright, which enable the creators and/or producers to monetize their format. Thus, not only economic theories but also the Democracy based Theory should take this into account.

6. Fourth feedback methodically failed

The fourth question of the survey focused on transaction costs, more precise, whether transaction costs would be higher or lower if formats are copyright protected.

Format Protection in Europe

1 Start 2 3 4 5 6 7 8 Submit

Working in the format industry requires dealing with rights, amongst other things. Rights can be sold – and have to be purchased. The most important right for formats is the adaptation right. If someone wants to use a format (or elements of it) that is (or are) copyright protected, s/he has to buy the rights. Dealing with rights is often a separate cost factor (so called transaction costs) and can be classified into three phases: Search and information costs, negotiation costs as well as control and enforcement costs.

Do you think transaction costs are lower or higher, if the format as a whole – and not only components of it, such as texts and music – is copyright protected?

Search and information:

lower same higher

Negotiation:

lower same higher

Control and enforcement:

lower same higher

Other:

lower same higher

Please specify

The answers of all participants together resulted in the following overall estimation: With respect to search and information costs, five contact persons estimated the costs lower, four people considered the costs as same and one person said that the costs would be higher. Regarding the negotiation costs, four people considered the costs as lower, three people hold the costs as same and three persons estimated the costs higher. Concerning the control and enforcement costs, five people said that the costs would be lower, two persons considered the costs as same, and three contact persons estimated the costs higher. Given the self-concepts of the survey's participants, there is hence a medium to strong tendency that search and information costs are lower if formats are copyright protected. In contrast, there is only a slight tendency that also negotiation costs decrease and a slight to medium tendency that control and information costs decline.

It is difficult to comprehend the reasoning of the participants. Actually, it seems likely that, at least, search and information costs increase if formats are copyright protected. Given that formats are copyright protected, re-creators, producers, distributors, and broadcasters have to prove if the format with that they work possibly infringes any pre-existing format. This leads to a sort of due diligence that might increase and not decrease the search and information costs. Therefore, it is probable that the question posed within the survey was not clear. Indeed, two contact persons mentioned in the box for the open answer that they “do not understand the concept underlying the question” and that the question leaves “unclear whose transaction costs” are meant. The answers corresponding to the final questions affirm this presumption. One of the final questions referred again to the transaction costs asking whether a comprehensive copyright protection for media formats would raise transaction costs in the exploitation of new formats. Here, not only the contact persons who confessed their lacking understanding of the fourth question answered contradictory to his preceding reply. While the survey's participants estimated, in general, the search and information costs in the fourth question as lower if formats are copyright protected, they considered the costs as higher in the final question, and reverse. The failure has, hence, to be seen in the way how the fourth question was posed. Indeed, the comparative form lacks a clear definition whose

transaction costs are meant as well as a clear reference for the comparison. The answers to the fourth question can, thus, not serve as feedback for the assumption of the underlying Transaction Cost Economics theory. It will be again examined in the context of the final question.

7. Fifth feedback about the relevance of formats for public discourse and democracy

The fifth question of the survey focused on the assumptions of the Democracy based Theory and was divided into three parts: The importance of formats for the public discourse, the importance of copyright for freedom of state and/or private control, and the importance of formats for democracy as such.

Format Protection in Europe

1 Start 2 3 4 5 6 7 8 Submit

Public discourse consists of the exchange of ideas. Basically, formats deliver ideas in many expressions: Entertainment, cultural, aesthetics, social, political etc. In your opinion, how important are formats for the public discourse?

Importance:

low medium high

Copyright enables, basically, the creator to finance and/or to control the distribution of her/his format free of state influence or private control: By selling licenses, everybody may finance the format independently from state funding. Using Creative Commons or other Open Source licenses, everybody might distribute it irrespective of private – market power based – control (copyright licenses, for example, allow any re-creator to adapt the format under the condition that s/he must grant it again under the same condition, so-called viral or copyleft effect).

Five contact persons estimated a medium and five a high importance of formats for the public discourse.

In your opinion, how important is copyright protection of formats for the following aspects?

Freedom of state influence (e.g. private market instead of public funds)
Importance:
low medium high

Freedom of private control (e.g. copyright instead of market power)
Importance:
low medium high

Democracy builds on a free and public discourse. Given your answers above, how important is copyright protection of formats for democracy?

Importance:
low medium high

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Five persons considered the importance of copyright for freedom of state influence as low, three as medium, and two participants as high. Four people said that copyright is of low importance for freedom of private control, two hold copyright as medium important and four people as highly important for the freedom of private control. Five participants considered that formats are of low importance for democracy as such, four people said that formats are medium important and one person hold it as highly important.

In conclusion, there is a strong tendency amongst the survey's participants estimating formats as highly important for the public discourse. The average opinion regarding the importance of copyright for freedom of state and/or private control is divided. While the considerations about the importance of copyright for freedom of private control are balanced, there is a medium tendency to low importance with

respect to state control. The importance is even estimated lower with regard to the importance of formats for democracy as such.

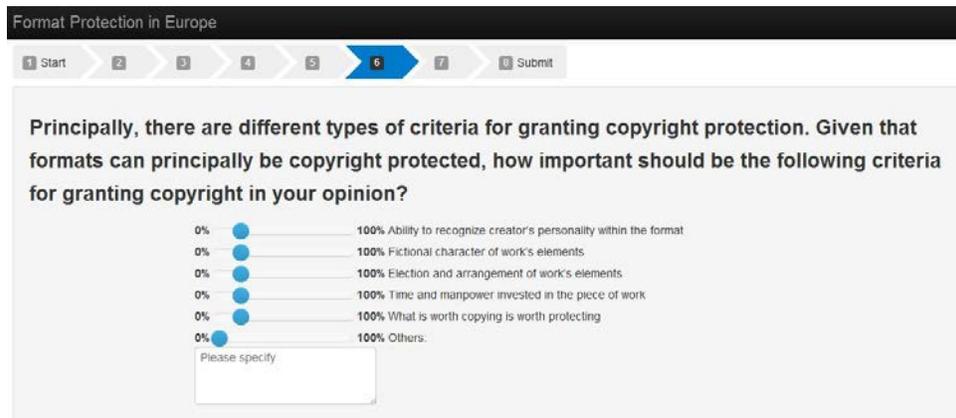
With respect to the criticism of the Democracy based Theory, the range of opinions prescribed is interesting. It illustrates that the considerations amongst the survey's participants about the importance of formats and copyright protection for a democratic civil society are nuanced. While the majority estimates formats as highly important for the public discourse, the participants are less convinced that formats are important for democracy as such. Thereby, the structural function of copyright is considered as more important for the freedom of private than such of state control. This might result from the elevated stage of democracy development that Western states have, nowadays, reached, or more focused on the case hereunder, how the survey's participants perceive the socio-political situation of their country of residence, that means here, Germany. Today private control seems to be the more relevant issue for the participants. Given these nuanced opinions, the importance of formats for democracy seems, at least in summary, not to be overestimated.²¹⁴

Furthermore, the participants do not seem to differ between different kinds of formats and their respective impact on democracy. Indeed, while the contact person working for the web publishing company providing text, video and pictures for journalistic purposes estimates the importance of formats as highly relevant for both the public discourse as well as for democracy as such, the contact person working for the broadcasting company producing and distributing television formats considers them only as medium important for the public discourse and low important for democracy. But the survey's participant working for the other broadcasting company sees TV formats, at least, as medium important for both the public discourse and democracy. A third participant working for the company developing and producing TV formats even considers them as highly important for the public discourse and medium important for democracy. The same differentiated situation occurs with regard to the persons working for the company developing concepts for commercials and websites, weblogs, alternate reality games as well as other transmedia experiences, respectively. While both consider formats as highly important for the public discourse, the former one sees them as low important and the latter one as, at least, medium important for democracy. Taking all these opinions into account, the survey's participants together seem not to differ between certain kinds of formats and their importance for a democratic civil society.

²¹⁴ See at point C. II. 3. b). "Criticism: Formats for Democracy?".

8. Sixth feedback with regard to the criteria for copyright protected formats

The sixth question of the survey refers to the basic criteria for the copyright protected work how they are used amongst the Member States. Thereby the question focuses on the main differences between the Anglo-Saxon and the Continental-Europe understanding of the term “originality” especially taking the requirement of the “fictional character of the work’s elements” into account how it is considered by the German Supreme Court:



The answers of all participants together resulted in the following average repartition (rounded up/down):

- a) Ability to recognize author’s personality within the work: 15 %
- b) Fictional characters of work’s elements: 11 %
- c) Election and arrangement of work’s elements: 38 %
- d) Time and manpower invested in the piece of work: 24 %
- e) What is worth copying is worth protecting: 11 %

The average results illustrate that the survey’s participants consider the criterion of the election and arrangement of the work’s element as most important. Time and manpower invested in the piece of work is estimated as the second essential criterion. At first view surprising is that the ability to recognize the author’s personality within the work is also considered as relevant criterion, especially because even the contact person who develops, produces, and promotes the OpenStreetMap database puts this criterion, after time and manpower invested in the piece of work (41 %) and election and arrangement of the work’s elements (39 %), on third place with 20 %. It seems difficult to comprehend how the database could reflect the creator’s personality. Databases are not only very technical but the OpenStreetMap database is, in addition, licensed under an OpenSource license.²¹⁵ This leads to the situation that many persons are, at least potentially, involved and weaken the reflection of one creator’s personality within the work. Therefore it is possible that the contact person understands this criterion less in a concrete but rather in an idealistic way. Several reasons affirm this assumption. Firstly, the contact person considered in an open answer box that his incentive to “make the special case of geographical data more available to common citizens” (underlining by the author) as one of his strongest incentives (38 %), beside influencing society

²¹⁵ www.openstreetmap.de/faq.html, re-called the 15th July 2013.

(39 %) and to garner recognition (21 %). In contrast, to earn money and express himself artistically is not important for him/her (both 1 %). The contact person furthermore stressed in his final open answer that the OpenStreetMap database is licensed under a strong copyleft license. Hence, the license compels others who adapt the database to license it under the same conditions as the original database itself.²¹⁶ This may result to the conclusion that the contact person sees his personality not reflected in the database itself but in his decision to create and, probably, how he creates the database.

Finally, it is interesting to see that the survey's participants considered both criteria "fictional characters of work's elements" as well as "what is worth copying is worth protecting" as the less important ones. Both can be seen as extreme positions in the question what kind of intellectual creation should be copyright protected. While the former criterion restrains protection to fictional creations, the latter grants copyright for almost any, more precise, marketable intellectual creation. The survey's participants rather decided for the more differentiating criterion of "election and arrangement of work's elements". Thereby, they want to take into account both the creator's personality reflected in the – possibly, process of – creation as well as time and manpower invested in the piece of work.

9. Final feedback about copyright's effects on innovation practice

The next-to-last question asked the survey's participants for their overall impression about the effects that a comprehensive copyright would have on their innovation practice:

Format Protection in Europe

1 Start 2 3 4 5 6 7 8 Submit

How would a comprehensive copyright protection for media formats affect your innovation practices?

0% 100% Give incentives for the development of new formats

0% 100% Hinder the development of new formats

0% 100% Raise (transaction) costs in the exploitation of new formats

0% 100% Protect the exploitation of new formats

All in all, how important is copyright protection for your work / innovation practice?

The answers of all participants together resulted in the following average repartition (rounded up/down):

- a) Give incentives for the development of new formats: 45 %
- b) Hinder the development of new formats: 13 %
- c) Raise (transaction) costs in the exploitation of new formats: 29 %
- d) Protect the exploitation of new formats: 13 %

The participants considered the incentives that copyright gives for the development of new formats as most important. In contrast, they estimated that copyright could hinder the development or serves to

²¹⁶ Cp. point A. I. „Balance of interests: From Culture Industry to Participatory aka. Remix Culture“.

protect the exploitation of new formats as much less relevant. Indeed, the participants are aware that a comprehensive copyright might essentially raise the (transaction) costs in the exploitation of new formats. Thereby, it is interesting to see at the answers that gave seven out of 10 survey's participants to the final question how important copyright protection is for their work and/or innovation practice. The range of opinion covers both extreme ends illustrating the different socio-economic aspects with that copyright law has to cope:

While one person simply considered the importance of copyright protection as "low", another one working for the web publishing company stated that copyright is "Extremely important. Basis of what we do. No investment in content will be made of copyright is not protected." In the middle range might be located the statement of the contact person which works for the company developing, producing, and internationally selling light entertainment TV shows. Pursuant to this person, copyright protection is "Not too important. The international tv market is very small. There is one big "show" lawsuit per year involving two major producers fighting over the "same" format. Never has there been a "killing" of one of them. It all calms down in the end and the buyers decide individually which one to buy. We as producers were never affected by copyright infringements. It is a little like: Who ever manages to create and sell the format (and brings it on air) is the one who will earn the money with it." The contact person illustrates that the "success" of a format not exclusively depends on the "inner value" of the format but equally on the ability to launch it. Of course, another participant working for the company developing and producing TV formats stresses the risk that creators and producers of formats have, if they do not possess such ability. For that person copyright protection is "Very important! Because formats are valuable ways of reaching an audience, but the development is expensive..."

More focused on the questions what can or should not be protected especially by copyright and what is actually traded on the format markets, are the answers of two other contact persons. The survey's participant working in the field of concept development for commercials considers that "Copyright protection is very important, because it enables the company to charge clients not only for its services but also for its creative work. Format protection would of course help, too, but could hinder development for society as a whole." And the contact person working for a broadcasting company developing, producing, broadcasting, and internationally selling TV formats differs: "If it is a real work, that it is of course important. All formats copy a part of other formats, this is important and should be possible. Formats, which are not protected by copyright, are know how licenses. If the format includes enough know how, they can and will be distributed. If it is only an idea, there is no need for copyright protection and such copyright protect would harm creative development and adaptation."

With regard to the function of copyright beside the commercial exploitation of intellectual creations, the participant developing, producing, and promoting the OpenStreetMap database explains: "We utilize database protection laws to ensure a free distribution of our work/database with strong copyleft elements. This free distribution is a key element in our project and therefore highly important." Another possible functioning of copyright is promoted by the contact person working for the educational institution developing interactive serial formats and platforms as well as consulting with regard to installations, transmedia concepts, and games: "All in all I think copyright should be thought completely new. I am a big fan for example of the culture flatrate with a fair system of the distribution of the money. I think the less copyright the better. It reduces costs and sparks innovation."

In summary, the answers to the final questions illustrate that the participants of the survey have a quite differentiated view on what kind of intellectual creations should be protected by copyright, for which purposes and in which way. Thereby, it became clear that most participants build their working models on copyright but do not promote the existence of copyright law as such. Copyright protection is rather an instrument serving specific purposes of the participants by finding the adequate balance between safeguarding their incentives and avoiding costs or other effects which could hinder their innovation practice.

III. Conclusion – Democracy based Theorie

The precedent feedback of the survey's participants is interesting with regard to the different approaches of the copyright theories that are summarized and criticized before. Pursuant to the survey's participants, the **Democracy based Theory** seems to be, in its overall approach, **more appropriate** to serve structuring and evaluating the question about and finding of the criteria for the copyright protected work. The assumptions of the Incentive Theory do not find the corresponding feedback. The financial incentive might be the most important one amongst the format markets' participants, but it is not the exclusive one. To garner recognition and to influence society are also mentioned as relevant incentives of, at least, the contact persons of the survey.²¹⁷ Furthermore, the exclusivity of copyright that enables the copyright owner to grant licenses for certain kinds of usage and corresponding fees is estimated less or equally important as informal norms and lack of practical Know-How.²¹⁸ There are also further business models, too, serving as basis on which the survey's participants monetize their formats. Beside individual licenses, advertising based financing, monetizing the brand, patronage, and public funding are considered as almost equally important. Indeed, the respective business models substantially differ amongst the participants. But there is no clear tendency that certain kinds of formats are based on certain business models. Pursuant to the feedback, there is not even coherence between the exclusivity of copyright and the licenses granted for corresponding fees. On the one hand, granting licenses might also possible because of informal norms or the lack of practical Know-How that the licensee wants to purchase. On the other hand, the exclusivity might not serve for granting licenses but to safeguard other binding provisions such as the attribution of creators or the viral copyleft effect.²¹⁹

Indeed, the Democracy based Theory also focuses on the financial incentive for the creators and/or producers of the work. But in contrast to the Incentive Theory, the Democracy based Theory's approach allows to integrate further incentives. While the former pursues the amortization of the investments for the creation of the work, the latter focuses on the establishment and maintenance of a market for the exchange of ideas. Hence, while the former loses its justification for copyright protection in cases of lacking financial incentives, a market for the exchange of (expressed) ideas might also require copyright protection to safeguard conditions of the creator that do not pursue the recoupment of development and/or production costs.²²⁰ Thereby, the feedback of the survey's participants illustrated that the **relevance of formats for a democratic civil society is not overestimated**. In contrast, the results let appear a strong

²¹⁷ See at point C. III. 3. "First feedback: Different kinds of incentives".

²¹⁸ See at point C. III. 4. "Second feedback: Alternative mechanisms to safeguard the incentives".

²¹⁹ See at point C. III. 5. "Third feedback: Alternative business models to monetize the product".

²²⁰ Cp. point C. II. 1. "Incentive theories" and 3. "Social planning theories".

tendency amongst the participants considering formats as highly important for the public discourse in a society. Indeed, with regard to the importance of formats for democracy as such, there is a medium to strong tendency of low importance. But given the relevance of formats considered for the public discourse as well as the basically acceptance of the structural function to safeguard freedom of state and private control, the overall relevance for the democratic civil society as a whole cannot be described as overestimated. Thereby, it is interesting that the participants' considerations did not let appear that they make any differences between certain kinds of formats.²²¹

²²¹ Cp. point C. II. 3. b) "Criticism: Formats for Democracy?" and III. 7. "Fifth feedback: Public discourse and democracy".

E. Formats as copyright protected works

Should formats be copyright protected? Which criteria for the definition of the copyright protected work shall apply to strike the right balance between the interests of the format markets' stakeholders? While the different copyright regimes of the EU Member States provide a set of more or less varying criteria for its definition, the European Court of Justice recently developed its own definition for the copyright protected work. In consequence, the following chapter firstly compares the varying criteria with the findings of the preceding chapter: Given the assumptions of the copyright theories and the feedback of the format markets' stakeholders, which criteria fit best for finding the right balance between their interests? Secondly, it illustrates the impact of the European Court's of Justice definition on the criteria and on the question about format's copyright protection. Does its definition affirm or deny copyright protection of formats? The chapter finally compares the purposes of European Copyright right with those provided for by utilitarian copyright theories. Does European Copyright – and its interpretation by the European Court of Justice – strike the right balance between the interests of the markets' stakeholders?

I. Definition by European Court of Justice

Since there is no legal definition of the copyright protected work provided for by the European legislator, the European Court of Justice was in the case ECJ C-5/08 “Infopaq vs. DDA” confronted with the question whether the economic rights, more precisely, the reproduction right of Art. 2 Copyright D can be defined without determining the criteria for the copyright protected work. The court took the opportunity to state, for the first time of its judicature, on an autonomous European definition of the copyright protected work and developed it, judgment by judgment, further.²²²

1. “Infopaq vs. DDF”

In the case ECJ C-5/08 “Infopaq vs. DDF”, Infopaq operates a media monitoring and analyzing business. Infopaq **monitored, selected, and summarized**, especially, Danish **newspapers on the basis of specific key words** agreed with the customers. Infopaq finally sent the summaries by Email to its customers. DDF is an association of publishers of Danish newspapers. DDF became aware that Infopaq was operating with articles of its publishers' newspapers without respective license. Amongst others, Infopaq scanned, printed and sent via email to its customers a sheet containing the following sentence that was printed before, the 4th November 2005, on page 3 of the newspaper “‘Dagbladet Arbejderen’: a forthcoming sale of the telecommunications group TDC which is expected to be bought”. DDF claimed that the operating process of Infopaq infringed the reproduction right on the sentence prescribed. The deciding Danish asked the EJC how to interpret the corresponding reproduction right in Art. 2 Copyright D.²²³

Preliminarily, the ECJ states in the light of the recitals 6 and 21 of the Copyright D that European provisions “must (be) given an **autonomous and uniform interpretation throughout the Community**” if these provisions do not expressly refer to the Member State to determine their meaning and scope.²²⁴ As far as Art. 2 Copyright D referred explicitly to the notion “work” but did not determine the definition nor

²²² Metzger, The ECJ's influence on Copyright law, GRUR 2012, 118 (121).

²²³ ECJ C-5/08, cip. 13 to 26.

²²⁴ ECJ C-5/08, cip. 27 and 28.

delegate the interpretation to the Member States, the ECJ had to interpret it on the basis of the existing common principles.²²⁵ Pursuant to the Computer D, the Database D and the Duration of Copyright D, computer programs, databases and photographs are only “protected by copyright if they are original in the sense that they are their **author’s own intellectual creation**”. In view of recitals 4, 9 to 11 and 20, the Copyright D grounds on the same principle so that the notion “work” has here to be correspondingly defined.²²⁶ Pursuant to the ECJ, recitals 9 and 11 of the Copyright D require a “high level of protection”, resulting in a broad definition of the copyright protected work. The high level of protection is important “in particular for authors to enable them to receive an appropriate reward for the use of their works (...)”.²²⁷

With regard to **parts of a copyright protected work**, the ECJ applies the same principle. As far as no European provision explicitly excluded them from copyright protection, also parts of works were protected given “that they contain elements which are the expression of the intellectual creation of the author of the work.”²²⁸ Concerning the elements of articles, the ECJ clarifies that “words which, considered in isolation, are not as such an intellectual creation of the author who employs them” and, thus, are not copyright protected. “It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an original creation. Words as such do not, therefore, constitute elements covered by the protection.”²²⁹

In summary, the ECJ holds copyright protection for certain isolated parts of sentences possible. The court states that, given the “requirement of a broad interpretation of the scope of protection (...), the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences (...), may be **suitable for conveying to the reader the originality** of a publication such as a newspaper article.”²³⁰

2. “BSA vs. Ministerstvo kultura”

In the case ECJ C-393/09 “BSA vs. Ministerstvo kultura”, BSA, an association of software companies, brought the Czech Ministry of Culture to court applying for the authorization as collecting agency for copyrights of computer programs. BSA claimed to be allowed collecting the remuneration not only for the use of computer programs with respect to the object code and the source code but also to the **graphic user interface**. The Czech Supreme Administrative Court asked the European Court of Justice if copyright protection of computer programs in Art. 1 sect. 2 Computer D covered only the object code and source code or if it extended even to the graphic user interface.²³¹

The European Court of Justice denied the broad interpretation of Art. 1 sect. 2 Computer D. Only the object and the source code fell under the scope of copyright protection for programs. But the European Court of Justice clarified, although the referring Czech Supreme Court did not ask for it, that graphic user

²²⁵ ECJ C-5/08, cip. 32 and 33.

²²⁶ ECJ C-5/08, cip. 35 and 36.

²²⁷ ECJ C-5/08, cip. 40.

²²⁸ ECJ C-5/08, cip. 38 and 39.

²²⁹ ECJ C-5/08, cip. 45 and 46.

²³⁰ ECJ C-5/08, cip. 47.

²³¹ ECJ C-393/09, cip. 15 to 21.

interfaces “can be protected by the **ordinary law of copyright** by virtue of (...)” the Copyright D. The court referred explicitly to the case “Infopaq vs. DDF” stating that copyright protection provided for by the Copyright D requires the originality of the work “in the sense that it is its author’s own intellectual creation”.²³² The referring Czech court had hence to verify whether the graphic user interface in question consists of the necessary originality. The court had to “take account, inter alia, of the specific arrangement or configuration of all the components which form part of the graphic user interface in order to determine which meet the criterion of originality. In that regard, that criterion cannot be met by components of the graphic user interface which are differentiated only by their technical function.” In such case, “the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression are indissociable. (... / That means that) the components of a graphic user interface do not permit the author to express his creativity in an original manner and achieve a result which is an intellectual creation of that author.”²³³

3. “Murphey vs. FAPL“

In the joined cases ECJ C-403/08 and C-429/08 “Murphey vs. FAPL”, the Football Association Premier League sued the British manager of a public house, Karen Murphey, who offered her guests to watch the English Premier League via a Greek satellite decoder. Normally, organizations of sport events such as the FAPL organize the international broadcasting of the respective events by granting exclusive licenses to national broadcasters. Thereby, they assure territorial exclusivity by both technical and contractual means obliging the broadcasting companies to encrypt the signals and not to sell the corresponding decoders but to citizens of the Member State where the broadcaster is tend to operate. Irrespective of the technical and contractual burdens, Karen Murphey achieved to purchase a decoder from Greece, which cost less than the British equivalent, and used it for showing the **football matches** in her public house. The FAPL brought Karen Murphey to court claiming the infringement of its broadcasting rights. Finally, the High Court of Justice of England and Wales stayed the proceedings and referred the case to the European Court of Justice.²³⁴

One of the questions referred on that the European Court of Justice had to decide was if the football matches in question were copyright protected under European Copyright law. The European Court of Justice denied the question referring to the legal requirements elaborated in the case ECJ C-5/08 “Infopaq vs. DDA”: “(...) Sport events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive. That applies in particular to football matches, which are subject to **rules of the game, leaving no room for creative freedom** for the purposes of copyright.”²³⁵ Indeed, the European Court of Justice clarifies that, although there was no copyright protection for sporting events by European law, they could be protected by national law: “None the less, sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works, and that protection can be granted, where appropriate, by the various domestic legal orders.”²³⁶ Thereby, the European Court of Justice stresses that

²³² ECJ C-393/09, cip. 41 to 45.

²³³ ECJ C-292/09, cip. 48 to 50.

²³⁴ ECJ C-403/08 and C-429/08, cip. 30 to 56.

²³⁵ ECJ C-403/08 and C-429/08, cip. 96 to 98.

²³⁶ ECJ C-403/08 and C-429/08, cip. 100.

such protection by intellectual property rights must “not go beyond what is necessary in order to attain the objective of protecting the intellectual property at issue.” Even if it is common sense that intellectual property is intended to enable the right holder to commercially exploit the subject matter by granting licenses in return for certain fees, such fees are only, pursuant to recital 10 of the Copyright D, to be appropriate.²³⁷

Finally, the European Court of Justice clarified that certain components of the sporting event in question, such as “the opening video sequence, the Premiere League anthem, pre-recorded films showing highlights of recent premier League matches, or various graphics” can, irrespective of the denied protection of the event as a whole, be copyright protected.²³⁸

4. “Painer vs. Standard“

In the case ECJ C-145/10 “Painer vs. Standard”, the Austrian photographer Maria Painer sued, amongst others, the Austrian publisher Standard VerlagsGmbH for infringing her copyright. Maria Painer has made several photographs of Natascha Kampusch, before the latter was abducted in 1998. After Natascha Kampusch has escaped from her abductor in 2006, the defendants published the photographs in their newspapers and on their online platform. Several publications contained a **computer animated photograph** of Natascha Kampusch that was **based on the former portraits** made by Maria Painer but represented the supposed image of the abducted person in her adulthood. The reproductions were done and published without corresponding consent by Maria Painer and without indicating her as the original author. Maria Painer sought, amongst others, an order before the Austrian courts that the defendants had immediately to cease to reproduce and publish her photographs without her consent and the contribution.²³⁹ The Austrian Supreme Court referred, finally, the case to the European Court of Justice asking, amongst others, if “photographs, particularly portrait photos, are afforded ‘weaker’ copyright protection or no copyright protection at all against adaptations because, in view of their ‘realistic image’, the degree of formative freedom is too minor”.²⁴⁰ The question based on the consideration of the referring court that whether the adaptation of the original photograph falls under the Austrian adaptation right or is “free use” depends on the level of originality of the original creation.²⁴¹

The European Court of Justice denied the question referring, here again, to the case C-5/08 “Infopaq vs. DDF”. In addition to the already elaborated definition of the copyright protected work, the court states that pursuant to recital 17 of the Duration of Copyright D “an intellectual creation is an author’s own one if it reflects the author’s personality. That is the case if the author was able to express his creative abilities in the production of the work by making **free and creative choices** (see, *a contrario*, Joined cases C-403/08 and C-429/08 Football Association Premier League and Others [2011] ECR I-0000, paragraph 98).”²⁴² Then, the court directly answers to the consideration of the referring Austrian Supreme Court “whether such protection is inferior to that enjoyed by other works, particularly photographic works, it is

²³⁷ ECJ C-403/08 and C-429/08, cip. 105 to 108.

²³⁸ ECJ C-403/08 and C-429/08, cip. 149.

²³⁹ ECJ C-145/10, cip. 27 to 43.

²⁴⁰ ECJ C-145/10, cip. 43.

²⁴¹ ECJ C-145/10, cip. 27 to 42.

²⁴² ECJ C-145/10, cip. 87 to 89.

appropriate to point out *straightaway* that the author of a protected work is, under Article 2(a) of (... / the Copyright D), entitled to, among other things, the exclusive right to authorize or prohibit its direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.” Given the broad interpretation of the reproduction right in Art. 2 Copyright D, “nothing in (... / the Copyright D) or in any other directive applicable supports the view that the extent of such protection should depend on possible differences in the degree of creative freedom in the production of various categories of works.”²⁴³

With regard to the portrait photographs in question, the European Court of Justice comes to the conclusion that “the photographer can make free and creative choices in several ways and at various points in its production. In the preparation phase, the photographer can choose the background, the subjects’ pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software.”²⁴⁴ Given these criteria, it is for the national court to verify if the photographs in question are copyright protected. “Since it has been determined (... / if they are a copyright protected work), its **protection is not inferior** to that enjoyed by any other work, including other photographic works.”²⁴⁵

5. “Dataco vs. Yahoo!”

In the case ECJ C-604/10 “Dataco vs. Yahoo!”, the British company Football Dataco Ltd. creates annual fixture lists of the football leagues in England and Scotland. The lists are created pursuant to so called golden rules, such as that “no club shall have three consecutive home or away matches”, organizational restrictions of the participating clubs and technical constraints caused by the computer programs and employees involved in the process. The whole creation process requires particular intellectual resources in determining the date, the time and the identity of teams with respect to the respective fixture list. The Internet search engine Yahoo! used the football fixture lists for its engine without prior consent of Dataco or any payment of remuneration. Dataco (and others) brought Yahoo! to court claiming to own a copyright on the **fixture lists as** copyright protected **database** in the meaning of Art. 3 of the Database D as well as under British Copyright law. The court of first instance affirmed the claim on the grounds that the creation of the football fixture lists requires significance labor and skill in order to attain the multiple technical and organizational restrictions. Finally, the Court of Appeal of England and Wales stayed the proceedings and referred to the European Court of Justice, firstly, the questions if the definition “author’s own intellectual creation” requires more than significant labor and skill and if the intellectual skill and labor of creating the data itself and/or the significance added to pre-existing data (for example in fixing the date for a football match) can be taken into account. Secondly, the Court of Appeal wanted to know if the Database D ruled out that national Copyright law grants protection for databases other than provided for by the directive.²⁴⁶

²⁴³ ECJ C-145/10, cip. 95 to 97.

²⁴⁴ ECJ C-145/10, cip. 90 and 91.

²⁴⁵ ECJ C-145/10, cip. 99.

²⁴⁶ ECJ C-604/10, cip. 12 to 24.

The European Court of Justice stated, firstly, that significant **labor and skill is not sufficient** to fulfill the requirements of copyright protection. Pursuant to recital 16 Database D, “the notion of the author’s own intellectual creation refers to the criterion originality (see, to that effect, Case C-5/08 *Infopaq International* [2009] ECR I-6569, paragraphs 35, 37, and 38; Case C-393/09 *Bezpečnostni softwarova asociace* [2010] ECR I-0000 paragraph 45; Joined cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-0000, paragraph 97; and Case C-145/10 *Painer* [2011] ECR I-0000 paragraph 87). As regards the setting up of a database, that criterion of originality is satisfied when, through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by making free and creative choices (see, by analogy, *Infopaq International*, paragraph 45; *Bezpečnostni softwarova asociace* paragraph 50; and *Painer*, paragraph 89) and thus stamps his ‘personal touch’ (*Painer*, paragraph 92). By contrast, that criterion is not satisfied when the setting up of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom (see, by analogy, *Bezpečnostni softwarova asociace*, paragraphs 48 and 49, and *Football Association Premier League and Others*, paragraph 98).”²⁴⁷

Therefore, neither the intellectual labor and skill of creating the data itself nor the significance added to pre-existing data can be taken into account because it does not refer to the “selection and arrangement” of the data.²⁴⁸ Even if the intellectual skill and labor concerns the “selection and arrangement” of the data, it does not “as such justify the protection of it by copyright (...), if that labour and skill do not express any originality” in the above meaning.²⁴⁹

Finally, the European Court of Justice states that the Database D precludes rights granted by national Copyright laws which go beyond the level of protection provided for by the directive. The court grounds its reasoning mainly on recitals 1 to 4 of the Database D which promote to **remove the differences** which existed **between the Member States** with regard to the legal protection of databases, “particularly as regards the scope and conditions of copyright protection, and which adversely affected the functioning of the internal market, the free movement of goods or services within the European Union and the development of an information market within the European Union.” Except the transitional provision for databases that were protected in a Member State before the Database D came into force, other criteria of originality than laid down in the directive are, therefore, precluded.²⁵⁰

6. Conclusion – An autonomous and exclusive definition?

During the process of development prescribed, the European Court of Justice clarifies that its statements, grounding not only on different economic rights but distinctive directives, constitute nothing less than the European definition of the copyright protected work binding all Member States. In the first case ECJ C-5/08 “*Infopaq vs. DDA*” already, the court made clear that all European provisions “must (be) given an autonomous and uniform interpretation throughout the Community” if these provisions do not expressly refer to the Member State to determine their meaning and scope.²⁵¹ While the court obviously considered

²⁴⁷ ECJ C-604/10, cip. 37 to 39.

²⁴⁸ ECJ C-604/10, cip. 32 and 41.

²⁴⁹ ECJ C-604/10, cip. 42.

²⁵⁰ ECJ C-604/10, cip. 48 and 50.

²⁵¹ ECJ C-5/08, cip. 27 and 28.

that such references were not provided for by the directives, it affirms in the second case ECJ C-393/09 “BSA vs. Ministerstvo kulture” the existence of an “ordinary (European) law of copyright”.²⁵² Authors, here, of graphic user interface designs can hence be protected by European copyright, even if there is neither a vertical directive granting the protection for the work in question nor any other provision defining, in general, the criteria for a “European copyright protected work”. Thereby, the court explicitly refers to its own definition firstly stated in the case “Infopaq vs. DDF” pursuant to that the Copyright D requires the originality of the work “in the sense that it is its author’s own intellectual creation”.²⁵³ The court continues this self-referential method adding further criteria in its following decisions.²⁵⁴ In the case ECJ-C 145/10 “Painer vs. Standard”, the court justifies the protection of photographs by means of both an analogous and an ex contrario conclusion referring to ECJ C-5/08 “Infopaq vs. DDA” as well as ECJ C-403/08 and C-429/08 “Murphy vs. FAPL”, respectively.²⁵⁵ In the last case ECJ C-604/10 “Dataco vs. Yahoo!”, the court stresses the consistent line of its argumentation referring to all precedent cases including ECJ C-393/09 “BSA vs. Ministerstvo kulture”.²⁵⁶ The European Court of Justice develops its definition of the copyright protected on the grounds of such diverging subject matters as texts, graphics, football matches, photographs, and databases. By doing so, the court exemplifies that the different provisions on which its sentences are based are not exceptions to a non-existent definition of the copyright protected work and which do not allow analogous conclusions. The divergence of the subject-matters rather illustrate the broad scope which serves as common ground to develop one **European definition of the copyright protected** work binding all Member States.²⁵⁷

An autonomous European definition of the copyright protected work raises the question about the exclusivity of the definition. With respect to databases, the European Court of Justice states that **other criteria of originality** than laid down in the directive **are precluded**. An exception exists only for databases that were protected in a Member State before the Database D came into force.²⁵⁸ Indeed, the decision refers to databases and not to the “ordinary European Copyright law”.²⁵⁹ In addition, the court bases its reasoning on recitals 1 to 4 of the Database D which promote to remove the differences of copyright protection which existed between the Member States especially regarding databases. On the other hand, the court stresses the importance of removing these differences “particularly as regards the scope and conditions of copyright protection, and which adversely affected the functioning of the internal market, the free movement of goods or services within the European Union and the development of an information market within the European Union”.²⁶⁰ These purposes may apply to any kind of copyright protected works.

Contrary, in the joint-cases ECJ C-403/08 and 429/08 “Murphy vs. FAPL” the European Court of Justice seems to acknowledge protection by national laws which go beyond the criteria developed by the court: “None the less, sporting events, as such, have a unique and, to that extent, original character which can

²⁵² Cp. Metzger, *ibid.*, p. 118 (122).

²⁵³ ECJ C-393/09, *cip.* 41 to 45.

²⁵⁴ Cp. Metzger, *ibid.*, p. 118 (122).

²⁵⁵ ECJ C-145/10, *cip.* 87 to 89.

²⁵⁶ ECJ C-604/10, *cip.* 37 to 39.

²⁵⁷ Metzger, *ibid.*, p. 118 (122).

²⁵⁸ ECJ C-604/10, *cip.* 48 and 50.

²⁵⁹ Cp. Point E. I. 2. „BSA vs. Ministerstvo kulture”: Ordinary European Copyright law”.

²⁶⁰ ECJ C-604/10, *cip.* 48 and 50.

transform them into subject-matter that is worthy of **protection comparable to the protection of works**, and that protection can be granted, where appropriate, by the various domestic legal orders.”²⁶¹ But the sentence clarifies that such subject matter would not be protected by copyright but by immaterial property rights which is “comparable to the protection of works”. Thus, its legal regime and the corresponding subject matter would be different to the copyright protected work.²⁶²

Therefore, the definition of the copyright protected work must be considered as exclusive in the meaning that national legislators are not allowed to grant copyright protection for intellectual creations which do not meet the criteria developed by the court.

II. Criteria for the copyright protected work

There are several criteria for the definition of the copyright protected work more or less varying amongst the Member States. The following will examine each of them with respect to its relevance for formats, whether or how far it corresponds with the purposes of utilitarian copyright theories prescribed and compares them with the recent definition by the European Court of Justice. As mentioned above, the definition of the copyright protected work serves as very first entry point for the balance of interests of the stakeholders of, especially, format markets: The broader the definition is, the more works are protected and the more the public is potentially restricted. Indeed, a broad scope of protection based on a wide definition of the copyright protected work may be limited again by narrowing, for example, the exclusive adaptation right, by means of limitations such as for quotations or by shortening the duration of protection. The definition of the copyright protected work hence determines how far the protection might be, in a later step, limited again.²⁶³

1. Work categories

One of the first criteria for what kind of creations could or should be copyright protected is the legal requirement of a certain work category. A so called closed list, like in the common law copyright systems of the UK and Ireland, only grants copyright to the kinds of work that are listed in the law. Creators who want to see their creations under copyright protection have to bring their creations within one of the listed categories.²⁶⁴

a) Impact on formats' copyright protection

Both closed lists as well as so called open lists such as implemented in continental European copyright systems have **advantages and disadvantages**. Critics stress the rule of law as one advantage of a closed list system because certain kinds of works can easily be identified under the listed categories. On the other side, closed lists risk the unjustified discrimination of certain kinds of works, especially with respect to new ones.²⁶⁵ Instead, open list systems are more technically neutral and open for future kinds of works.

²⁶¹ ECJ C-403/08 and C-429/08, cip. 100.

²⁶² ECJ C-403/08 and C-429/08, cip. 105 to 108.

²⁶³ See at point A. I. 3. “Copyright protected works: Formats between private property and public domain”.

²⁶⁴ Aplin, *ibid.*, pp. 54 and 74.

²⁶⁵ Aplin, *ibid.*, pp. 68/69.

Of course, also open list systems are not free of potential discriminations. The openness corresponds with a greater scope of interpretation for the definition of the copyright protected work. Some courts may identify creations as protected and others not what finally leads to legal uncertainty with regard to the protected subject matter.²⁶⁶

As the legal situation in the UK illustrates, a closed list is specifically difficult for **television formats** to come under one of the listed work categories. The CDPA lists, amongst others, “literary works”, “dramatic works”, “cinematographic works”, “artistic works” and “musical works”. The paper format of a television format could be protected as “literary” work. The produced television format can principally protected as “cinematographic work”, while the underlying elements could fulfill the criteria of a “dramatic” work.²⁶⁷ These examples illustrate how difficult it becomes to bring all parts of a television format under the listed categories so that it is protected as a whole. It is obvious that the situation becomes more complicated with regard to transmedia formats that expand over a multitude of media platforms with narrative, reality, scripted reality, and gaming elements.²⁶⁸

b) Balance of interests pursuant to utilitarian copyright theories

With respect to the approach of the Democracy based Theory, the justification of a **closed list** for certain kinds of works is **highly arguable**. The Democracy based Theory pursues to establish and maintain a market for the exchange of (expressed) ideas free of state or private control, irrespective what kind of intellectual creation, and more relevant here, what kind of format. Given the importance of formats for the public discourse, there is no reason to exclude them, be it a format for television and/or any other media platform, from copyright protection per se.²⁶⁹ The legal systematic that certain work categories must be listed for its protection is contradictory to this theory. Similarly with regard to the Incentive Theory, an economic incentive basically exists irrespective of the type of format or, much broader, of the intellectual creation that a creator and/or producer want/s to develop and/or produce.²⁷⁰ Only in view of transaction costs, it might be necessary to exclude certain kinds of intellectual creations from copyright protection if those costs would be too high.²⁷¹ Unfortunately, there is no direct feedback by the stakeholders of German format markets to the question how they estimate the costs regarding harmonized (no) copyright protection of formats.²⁷²

c) Definition by European Court of Justice

The European Court of Justice has not explicitly answered the question whether formats have to belong to certain work categories listed in the law to be copyright protected. At least, in view of the broad definition of the copyright protected work that the court developed on the grounds of several distinctive subject matters, an **open list** seems more **likely** than a closed one **to be favored by the court**. In the case ECJ C-

²⁶⁶ Aplin, *ibid.*, pp. 72.

²⁶⁷ Logan, TV Format Protection in the United Kingdom, p. 88.

²⁶⁸ Cp. point B. I. 2. “Transmedia formats: Franchising, formatting and participation”.

²⁶⁹ See at point D. I. 3. „Social Planning Theories, esp. Democracy based Theory”.

²⁷⁰ See at point D. I. 1. a) „Dilemma of intellectual works as public goods”.

²⁷¹ See at point D. I. 2. a) „Copyright law and costs”.

²⁷² See at point D. II. 6. “ Fourth feedback methodically failed”.

604/10 “Dataco vs. Yahoo!”, the court rules out other criteria than provided for by European Copyright law.²⁷³ It depends on future decisions whether national legislators are allowed to exclude certain work categories from copyright protection.

2. Author’s own intellectual creation

Anyway, both closed and open list systems require for most listed works their originality. It is the most prominent criteria to define the copyright protected work. Indeed, not all Member States’ copyright laws explicitly refer to this requirement. But in fact, it is constant in most doctrine and case law.²⁷⁴ As mentioned in the introduction, the minimum common ground is hereby that works are the author’s „own intellectual creation“.²⁷⁵

a) Impact on formats’ copyright protection

To begin with, the term “intellectual creation” clarifies the principal difference between the physical good that may carry the intellectual creation – for example the canvas for a painting, the film material for movies or any server with digital music, books, videos and so forth on it – and the immaterial property itself. Subject of the immaterial property right is hence not the carrier but the **intellectual idea expressed in a certain form**.²⁷⁶

The form requirement does, at least objectively, not mean that the intellectual creation has to be fixed on a physical carrier; this is in view of some critics the consequence of the difference between material and immaterial property right.²⁷⁷ Just as an example, speeches or performances exist without fixation. Other creations such as sand writings or ice statutes are, at least, not permanently fixated. And many creations are not fixated in their final form, for example drafts or any other stages of creative developments.²⁷⁸ The form requirement is therefore rather the prior condition that other people can experience the idea.²⁷⁹ In legal terms, only few Member States, such as the UK, require the **fixation of the work** – which is different to formality or registry requirements that are ruled out by the Berne Convention.²⁸⁰ But even where fixation of the creation is required, in conclusion, the creation has only to be “capable of reproduction in a tangible form.” That means that even in the UK the fixation of the intellectual creation is not really necessary for copyright protection.²⁸¹ Nevertheless, fixation of the copyright protected work is mostly necessary for judicial prove of the existence as well as the precedence of the work. Without any material fixation, it is very difficult, if not impossible, for courts to compare, for example, two litigated works. But in principle, the judicial prove is independent from the legal requirements for copyright protected works.²⁸²

²⁷³ See at point E. I. 6. “Conclusion – An autonomous and exclusive definition?”.

²⁷⁴ Casas Vallés, The requirement of originality, pp. 106.

²⁷⁵ Cp. point A. I. 2. „Definitions: Formats, originality and intellectual creations/copyright protected works”.

²⁷⁶ Barudi, *ibid.*, p. 21.

²⁷⁷ Kreutzer, *ibid.*, p. 56.

²⁷⁸ Latreille, From idea to fixation: a view of protected works, p. 141.

²⁷⁹ Barudi, *ibid.*, p. 21.

²⁸⁰ Cp. Art. 2 sect. 2 and Art. 5 sect. 2 RBC.

²⁸¹ Cp. Latreille, *ibid.*, pp. 144/145.

²⁸² Latreille, *ibid.*, p. 146.

Related to the form requirement is the legal pre-condition of the so-called **work unity** which has two components: Personal and factual unity. Personal unity means that the copyright protected work must be created from one or more creators as one common work. With regard to factual unity, the single elements of the work must form a whole. Crucial is the perspective of the recipients of the work. Thereby, not only the work as a whole but also components of it can – but do not must – be copyright protected. The pre-condition is that they fulfill, again, the requirements for a copyright protected work. Different copyright protected works can therefore form another copyright protected work. These single works or work components, respectively, can be from different work categories. Text, music, pictures and so forth can therefore form together, irrespective if they are as such copyright protected or not, one unity and, as consequence, be one common copyright protected work.²⁸³

Another function of the term “authors own intellectual creation” is to rule out so called **aleatoric and unintentional creations**. At the one hand, the reference to the author excludes creations that are not created by natural persons. Therefore, products made by machines are not copyright protected. That does not mean that creators must not use machines for the process of creation. Only as long as humans are responsible for fulfilling the criteria used for the definition of copyright protection, irrespective if they use machines or not, the outcome is protectable.²⁸⁴ At the other hand, given that natural persons create the work, they have to do it intentionally. This refers to the notion “intellectual creation”. Creations made by accident, automatically or even unconsciously are therefore not copyright protected.²⁸⁵

With respect to, especially, **television and transmedia formats**, the criterion of an intentional expression in a certain form is doubtlessly fulfilled. Most formats are even fixated, be it in a paper format, a pilot the show or in the production package. Only the requirement of work unity is worth for further examination. As prescribed in the preceding chapter, formats are complex creations containing a multitude of elements from different work categories with, at least in most cases, many creators involved. Furthermore, especially transmedia formats are not restricted to one single media, such as one book or movie, but are scattered over several media, such as blogs and Facebook accounts of protagonists, webisodes, online games and several movies. Pursuant to the criteria prescribed, such formats fulfill the requirement of work unity as long as the audience perceives it as one unity, in other words, as one common work. Thereby, it does not principally matter in which stage of development they are. If the format paper already contains the elements that form the copyright protected work, it becomes a component of later developments, such as the pilot or the production package.²⁸⁶

b) Balance of interests pursuant to utilitarian copyright theories

The understanding of **intellectuality** prescribed corresponds with the theoretical approach of the Democracy based Theory. Given the approach to establish and maintain a market for (expressed) ideas, the creation must not be an aleatoric work or unconsciously made because these are no expressions of an

²⁸³ Schricker, *ibid.*, pp. 923 (926).

²⁸⁴ Kreutzer, *ibid.*, p. 51.

²⁸⁵ Kreutzer, *ibid.*, p. 52 with further references to authors who want to protect creations made in trance.

²⁸⁶ Schricker, *ibid.*, p. 926; Heinkelein/Fey, *ibid.*, p. 386 with references to contrary opinions.

idea.²⁸⁷ In contrast, the theoretical approach of the Incentive Theory or, similarly, of the New Institutions Economics do not require such “intellectuality”, at least not in this context. A financial incentive exists also for the recoupment of production costs for aleatoric works and copyright might serve as allocation of any kind of goods.

With regard to the Democracy based Theory, also the **form requirement is necessary**. The form requirement means that an intellectual creation must be perceivable by other persons. The intellectual creation must be perceived to be exchangeable on markets. In contrast, the **fixation on a physical carrier is not necessary** for such markets. Ideas expressed, for example, in songs, poems, theater or role-plays can be exchanged without fixation.²⁸⁸ Similarly, also the Incentive Theory and the Transaction Costs Economics require the expression of the idea in a certain form. The Incentive Theory intends to recoup the development costs because of the marginal costs for copies. This reasoning implies that the idea is perceivable by others and can be consequently copied. Pursuant to the Transaction Cost Economics, copyright serves the allocation of intellectual creations granting access to them. Therefore, these must be perceivable by others. In contrast, copying of or access to intellectual creations does not necessarily require a physical carrier, as copying of or listening to mere singing illustrates. Neither the Incentive Theory nor the Transaction Costs Economics thus require the fixation, for example, of a song.²⁸⁹

The Democracy based Theory as well as the Transaction Cost Economics require that users perceive the intellectual creations as **one unite work**. As far as they justify copyright protection for certain intellectual creations, be it for sake of economic allocation, be it to create a market for the exchange of idea in favor of democratic civil societies, they imply that others than the creator and/or producer see it as unite work, in other words, one product.²⁹⁰ In contrast, the Incentive Theory does not necessarily require work unity. Intellectual creations might be copied irrespective if others see them as parts of a whole or not. In any case, there is a need for the creator and/or producer to recoup the costs of development.²⁹¹

c) Definition by European Court of Justice

In the case ECJ C-5/08 “Infopaq vs. DDF”, the European Court of Justice elaborates on the basis of the definitions of the copyright protected work in the Computer D, the Database D and the Duration of Copyright D as well as in view of recitals 4, 9 and 11 of the Copyright D the criteria “author’s own intellectual creation”.²⁹² Thereby, the court states that also parts of works can be copyright protected if they “contain elements which are the expression of the intellectual creation of the author” and that they may be, with respect to the copied parts of the sentence in question, “suitable for conveying to the reader the originality”.²⁹³

The European Court of Justice therewith affirms several of the criteria prescribed. Firstly, the creation must be an author’s **intellectual** creation. Creations as result of an exclusively machine made process,

²⁸⁷ Cp. point D. I. 3. a) „Functions of Copyright law in a Democratic Civil Society”.

²⁸⁸ Cp. point D. I. 3. a) “Functions of Copyright law in a Democratic Civil Society”.

²⁸⁹ Cp. points D. I. 1. a) „Dilemma of intellectual works as public goods“ and 2. a) „Copyright and costs“.

²⁹⁰ Cp. points D. I. 3. a) „Functions of Copyright law in a Democratic Civil Society” and 2. a) „Copyright and costs“.

²⁹¹ Cp. point D. I. 1. a) „Dilemma of intellectual works as public goods“.

²⁹² ECJ C-5/08, cip. 35 and 36.

²⁹³ ECJ C-5/08, cip. 38, 39, and 47.

that means aleatoric works, are not copyright protected. As already mentioned, that does not preclude using machines for the creation process. The European Court of Justice did implicitly affirm that in the case ECJ C-393/09 “BSA vs. Ministerstvo kulture” stating that the use of machines, such as computer programs, does not preclude the protection of the work, here an user-interface, as far as “it is its author’s own intellectual creation.”²⁹⁴ Secondly, the court makes clear that also parts of works can be copyright protected and refers, thereby, to the perception of the user of the work. Therewith, the court simultaneously affirms the **form requirement** that means that the intellectual creation must be perceivable by others. Indeed, the decisions do not clarify the questions about further requirements such as whether the author must consciously create the work or whether he must fixate it. Indeed, there is no decision on the **requirement of fixation** of the work. Since in all cases the intellectual creations questioned were fixated, the conclusion on a correspondent statement by the court is not possible.

As illustrated above, formats mostly start to be existent as paper formats and are then elaborated further to pilots and/or entire shows ending up in production packages or format bibles. Hence, they are as such **part of a subsequent work**. It might be argued that the European Court of Justice does not refer, in the case ECJ C-5/08 “Infopaq vs. DDA”, to parts of work in the meaning of several stages of development but only to parts of one existing work. But in the case ECJ C-145/10 “Painer vs. Standard”, the court examines the reproduction of the original photograph serving as template for the subsequent computer animation. As such the photograph takes, without doubt, part of the animation. Even if the court does not examine whether the animation is a copyright protected work, what was not part of the referred question, the animation was, at least, an intellectual creation in which the former work was considered by the court as apparent and has to be, as such, part of it.²⁹⁵ It is assumable that the European Court of Justice does not preclude creations as parts of subsequent works and/or creations from copyright protection.

With respect to transmedia formats, it is important to stress that the European Court of Justice also clarified the perspective in which the different elements must meet the criterion “author’s own intellectual creation” or “originality” respectively. The intellectual creation must be “suitable for conveying to the reader the originality”.²⁹⁶ Transmedia formats that consist of elements dispersed over a multitude of media platforms can, hence, be copyright protected if the **user perceives it as one unite “original” work**.²⁹⁷ This is similar to the decision of the Dutch Supreme Court in the case “‘Survive!’ vs. ‘Big Brother’” illustrated above. The Dutch Supreme Court “take(s) the overall impressions of the ‘Survive!’ format and of the ‘Big Brother’ program into account in which the similarities between format and program are decisive.”²⁹⁸ It depends on the “impression” if the work’s elements are suitable to convey the necessary originality.

²⁹⁴ ECJ C-393/09, cip. 51.

²⁹⁵ Cp. ECJ C-145/10, cip. 42 and 85 as well as 86 to 94.

²⁹⁶ ECJ C-5/08, cip. 38, 39, and 47.

²⁹⁷ See at point C. I. 2. “Author’s own intellectual creation: Form, fixation, and intellectuality”.

²⁹⁸ Hoge Raad der Nederlanden, 16th April 2004, No. C02/284HR, sent. 8: “Bij de vraag of de Big Brother-programma’s inbreuk maken op het Survive-format zal het hof de totaalindrukken van het Survive-format en van de Big Brother-programma’s in zijn beoordeling betrekken, waarbij het hof beseft dat primair de overeenkomsten tussen format en programma’s van belang zijn voor de inbreukvraag.”

3. Free and creative choices

The European Court of Justice states in its first case ECJ C 309/09 “Infopaq vs. DDF” that copyright protection provided for by the Copyright D requires the originality of the work in the sense that it is its author’s own intellectual creation.²⁹⁹ As mentioned before, not all copyright laws of the Member States explicitly refer to the term “originality”. But as said, it is constant in most doctrine and case law.³⁰⁰

a) Balance of interests pursuant to utilitarian copyright theories

Thereby, the possibility for the creator to make **free and creative choices** seems to become more and more the essential starting point in the today’s discussion.³⁰¹ The reason is that works that are created without possibility of free and creative choices would monopolize the idea, not only its expression. The argument refers to the “idea-expression-dichotomy” that will be discussed in the following: If there is no free and creative choice, there is no other way to express the idea. Nobody would be allowed to express it anymore. In favor of the public, that means users, creators, re-creators and so on, intellectual creations without free and creative choices are therefore not copyright protected.³⁰²

Given the theoretical approach of the Democracy based Theory, the requirement of “**free and creative choices**” is necessary. As far as the creator follows only technical conditions, she does not express aesthetics, cultural, social or political ideas that might be exchanged.³⁰³ In contrast, neither the Incentive Theory nor the Transaction Cost Economics require such free and creative choices. There might be a need to refinance the development and production costs also for creations that exclusively follow functional restraints. The allocation of intellectual goods is not restricted to such that are made with free and creative choices.³⁰⁴

b) Definition by European Court of Justice

By defining its understanding of the term “originality”, the European Court of Justice not only affirms the criteria of intellectuality, form and work unity but also the requirement of “free and creative choices”. In the case ECJ C-5/08 “Infopaq vs. DDA”, the court firstly **distinguishes the work from its not protected elements**: “It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an original creation. Words as such do not, therefore, constitute elements covered by the protection.”³⁰⁵ In the following case ECJ C-292/09 “BSA vs. Ministerstvo kulture”, the court concretizes under which conditions the “specific arrangement or configuration” of the elements do not meet the criterion of originality. That is the case if they “are differentiated only by their technical function (...), since the different methods of implementing

²⁹⁹ ECJ C-393/09, cip. 41 to 45.

³⁰⁰ Casas Vallés, The requirement of originality, pp. 106.

³⁰¹ Instructive summary at Barudi, *ibid.*, pp. 41.

³⁰² Barudi, *ibid.*, p. 249.

³⁰³ Cp. point D. I. 3. a) „Functions of Copyright law in a Democratic Civil Society”.

³⁰⁴ Cp. points D. I. 1. a) „Dilemma of intellectual works as public goods,, and 2. a) „Copyright law and costs,,.

³⁰⁵ ECJ C-5/08, cip. 45 and 46.

an idea are so limited that the idea and the expression are indissociable.”³⁰⁶ The court seems to refer to the reason described above why there must always remain different ways to express the idea: If there is only one possibility to express the idea, the protection of the expression would lead to the monopolization of the idea. In favor of the public, ideas have to remain free. Finally, in the subsequent case ECJ-C 145/10 “Painer vs. Standard”, the European Court of Justice explicitly introduces the term “**free and creative choices**” to determine the criteria that an intellectual creation must meet to be a copyright protected work: “That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices (see, *a contrario*, Joined cases C-403/08 and C-429/08 Football Association Premier League and Others [2011] ECR I-0000, paragraph 98).”³⁰⁷

c) Impact on formats’ copyright protection

The criterion of “free and creative choices” does not exclude, per se, formats from copyright protection. Only so called **facsimiles**, that means reproductions of factual circumstances without any further changes and/or arrangements, might **fall out of the scope of copyright protection**.³⁰⁸

More relevant it is to stress the similarity of the reasoning by the European Court of Justice to the case “‘Survive!’ vs. ‘Big Brother’”. To ascertain which similarities between two formats are, pursuant to the “overall impression”, decisive for the question about copyright protection, the Dutch Supreme Court takes into account “the different elements on that the format is build on (...). Especially, if a format consists of a combination of unprotected elements (as here is the case), an infringement is only possible if several elements are recognizable and in a similar way adopted. “(..) If all elements have been copied, there is no doubt. In that case copyright infringement is involved. If only one (unprotected) element has been copied, the situation is also clear: in that case no infringement is involved. A general answer to the question of how many elements must have been copied for infringement to be involved cannot be given; this depends on the circumstances of the case.”³⁰⁹ In both judgments, it depends on the “**combination**” or “**choice, sequence and combination**” or “**specific arrangement or configuration**” of the elements, if the intellectual creation is original and, thus, a copyright protected work. Given this requirement, the question about copyright protection of a format mainly depends on the combination of its elements.

4. “Idea-expression-dichotomy”

The “**idea-expression dichotomy**” has been, in the past, the essential criteria for differing between copyright protected works and other intellectual creations. Ideas had to be free because they are part of the common knowledge.³¹⁰ Nowadays, the “idea-expression-dichotomy” still exemplifies the balance that copyright law has to find between the interests of creators resp. producers and the public such as users, re-creators, and so forth. But technically, it does not serve as main criterion for the legal demarcation

³⁰⁶ ECJ C-292/09, cip. 48 to 50.

³⁰⁷ ECJ C-145/10, cip. 87 to 89.

³⁰⁸ Kreutzer, *ibid.*, pp. 433 and 439.

³⁰⁹ Hoge Raad der Nederlanden, 16th April 2004, No. C02/284HR, sent. 8: “Bij de vraag of de Big Brother-programma's inbreuk maken op het Survive-format zal het hof de totaalindrukken van het Survive-format en van de Big Brother-programma's in zijn beoordeling betrekken, waarbij het hof beseft dat primair de overeenkomsten tussen format en programma's van belang zijn voor de inbreukvraag.”

³¹⁰ Kreutzer, *ibid.*, p. 55.

anymore. The reason is that the more complex intellectual works become the more difficult it is to differ between idea and expression.³¹¹ In literacy, for example, it is meanwhile – at least in Germany – common sense that not only the concrete text can be the subject of copyright protection but also the story behind, the so called fable, that may find its expression “in the plotline, the personality and the role play of the characters, the arrangement of the scenes and the general setting of the novel”.³¹²

a) Impact on formats’ copyright protection

But there are still other criteria in use that reflect the “idea-expression-dichotomy”. Amongst them, “technique, style and manner” are the general terms. **Techniques, styles and manners** are not copyright protected because they are the method with that ideas are expressed. That does not mean that the application of methods exclude copyright protection. Indeed, there might be no copyright protected work that is created without a certain method. Therefore, only the method itself is not copyright protected but the concrete expression of a method – as the expression of an idea – can be copyright protected.³¹³

Similarly to the method, **rules of games and riddle ideas** are discussed. Without doubt, the form of rules of games and riddle ideas is protectable by copyright. The book of rules or, for example, the exposé that describes the riddle can hence be copyright protected. Instead, the idea of the game or of the riddle shall, pursuant to some critics, not be copyright protected. The reason is, here again, that those ideas or methods must not be monopolized in favor of the public. Others argue that, in comparison to the so called fable of fictional stories, not only the “mere verbal expression” of, at least, rules of games can be copyright protected but also the “intellectual content” if it is an “author’s own intellectual creation”. The German Federal Supreme Court decided, for example, on a correspondent case and only denied copyright protection because the rule was a “matter of course”, in other words, was not sufficiently original.³¹⁴

Nevertheless, the German Supreme Court generally denied, in a later case, copyright protection for television formats. The court stated in its reasoning that television formats are not fictional but rather serve as model for the production of the show. The sentence lets assume the reasoning prescribed: Since methods express the idea, they shall remain free.³¹⁵ Indeed, this poses the question whether all kinds of **formats** – in any stages of development – are **mere methods expressing ideas** or can be protected as **combinations of expressed elements**.

b) Balance of interests pursuant to utilitarian copyright theories

In terms of the Incentive Theory as well as of the Transaction Costs Economics, copyright protection of production methods for formats tends to be necessary. The development of methods is mostly very cost-

³¹¹ Barudi, *ibid.*, p. 22.

³¹² BGH Urt. v. 29.4.1999, I ZR 65/96 (“Laras Tochter”): “...im Gang der Handlung, in der Charakteristik und Rollenverteilung der handelnden Personen, der Ausgestaltung von Szenen und in der Szenerie des Romans...”

³¹³ Schricker, *ibid.*, p. 927 also referring to contrary opinions.

³¹⁴ Heinkelein, *ibid.*, pp. 66, with reference to BGH GRUR 1962, pp. 51 (52).

³¹⁵ See at points C. II. 2. b) „Reasoning: ‘Fiction-model-dichotomy’” and 3. “Comparing ‘combination of elements’ vs. ‘fiction-model-dichotomy’”.

intensive so that there is a basic need to refinance them or to allocate them as intellectual goods.³¹⁶ With respect to the Democracy based Theory it is more difficult to answer whether it supports or it is opposed to the protection of production methods by means of copyright. Pursuant to its production function, methods can principally be exchanged. So far, their copyright protection would be justified. Indeed, as far as the production function pursues to nourish civil society with aesthetics, cultural, social or political information and ideas, it is arguable if methods contain such information or if they rather produce the information. But methods are also information in the meaning that they define how to produce certain results. Therefore, it might belong to the structural function to exclude them from copyright protection. This seems to be justified because ideas and methods are more abstract than their expressions. Hence, monopolizing ideas and methods would, simultaneously, monopolize all expressions that might be their result. Given such broad impact of those monopolies, copyright would enhance public or private persons to control wide areas of information that should be, actually, freely exchanged.³¹⁷ In conclusion, while the production function of the Democracy based Theory justifies their copyright protection, its structuring function excludes them from protection. This corresponds with the feedback of the German format markets' stakeholders to the question about the impact of copyright on their innovation practice. On average, most of them answered that copyright protection of formats is necessary but must not hinder the creation of new formats.³¹⁸ Hence, the question is **how to technically draw the line** between public domain and copyright, **between methods expressing ideas and combinations of expressed elements**.

c) Definition by European Court of Justice

With regard to this question, the reasoning in the sentence ECJ C-403/08 and C-429/08 "Murphey vs. FAPL" is highly relevant. In the joint cases, the European Court of Justice denied copyright protection for football matches on the grounds that they are "**subject to rules of the game, leaving no room for creative freedom** for the purposes of copyright."³¹⁹

At first view, this seems like a general denial of copyright protection for games because it does not justify, in terms of grammar, its decision on a if-then-sentence but by using the progressive form: Instead of "subject to rules of the game if they leave no room for creative freedom", the court states "subject to rules of the game, leaving no creative freedom". That might lead critics to the conclusion that the court precludes games as such from copyright protection. Another part of the decision seems affirming this, especially in view of the similar reasoning of the German Supreme Court in the case "L'école des fans vs. Kinderquatsch mit Michael". The European Court of Justice admits that "None the less, sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works (...)"³²⁰ Already the German Supreme Court used these, at first view, contradictory words stating that the format was "a unite concept of individual originality" denying, nevertheless, the copyright protection of the format in question.³²¹ Indeed, for the German Supreme Court it was crucial that the format was not fictional. But as elaborated

³¹⁶ See at points D. I. 1. a) „Dilemma of intellectual works as public goods“ and 2. a) „Copyright law and costs“.

³¹⁷ Cp. point D. I. 3. a) „Functions of Copyright law in a Democratic Civil Society“.

³¹⁸ See at point D. II. 9. " Final feedback about copyright's effects on innovation practice".

³¹⁹ ECJ C-403/08 and C-429/08, cip. 96 to 98.

³²⁰ ECJ C-403/08 and C-429/08, cip. 100.

³²¹ BGH, *ibid.*, p. 9.

above, the actual reason for the denial was the court's consideration that the inner structure of a format combining the different episodes is, in contrast to the fable of fictional stories, rather a method, in terms of the court, a "model", than its expression.³²² Last but not least, the European Court of Justice also clarified that components of the intellectual creation such as "the opening video sequence, the Premiere League anthem, pre-recorded films showing highlights of recent premier League matches, or various graphics" can be, irrespective of the protection of the event, be copyright protected.³²³ Even if formats do not meet the criteria of "originality, the **components of the format can thus be copyright protected.**

Nevertheless, it is arguable that the European Court of Justice really, comparable to the German Supreme Court, precludes games as such from copyright protection. It is more likely that the court referred to the concrete football matches in question. Indeed, these are not the creation of the football association claiming for copyright protection but run on the basis of pre-existing rules of "since time immemorial" existing football matches. Those rules of a game doubtlessly belong to the public domain. The definite article used by the European Court of Justice heads into this direction: Instead of "subject to rules of a game", the court states "subject to rules of the game". In contrast to the German Supreme Court, the European Court of Justice elaborates in detail the criteria that an author's own intellectual creation has to meet to be original and, thus, a copyright protected work. "That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices."³²⁴ Thereby, the court refers to the "choice, sequence and combination"³²⁵ or "specific arrangement or configuration"³²⁶ of the elements of the intellectual creation in question which are not copyright protected if they "are differentiated only by their technical function (...), since the different methods of implementing an idea are so limited that the idea and the expression are indissociable."³²⁷ Thus, **as far as games are invented or re-created** in a way that they express "the creative abilities (of the author) in the production of the work by making free and creative choices" and are **not limited to one possible expression**, they can, principally, be protected by European copyright.³²⁸

This interpretation also draws the line between not protected methods expressing format ideas and protected combinations of their elements: As far as the expression of the format idea is not limited to one possible expression but is the result of the creative abilities in the production of the format by making free and creative choices, the **format can be copyright protected.**

5. Author- or work-centric originality

The further definition of the term "originality" can be classified into two different categories: Author- and work-centric criteria. **Author centric criteria** require the ability to recognize the creator's personality within the work. The theory refers directly to the individualistic copyright theories described in the introduction. Pursuant to these theories – mainly discussed in the copyright systems of Continental

³²² See at point C. II. 3. "Conclusion – Comparing 'Combination of elements' and 'fiction-model-dichotomy'" referring to BGH, *ibid.*, p. 11.

³²³ ECJ C-403/08 and C-429/08, *cip.* 149.

³²⁴ ECJ C-145/10, *cip.* 87 to 89.

³²⁵ ECJ C-5/08, *cip.* 45 and 46.

³²⁶ ECJ C-292/09, *cip.* 48 to 50.

³²⁷ ECJ C-292/09, *cip.* 48 to 50.

³²⁸ ECJ C-145/10, *cip.* 87 to 89.

Europe – Copyright law protects the relationship between the author and its work.³²⁹ Pursuant to individualistic theories, it is the author-centric subject matter of protection that distinguishes copyright from other, more economy driven, immaterial property rights. As consequence, some argue that any copyright protection requires the “seal of the personality” of the creator on his intellectual creation.³³⁰

a) Impact on formats’ copyright protection

Critics³³¹ of the author-centric definition argue that, in view of the necessary rule of law as well as of the actual circumstances, an author-centric definition of the term “originality” is **not anymore sustainable**. Barudi illustrates in detail, on the example of literary creations, how the author-centric definition mainly emerged in – and because of – the surrounding of the romantic idea of the artistic “genius” in the 18th Century. A legal prove of the reflection of the author’s personality within the work seems, in most cases, to be impossible. Furthermore, the work-centric definition of “originality” excludes vast areas of intellectual creations from the scope of copyright protection. Forms of collective creations or “ghost writing” – which can doubtlessly be transferred to other forms of creations with hidden authorship – would not be protected. Subsequently, neither legal nor case law applies, at least not consistently, the author-centric definition. Indeed, the scope of copyright protection is much wider in the praxis, how decisions of German Courts about copyright protection, for example, of short texts only consisting in view words that are optimized for Internet search engines illustrate.³³²

The difference between author- and work-centric definitions of the term “originality” is essential for the question about copyright protection of, especially, **television and transmedia formats**. In view of the multitude of creators involved in the creation process of formats and the highly standardized nature of these products, the strict application of an author-centric definition of the term “originality” is likely to exclude most kinds of formats from the protection of copyright law. Only in view cases, it seems possible to recognize the personality of the creator(s), at least, in one stage of the format development.

b) Balance of interests pursuant to utilitarian copyright theories

The Democracy based Theory clearly favors the **work-centric definition** of the term “originality”. Not the person who creates the work but the work in that the idea is expressed stands in the center of its theoretical approach. The theory pursues to establish and maintain a market not for the creators themselves but for their ideas. This becomes obvious taking into account that such market shall enable citizens to exchange ideas especially in cases they cannot meet in person. The copyright protected work serves hereby as sort of carrier for the exchange of ideas. The typical situation of a songwriter might serve as an example. A songwriter cannot give concerts for everybody she wants to reach. Limited time, at least by death, and geographical distances prohibit to personally get in contact with all members of his audience. Copyright protection of her songs enables her to record, copy and distribute them under conditions that she prefers. That does not mean that her songs must not reflect her personality. But given

³²⁹ Cp. Barudi, *ibid.*, p. 25.

³³⁰ Barudi, *ibid.*, p. 28 with further references.

³³¹ Comprehensively, Barudi, *ibid.*, summarizing his scientific findings on pp. 235.

³³² Recently, OLG Köln, Judgment from the 30th September 2011 (6 U 82/11), re-called the 30th May 2013 on http://medien-internet-und-recht.de/volltext.php?mir_dok_id=2358.

the establishment and maintenance of markets for (expressed) ideas pursued by the theory, it is sufficient that the creator is able to express her idea in the creation process. The survey's participants seem to follow such requirement. They clearly estimated the "election and arrangement of work's elements" as main criterion for copyright protection (38 %), while they considered the "ability to recognize the author's personality within the format" as much less important one (15 %). Especially the contact person developing, producing, and promoting the OpenStreetMap database seems to favor the reflection of his personality not in the database itself but in its creation process.³³³

c) Definition by European Court of Justice

On the question whether an author- or work-centric definition of the criterion "originality" applies, the European Court of Justice states the first time in the case ECJ C-145/10 "Painer vs. Standard". The court refers in its decision to recital 16 of the Duration of Copyright D stating that "an intellectual creation is an author's own one if it reflects the author's personality. That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices."³³⁴ At first view, the decision seems to decide in favor of the author-centric definition. But at a second view, the court clearly refers to the production process. Hence, the **reflection of the author's personality** must not appear within the intellectual creation itself but **in the process of its creation**. The definition of the court does hence not follow the author-centric definition of the term "originality".³³⁵ This interpretation of the court's decision is affirmed in the case ECJ C-604/10 "Dataco vs. Yahoo!". Here, the European Court of Justice states: "As regards the setting up of a database, that criterion of originality is satisfied when, through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by making free and creative choices (see, by analogy, *Infopaq International*, paragraph 45; *Bezpečnostni softwarova asociace* paragraph 50; and *Painer*, paragraph 89) and thus stamps his 'personal touch' (*Painer*, paragraph 92).³³⁶ Pursuant to an author-centric definition, it would be, at least in most cases, impossible for the author of a database to prove that he "stamp(ed) his 'personal touch'" within the database.

As illustrated above, the decision of the European Court of Justice in favor of the work-centric definition of the notion "originality" is essential for the question about copyright protection of formats. Given the multitude of creators involved in the process developing the format from an idea to the paper format to the show and, finally, to the highly standardized production package and/or production bible, it would be impossible for them to prove that the final product reflects their respective personalities. Instead, the work-centric definition of the notion "originality" requiring "free and creative choices" **enables the creators of formats to make the judicial prove**.

³³³ See at point D. II. 8. "Sixth feedback with regard to the criteria for copyright protected formats".

³³⁴ ECJ C-145/10, cip. 87 to 89.

³³⁵ Metzger, *ibid.*, p. 118 (122).

³³⁶ ECJ C-604/10, cip. 37 to 39.

6. Innovation vs. recreation

As prescribed, in the center of a **work-centric definition of the term “originality”** does not “stand the author but the work as economically relevant and culturally important good of communication”.³³⁷ Indeed, if the term “originality” does not refer to the personality of the creator, other criteria have to be found for the further definition.³³⁸

a) Impact on formats’ copyright protection

One approach could be that the creation must be an **“innovation”** to be copyright protected. That means that there is no identical pre-existent work compared to the creation in question. Critics stress that such an objective requirement would constitute a fundamental change within the current copyright systems. So far, both individualistic and utilitarian theories based copyright laws do not require that the copyright protected work must be an objective innovation. Instead, it is sufficient that the work is subjectively, that means in the perspective of the author(s), new.³³⁹ This might originate from the individualistic theories’ perspective on the author which seems, by means of international treaties, transferred to utilitarian theories’ based copyright systems.³⁴⁰ Anyway, given a strict work-centric perspective, the criterion of an objective innovation seems unavailable.³⁴¹

On the other hand, it is arguable to require from creators to prove if there is any pre-existent work that hinders the copyright protection of their own one. From an economic point of view, such a “due diligence” could have significant negative effects on the incentive to create new, or in this context, subsequent works and, as consequence, for the public welfare.³⁴² Given the perspective of modern art philosophies, the consequences seem even fatal. Pursuant to the so-called post-modernism, there are no free choices for truly innovative creations anymore. In view of the innumerable artistic works in human history, **any new creation is just a re-creation** of something already existing.³⁴³ Therefore, the requirement of “innovation” should be broadly interpreted: Already marginal differences to pre-existent works constitute an innovation.³⁴⁴

Given the work-centric definition of the term “originality”, the minimum requirement of “innovation” means that a **format** can only be copyright protected if it is not an identical copy of a precedent copyright protected work. In view of the different stages of development, the adaptation of a precedent work can only constitute an independently copyright protected work if it is, at least slightly, different to the adapted one. As long as the adaptation re-arranges or contains new elements belonging to the combination that fulfills, as a whole, the originality requirement, the new format is innovative and can be protected, too.

³³⁷ Kreutzer, *ibid.*, p. 432: “Im Mittelpunkt eines so ausgerichteten Urheberrechts stünde nicht der Urheber, sondern das Werk als wirtschaftlich relevantes und kulturell bedeutendes Kommunikationsgut.”

³³⁸ Cp. Barudi, *ibid.*, pp. 249/250.

³³⁹ Barudi, *ibid.*, pp. 250/251.

³⁴⁰ Cp. Art. 5 sect. 2

³⁴¹ Barudi, *ibid.*, p. 251.

³⁴² Barudi, *ibid.*, p. 252; Landes/Posner, *The economic structure of intellectual property law*, pp. 58, quoting respective plagiarisms of Shakespeare based on Plutarch and T.S. Elliott based on Shakespeare.

³⁴³ Hansen, *ibid.*, pp. 49/50.

³⁴⁴ Barudi, *ibid.*, p. 252.

b) Balance of interests pursuant to utilitarian copyright theories

Pursuant to the theoretical approach of the Democracy based Theory, an objective innovation is not necessary. Rather any re-creation can principally be copyright protected. The public discourse in a democratic civil society builds upon aesthetics, social, cultural, and political ideas that are, in most cases, not – objectively – new. The public discourse rather consists of pre-existing ideas that are constantly re-combined, developed, and promoted.³⁴⁵ The Democracy based Theory hence justifies **copyright protection not only for objective innovations but for any re-creations**. As far as formats are re-produced and not only recorded shows are copied, the Incentive Theory justifies copyright protection even for identically re-produced shows. Even if there are no development costs, there are still production costs that have to be, supported by the exclusive copyright, recouped.³⁴⁶ Pursuant to the theoretical approach of the Transaction Costs Economics, the requirement of an objective innovation would, in addition, significantly raise the search and information costs. If any creator and/or producer had to verify the objective innovation of her product to be sure that her investments can be, on the basis of copyright, amortized, she had to compare her creation with any other pre-existing work. This corresponds with the feedback of the format markets' stakeholders who consider the risk of raised transaction costs, given comprehensive copyright protection.³⁴⁷

c) Definition by European Court of Justice

Even if the European Court of Justice affirms the work-centric definition of the term “originality”, it does not explicitly refer to the question whether an intellectual creation must be objectively innovative to be copyright protected. Given the high importance that the criterion of making a “free and creative choice” through the “choice, sequence and combination”³⁴⁸ or “specific arrangement or configuration”³⁴⁹ of the elements has, it is likely that the court let any re-creation basically suffice for affirming its originality. Also the last decisions in which the court requires, referring to the case ECJ C-604/10 “Dataco vs. Yahoo!”, that the “author expresses his creative ability in an original manner by making free and creative choices (...) and thus stamps his ‘personal touch’” let assume that the court prefers a subjective innovation to an objective one.³⁵⁰ Of course, in the moment where the re-creation is a slavish copy, there is no free and creative choice so that the court will deny its copyright protection.

7. Level of originality

The broad understanding that even marginal differences to pre-existent works constitute an “innovation” is followed by two subsequent questions. The first one examines whether such a broad definition does, as such, suffice to differ between copyright protected works and other intellectual creations.³⁵¹

³⁴⁵ Cp. point C. I. 3. a) „Functions of Copyright law in a Democratic Civil Society”.

³⁴⁶ Cp. point C. I. 1. a) „Dilemma of intellectual works as public goods”.

³⁴⁷ See at point C. II. 9. “Final feedback about copyright’s effects on innovation practice”.

³⁴⁸ ECJ C-5/08, cip. 45 and 46.

³⁴⁹ ECJ C-292/09, cip. 48 to 50.

³⁵⁰ Cp. ECJ C-604/10, cip. 38.

³⁵¹ Barudi, *ibid.*, p. 252.

a) Impact on formats' copyright protection

In search of further criteria, the pre-condition “**qualified originality**” is discussed in Germany. Indeed, the discussion initially took place in another context. In relation to “works of applied art”, critics attempted to differ between protection by copyright law and by design law which has a lower level of protection.³⁵² To justify the higher level of protection of copyright law, works of applied art had to have a qualified level of protection. Trivial intellectual creations of applied art should hence not be copyright protected. Thereby, the author-centric definition serves as theoretical reasoning behind. Industrialized intellectual creations do, principally, not reflect the author's personality. Today, the criterion is highly criticized. The main argument is that German copyright law does not differ between divergent levels of originality, Art. 2 sect. 2 UrhG. European copyright law seems to affirm the criticism.³⁵³ Both Art. 1 sect. 3 Computer D as well as Art. 3 sect. 1 Database D require for the protection of computer programs and of databases, respectively, only the “author's own intellectual creation”.³⁵⁴ Furthermore, Art. 6 Duration of Copyright D not only refers for the protection of photographs to the “author's own intellectual creation”, too, but states that “No other criteria shall be applied to determine their eligibility for protection”.³⁵⁵ Of course, it depends on the scope and further interpretation of these definitions, if European copyright law really rules out the criterion of “qualified originality”.

The criterion of “qualified originality” is relevant for, at least, **television and transmedia formats** with respect to the many critics arguing that these formats are “so ordinary”, in other words, not original. One can imagine how highly educated judges and/or legal scholars would intuitively deny an elevated level of originality watching those shows.

b) Balance of interests pursuant to utilitarian copyright theories

The Incentive Theory does not require an elevated level of originality. In the center of its theoretical approach stands rather time and manpower invested in the piece of work and that has to be re-financed.³⁵⁶ It is arguable whether the Democracy based Theory justifies a low or requires a high level of originality.³⁵⁷ Pursuant to its production function, copyright protection shall safeguard the incentive to nourish the public discourse with aesthetics, social, cultural, and political ideas. Thereby, intellectual creations of low originality can serve this purpose, too. Netanel stresses that even “pure aesthetics and

³⁵² Cp. the duration of protection of 25 years, pursuant to Art. 12 of the Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, with the duration of 70 years for copyright protected works, pursuant to Art. 1 sect. 1 of the Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.

³⁵³ Cp. Barudi, *ibid.*, pp. 47, summarizing the discussion.

³⁵⁴ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

³⁵⁵ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.

³⁵⁶ C. I. 1. a) „Dilemma of intellectual works as public goods”.

³⁵⁷ Cp. point C. II. 3. a) „Dilemma of intellectual works as public goods”.

entertainment help to support a participatory culture.”³⁵⁸ Given that not only financial incentives but also further ones such as to garner recognition and to influence society shall be safeguarded by copyright protection, the production function justifies already a low level of originality. The high importance of time and manpower invested in the piece of work considered by the survey’s participants (24 %) correspond to this conclusion.³⁵⁹ A low level of originality respects more such investments, irrespective whether they want to exploit their formats commercially or not. Indeed, the structural function might tend to higher the level of protection avoiding that market participants take control over too many simple, in other words, to simply expressed ideas.³⁶⁰ In contrast, the theoretical approach of the Transaction Costs Economics serves further arguments for a low level of protection. The requirement of an elevated level of originality leads to an increased uncertainty amongst the market participants whether their intellectual creations are copyright protected or not. This is an essential factor increasing, especially, search and information costs.³⁶¹ Given the survey’s participants’ awareness of transaction costs,³⁶² a **low level of originality** seems, therefore, to be **more appropriate** for copyright to serve as structuring instrument for markets of intellectual creations.

c) Definition by European Court of Justice

In the case ECJ C-145/10 “Painer vs. Standard”, the European Court of Justice found, so far, two answers to the question about the level of protection:

On the one hand, **mere skills and labor** invested by the author into the process of creation shall **not be sufficient for copyright protection**. That is the result of the requirement that the author has to “express(es) his creative ability in an original manner by making free and creative choices”.³⁶³ It constitutes a clear denial of the definition of “originality” pursuant to Anglo-Saxon Copyright laws where only the investment of skills and labor justifies copyright protection.³⁶⁴ The court affirmed its decision in the following case ECJ C-604/10 “Dataco vs. Yahoo!” with respect to databases: Even if the intellectual skill and labor concerns the “selection and arrangement” of the data, it does not “as such justify the protection of it by copyright (...), if that labour and skill do not express any originality” in the above meaning.³⁶⁵

On the other hand, the court answers to the question referred by the Austrian Supreme Court whether different levels of protection shall apply, corresponding to different types of works. The Austrian Supreme Court considered an inferior level of protection of “photographic works and/or photographs, particularly portrait photos (...) because, in view of their “realistic image”, the degree of formative freedom is too minor”.³⁶⁶ The European Court of Justice “point(s) out *straightaway* that the author of a

³⁵⁸ See at point C. I. 3. a) „Functions of Copyright law in a Democratic Civil Society” referring to Netanel, *ibid.*, p. 350/351.

³⁵⁹ See at point C. II. 8. “Sixth feedback with regard to the criteria for copyright protected formats”.

³⁶⁰ Cp. point C. I. 3. a) „Functions of Copyright law in a Democratic Civil Society”.

³⁶¹ Cp. point C. I. 2. a) „Copyright law and costs”.

³⁶² See at point C. II. 9. „Final feedback about copyright’s effects on innovation practice.”

³⁶³ ECJ C-604/10, *cip.* 37 to 39.

³⁶⁴ Metzger, *ibid.*, 118 (122).

³⁶⁵ ECJ C-604/10, *cip.* 42.

³⁶⁶ ECJ C-145/10, *cip.* 43.

protected work is, under Article 2(a) of (... / the Copyright D), entitled to, among other things, the exclusive right to authorize or prohibit its direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.” Given the broad interpretation of the reproduction right in Art. 2 Copyright D, “nothing in (... / the Copyright D) or in any other directive applicable supports the view that the extent of such protection should depend on possible differences in the degree of creative freedom in the production of various categories of works.”³⁶⁷ The court comes to the following conclusion: “Since it has been determined (... / that the work is copyright protected because the author made free and creative choices in the production process), its **protection is not inferior** to that enjoyed by any other work, including other photographic works.”³⁶⁸

With respect to formats, the decisions make clear that they are not copyright protected as far as the creators only invest skills and labor in creating them. This is important because the development process of formats often consists in the manpower of a multitude of persons. The **mere investment of their skills and labor does not justify copyright protection of formats**. Only if they make free and creative choices the criterion of “originality” is met. But as far as such originality is determined, the protection of a format is not lower compared to other kinds of works, even if they contain realistic elements that can be, especially, the case with regard to formats which operate on role plays or, in terms of television formats, dramatic-realistic methods such as “scripted reality”.

8. Gap of transformation

The second question resulting from the broad definition of the criterion “innovation” asks if the creator of a subsequent work – that might be copyright protected, too – was allowed to create it. The question about copyright protection of creations is, hence, different to the question about the allowance.

a) Impact on format’s copyright protection

The allowance depends on the author of the precedent work only if the creation of the subsequent work is an adaptation. In German Copyright law, Art. 23 and 24 UrhG regulate whether a certain act of usage is an adaptation – what requires the license from the owner of the adaptation right – or not restricted in favor of subsequent authors. The essential criteria to differ between the adaptation right and non-restricted use can be described as **gap of transformation**. How many elements can be adapted without infringing the adaptation right on the former work? This is, so far, not a question about the requirements of copyright but about its limitation.³⁶⁹

The question whether adaptations are allowed even if the original is copyright protected is of highest relevance for (re-)creators and producers of **television or transmedia formats**. The more intellectual creations are protected, the more users, especially later coming re-creators, are potentially restricted. The broader the copyright protected work is, the more the copyright might be limited by a narrow adaptation right or by means of exceptions like “fair use”.

³⁶⁷ ECJ C-145/10, cip. 95 to 97.

³⁶⁸ ECJ C-145/10, cip. 99.

³⁶⁹ Schulze, § 24 cip. 1.

b) Balance of interests pursuant to utilitarian copyright theories

In terms of the Democracy based Theory, the balance between the adaptation right and the free use belongs to the structuring function of its theoretical approach. The structuring function of copyright safeguards the freedom of state and private control. Netanel stresses, “Media entities typically exercise that control to prevent any controversial use that might run contrary to their corporate image or threaten the salability of their expressive products. In addition, in many instances prospective authors are unable or unwilling to bear licensing fees for creative, transformative uses of media-controlled expression. As such, expansive copyright owner control over existing expression may exacerbate the problem of market-based hierarchy.” Therefore, to fulfill its structural function Copyright law has to limit private control over existing intellectual works. One way to do so is to **limit the right of adaptation of protected works** by lowering the gap of transformation that is necessary to be free use.³⁷⁰ The Transaction Costs Economics theory might favor such low gap of transformation, too. The lower the necessary gap of transformation is the less (re-)creators have to spent costs in comparing similar precedent works, searching corresponding right holders, in subsequent negotiations and, finally, for license fees.³⁷¹ Also the survey’s participants seem to consider the necessity of limiting comprehensive copyright protection. Indeed, the average results of the next-to-final question let assume that they do not consider comprehensive copyright protection as hindering the development of new formats anyway (13 %). But the answers to the final (open) question about the importance of copyright protection for their innovation practice might illustrate the reasoning behind. The contact person working for the development of advertising concepts stresses that “Copyright protection is very important, (...) but could hinder development for society as a whole” and another participant working at a television channel developing, producing, broadcasting and internationally selling TV formats stresses that “All formats copy a part of other formats, this is important and should be possible.” Another person developing, producing and internationally selling light entertainment shows even attributes the benefits to the company which is able to launch the final format: “(...) We as producers were never affected by copyright infringements. It is a little like: Who ever manages to create and sell the format (and brings it on air) is the one who will earn the money with it.”³⁷² The survey’s participants seem to limit the principally favored comprehensive copyright protection by implying or claiming a narrow adaptation right.

c) Definition by European Court of Justice

So far, the European Court of Justice did not explicitly decide on the adaptation right. It is not even clear if the adaptation right falls under the, EU wide, harmonized reproduction right of Art. 2 Copyright D or if its regulation still belongs to the national legislator.³⁷³ In fact, the court implicitly stated on the adaptation right. In the case ECJ-143/10 “Painer vs. Standard”, the defendants published in their newspapers and on their online platform a **computer animated photograph** of Natascha Kampusch that was **based on the**

³⁷⁰ See at point D. I. 3. a) „Functions of copyright law in a Democratic Civil Society” referring to Netanel, *ibid.*, p. 362.

³⁷¹ Cp. Point D. I. 2. a) „ Copyright law and costs”.

³⁷² See at point C. III. 9. „Final feedback: Copyright’s effects on innovation practice.”

³⁷³ See at point C. I. 3. „No harmonization of the copyright protected work (and the adaptation right)” referring to Ohly, *ibid.*, p. 215.

claimant's photographs but represented the supposed image of the abducted person in her adulthood.³⁷⁴ The court decided that “that the author of a protected work is, under Article 2(a) of Directive 2001/29, entitled to, among other things, the exclusive right to authorize or prohibit its direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.”³⁷⁵ Since the computer animation is less a reproduction but rather an adaptation of the photograph because it transformed the former portrait of Natascha Kampusch as a child into a picture showing her supposed adult face, the court implies that this adaptation falls under the reproduction right of Art. 2 Copyright D. Anyway, the court unfortunately did not examine more detailed the adaptation right, especially, the necessary gap of transformation to constitute a non-restricted act of usage. In view of the implicit statement, it is difficult to conclude further criteria for a definition of the adaptation right or its limitation, respectively.

9. Conclusion – Copyright protected formats and remaining questions

The preceding illustrated how far the European Court of Justice developed the definition of the copyright protected work and which criteria the national courts of the Member States have, consequently, to apply. With regard to **formats**, it depends, hence, on the combination of the elements. These do not have to be as such copyright protected but must convey to the user the originality of the respective format. Thereby, the elements may belong to different media as well as take part of subsequent intellectual creations. Paper formats can, thus, principally be protected even if they are developed to and/or adopted by subsequent pilots, iterative shows and over a multitude of media platforms.³⁷⁶ As far as they consist in games, it is decisive whether the rules of the respective game are pre-existent, with the result that they belong to the public domain. If creators invented or re-created games or, more general, formats in a way that they express the creators' free and creative choice they can principally be copyright protected. They are not protected if they solely follow their technical function, in the meaning that the methods applied for their creation are so limited that the idea and its expression are indissociable. In consequence, as far as the invented or re-created game or format is one out of different possibilities to express the idea that stands behind, it is protected.³⁷⁷ Thereby, the work-centric definition of the copyright protected work enables the creators of the format to make the judicial prove that the format results from their creative process, even if it is, following the economic rules of media industries, highly standardized and does not reflect their personalities. The creators have to prove that they made free and creative choices during the process of creation by selecting, combining, arranging and/or configuring the decisive format's elements.³⁷⁸ Indeed, the investment of mere skills and labor cannot justify copyright protection, even if the creators made it during the process of development. But in the moment where the originality of the format is determined, the format is copyright protected like any other work. For different kinds of works, there are no different levels of originality so that formats are equally protected.³⁷⁹

Of course, there are several criteria existing amongst the Member States that are not yet clarified as binding by the European Court of Justice. The court did not yet rule out explicitly a closed list of

³⁷⁴ ECJ C-145/10, cip. 27 to 43.

³⁷⁵ ECJ C-145/10, cip. 95.

³⁷⁶ See at points E. II. 2. “Author's own intellectual creation” and 3. “Free and creative choices:”.

³⁷⁷ See at point E. II. 4 “Idea-expression-dichotomy”.

³⁷⁸ See at point E. II. 5. “Author- or work-centric originality”.

³⁷⁹ See at point E. II. 6. “Level of originality”.

copyright protected works in national copyright regimes nor did it state whether intellectual creations must be fixated. The court did not explicitly decide whether unconsciously made creations can be protected or if the work must be an objective innovation, neither. Most important will be if or how the European Court of Justice will re-balance its, so far, broad definition of the copyright protected work by narrowing the adaptation right. This is essential to strike the right balance between the interests of the format markets' stakeholders. Thereby, by defining the criteria for the copyright protected work, the court came mostly to the same results as the Democracy based Theory that is here preferred. Are these results coincidence or did the court balance the purposes of copyright?

III. Balance of interests: Recitals and the European Court of Justice

Technically, the broad definitions provided for by the directives enable the European Court of Justice to interpret these provisions in correspondence to the current situation. **The broader the legal definitions are, such as for the copyright protected work or of the adaptation right, the more flexible is the court in adapting the legal framework** to social, cultural and economic innovations and, especially, future technologies.³⁸⁰ Of course, the broader the definitions are the more important are the purposes provided for in the recitals serving to lead the court in its decisions. The European Court of Justice must not substitute the legislator.³⁸¹ As prescribed in the introduction, copyright theories hence serve here three functionalities: Firstly, they help to define the purposes why or whether Copyright law, and more nuanced, for which kinds of works to which extent copyright protection should exist or not. Secondly, the definition of such purposes helps interpreting the law pursuant to them. And thirdly, the purposes enable, given that adequate interpretation is not possible within the legal scope, to prove whether or in which way current Copyright law does not reach the purposes defined.³⁸²

1. Purposes of European Copyright

With respect to European Copyright law, the legislator itself provides such purposes within the recitals that precede the binding copyright provisions. Thereby, the recitals of the Copyright D are considered here as especially relevant. The Copyright D is not only the most comprehensive harmonization of European Copyright law but also represents, especially in its recitals, the political common sense of all Member States affirming its establishment. Dietz stresses that “there is no more recent and comprehensive reasoning for modern copyright protection” than provided for by the recitals of the Copyright D.³⁸³ Therefore, the following shall not only describe the most relevant recitals but also in which way the European Court of Justice uses them to justify its definition of the copyright protected work.

a) Legal certainty

In its first case ECJ C-5/08 “Infopaq vs. DDA”, the European Court of Justice justifies its decision that European provisions “must (be) given an **autonomous and uniform interpretation throughout the Community**” on the grounds of, especially, recital 6 Copyright D.³⁸⁴

Recital 6 Copyright D states:

“Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the

³⁸⁰ Ohly, *ibid.*, p. 235.

³⁸¹ Cp. Metzger, *ibid.*, p. 126.

³⁸² See at point A. IV. “Theoretical scale: Utilitarian theories as justification for copyright protection” referring to Hansen, *ibid.*, pp. 8.

³⁸³ Dietz, The plans of the German Federal Government for the regulation of copyright contract law, ZUM 4/2001, p. 276 (280): “Aktuellere und umfassendere Rechtfertigungsformeln für den modernen Urheberrechtsschutz findet man auf der ganzen Welt nicht.“

³⁸⁴ ECJ C-5/08, *cip.* 27 and 28.

technological challenges might result in **significant differences in protection** and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.” (Underlining by the author.)

b) Fostering creativity and competitiveness

In the following, the European Court of Justice refers to recitals 4 and 9 to 11 Copyright D to define the requirement of “**originality**” that is met if the “work” in question is the “author’s own intellectual creation”. Pursuant to the required high level of protection, also single sentences, and even parts of it, consisting in few words can be copyright protected.³⁸⁵

Recital 4 Copyright D states:

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

Recital 10 Copyright D establishes:

“If authors or performers are to continue their creative and artistic work, they have to receive an **appropriate reward for the use of their work**, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as ‘ondemand’ services, is considerable. **Adequate legal protection** of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.”

In fact, the European Court of Justice mentions in its decisions only the requirement of a “high level of protection”. There are no further references to the aim of the Copyright D to “foster investments in creativity and innovation” leading to “growth and increased competitiveness”. The reason might be that the directive itself does not consider copyright protection as – two-edged – potential handicap for subsequent creators or, especially in the case, technological innovation and competitiveness.³⁸⁶ The directive rather

³⁸⁵ ECJ C-5/08, cip. 35 and 36.

³⁸⁶ Cp. point A. II. “Relevance of formats for the discussion about copyright”.

presumes that the higher the level of copyright protection is the more investments in creativity and innovation will be made in European Industry. Given this understanding, the court's focus on the effectiveness of copyright protection corresponds, at least, to the purpose how it is established in recital 4 Copyright D. Indeed, in the joint cases ECJ C-403/08 and 429/08 "Murphey vs. FAPL" the court stresses that protection by intellectual property rights must "not go beyond what is necessary in order to attain the objective of protecting the intellectual property at issue." Right holders "are ensured (...) only appropriate remuneration for each use of the protected subject-matter".³⁸⁷ That is a first restriction of copyright protection based on recital 10 Copyright D that underlines that right holders are only granted a right for "appropriate remuneration".

With regard to recitals 9 and 11 Copyright D the European Court of Justice stresses in the case ECJ-C-5/08 "Infopaq vs. DDA" that the high level of protection, resulting in a broad definition of the copyright protected work, is important "in particular for authors to enable them to receive an appropriate reward for the use of their works (...)".³⁸⁸ At first view, this could be considered as another restriction of copyright protection. Only authors, not producers or distributors, seem to be respected in getting an appropriate reward. But the court simply follows, stressing the importance of authors ("in particular"), the guidelines foreseen in the recital.

Recital 9 Copyright states:

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

Recital 11 Copyright D states:

"A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of **safeguarding the independence and dignity of artistic creators** and performers."

Indeed, the case illustrates that not the author is the actual beneficiary of the decision. Since not the author of the text in question but the publisher of the Danish Newspaper was the claimant, it is the established industry and not the author – and, of course, not at all the upcoming company defending its innovative business model nor the readers – which "won" the case.³⁸⁹

³⁸⁷ ECJ C-403/08 and C-429/08, cip. 105 to 108.

³⁸⁸ ECJ C-5/08, cip. 40.

³⁸⁹ Cp. point E. I. 1. "Infopaq vs. DDF".

c) Personality and broad reproduction right

In the case ECJ C-145/10 “Painer vs. Standard”, the claiming party was indeed the author, more precise, the photographer of the portraits in question. The author was thus the beneficiary of the “high level of protection” and not the defending publishers. In the case ECJ C-604/10 “Dataco vs. Yahoo!”, the defending New Media enterprise was allowed to continue the reproduction of the database. In both cases the European Court of Justice defined the balance point between mere skills and labor invested in the intellectual creation and making free and creative choices that justifies the corresponding copyright protection. Thereby, the court only refers to recital 16 of the Duration of Copyright D.³⁹⁰

Recital 16 Duration of Copyright D states:

“The protection of photographs in the Member States is the subject of varying regimes. A photographic work within the meaning of the Berne Convention is to be considered original if it is the **author's own intellectual creation reflecting his personality**, no other criteria such as merit or purpose being taken into account. The protection of other photographs should be left to national law.”

At first view, the recital seems to refer to the personality-centric definition of the copyright protected work. In the opposite, the European Court of Justice interpreted the recital in favor of the work-centric definition excluding mere skills and labor from the scope of copyright.³⁹¹

Although the European Court of Justice decided in most cases prescribed on the reproduction right in Art. 2 Copyright D, the court did only refer to the respective recital 21 Copyright D to justify its “autonomous and uniform interpretation throughout the Community”.³⁹² Actually, the reference would have been even more interesting in the case ECJ C-145/10 “Painer vs. Standard” regarding the reproduction of the portrait by means of the computer animation. The computer animation was, actually, an adaptation so that the court, in fact, implicitly decided on the adaptation right which is considered as not yet harmonized.³⁹³

Recital 21 Copyright D states:

“This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the *acquis communautaire*. A **broad definition of these acts is needed to ensure legal certainty** within the internal market.”

The recital claims a broad definition of the acts protected by the reproduction right in favor of legal certainty. It does not mention, at least not explicitly, the adaptation right. This might be the reason why the European Court of Justice did not refer to the recital.

³⁹⁰ Cp. Points E. I. 4. „Painer vs. Standard” and 5. “Dataco vs. Yahoo!”.

³⁹¹ See at point E. II. 5. c) “Author- or work-centric originality”.

³⁹² ECJ C-5/08, cip. 27 and 28.

³⁹³ See at points C. I. 3. “No harmonization of the copyright protected work (and the adaptation right)” and E. II. 8. c) “Definition by European Court of Justice”.

2. Conclusion – Comparison with utilitarian copyright theories

This work finishes with the direct comparison of the prescribed recitals and how the European Court of Justice interprets them defining the subject matter of European Copyright with the purposes of the copyright theories, especially, the Democracy based Theory.

The first coherence to the copyright theories prescribed might be seen in recital 6 Copyright D. In its first case ECJ C-5/08 “Infopaq vs. DDA”, the European Court of Justice justifies its decision that European provisions “must (be) given an autonomous and uniform interpretation throughout the Community” on the grounds of recitals 6 and 21 Copyright D.³⁹⁴ Pursuant to recital 6 Copyright D “Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.” This consideration grounds on the same assumptions as considered in the **Transaction Costs Economics**. The different legal differences amongst the Member States lead to uncertainty increasing especially search and information costs.³⁹⁵ Given the consequences of these differences prescribed as well as the awareness of the survey’s participants that such kind of costs depend on copyright,³⁹⁶ the interpretation by the court corresponds to the obviously existing market circumstances.

Similarly to **the production function** of the Democracy based Theory, recital 9 Copyright D presumes that copyright protection “helps to ensure maintenance and development of creativity in the interests of authors, performers, consumers, culture, industry and the public at large.” Correspondingly, recital 4 Copyright D assumes that “intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry”. Of course, recitals 4 and 9 do not pursue nourishing the public discourse in a democratic civil society.³⁹⁷ But they presume, focusing on consumer protection, culture, innovation, and economy, that copyright protection serves the society at large. Like the Democracy based Theory, the recitals exclusively build upon the assumption that copyright protection safeguards mainly the financial incentive of creators. Recital 10 Copyright D states: “If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as ‘ondemand’ services, is considerable.” In contradiction to the self-concepts of the participants of format markets surveyed, further incentives are not mentioned in the recitals, at least, as far as the term “investments” is understood only as financial one.³⁹⁸ Therefore, correspondent to a broader understanding of the Democracy based Theory opening its theoretical approach towards further incentives, also the term “investments” should be interpreted widely.³⁹⁹

³⁹⁴ ECJ C-5/08, cip. 27 and 28.

³⁹⁵ Cp. point C. 3. “Conclusion – Effects on European format markets”.

³⁹⁶ See at point D. I. 2. a) “Copyright law and costs” and D. III. “Conclusion – Democracy based Theory and stakeholders’ feedback”.

³⁹⁷ See at point D. I. 3. a) “Functions of Copyright law in a Democratic Civil Society”.

³⁹⁸ See at point D. II. 3. “First feedback about kinds of incentives”.

³⁹⁹ See at point D. I. 3. c) „Conclusion – All types of incentives for a democratic civil society”.

In contrast to the Incentive Theory, recital 10 treats more carefully, only potentially, existing **coherences between copyright, its exclusivity and its condition for re-financing the investments**: “Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment” (underlining by the author). Recital 10 Copyright D leaves open whether the creator and/or producer actually uses copyright protection as basis for his incentive’s satisfaction. This corresponds to the self-concepts of the survey’s participants who considered the exclusivity of copyright and further mechanisms to exclude others from the use of their creation as well as alternative business models, beside granting licenses for fees, as equally important.⁴⁰⁰

Recital 11 Copyright D even reflects the **structuring function** of the Democracy based Theory: “A rigorous, effective system for the protection of copyright (...) is one of the main ways (...) of safeguarding the independence and dignity of artistic creators (...)” (underlining by the author). Indeed, the case ECJ C- 5/08 “Infopaq vs. DDA” illustrates that the structuring function serves here more as pseudo-justification of copyright protection, since the claimant was not the author but the publisher of the text in question.⁴⁰¹ Also the tendency for a high level of copyright protection stated in several recitals such as recital 4 and 9 Copyright D seems to undermine the structuring function. Without further considerations, the directive presumes that the higher the level of copyright protection is the more investments in creativity and innovation will be made in European industry. Indeed, the self-concepts of the market participants affirm this presumption. The investment of time and manpower invested in the piece of work was one of the main criteria estimated as essential for the copyright protected work. This speaks clearly, on the basis of the production function, for a low level of protection.⁴⁰²

In consequence, the structuring function should exploit its effects on a later step. As prescribed, the broader the definition the more works are protected and the more the public is potentially restricted. Thereby, a broad scope of protection based on a wide definition of the copyright protected work can be limited again, for example, by means of limitations such as for quotations or by shortening the duration of protection or, of course, by **narrowing the adaptation right**.⁴⁰³ Those limitations serve as instrument to fulfill the structuring function aiming to restrain state and, especially, private control over the production function.⁴⁰⁴ Therefore, it is interesting to see whether the recitals foresee such limitations, especially, with regard to the adaptation right. Indeed, recital 21 Copyright D does not refer at all to the adaptation right. Instead, the recital states “A broad definition of these acts (that fall under the reproduction right) is needed to ensure legal certainty within the internal market.” As far as the adaptation right is not (clearly) harmonized, creators, producers, users and re-creators must, in the case of ubiquitous acts of usage such as making the work available online, respect 28 different definitions of the adaptation right.⁴⁰⁵ The legal uncertainty, and corresponding search and information costs, will remain significant.⁴⁰⁶ As far as the reproduction right in Art. 2 Copyright D also covers adaptations of the work, such broad definition should

⁴⁰⁰ See at point D. II. 4. “Second feedback on alternative mechanisms to safeguard the incentives” and 5. “Third feedback on alternative business models to monetize the product”.

⁴⁰¹ ECJ C-5/08, cip. 27 and 28.

⁴⁰² See at point D. III. “Conclusion – Democracy based Theory and stakeholders’ feedback”.

⁴⁰³ See at point A. I. 2. “Relevance of formats for the discussion about copyright”.

⁴⁰⁴ See at point D. I. 3. a) “Functions of Copyright law in a Democratic Civil Society”.

⁴⁰⁵ See at point C. I. 3. „ No harmonization of the copyright protected work (and the adaptation right) ”.

⁴⁰⁶ Cp. point D. III. “Conclusion – Democracy based Theory and stakeholders’ feedback”.

only serve to ensure, how it is foreseen in recital 21, legal certainty amongst the Member States. To safeguard the structuring function of copyright, in terms of recital 11 Copyright D, to safeguard the independence of (subsequent) artistic creators, the effects of such adaptation right should be limited. This might be possible by excluding subsequent works, given a certain gap of transformation.⁴⁰⁷ Such limited adaptation right would also correspond to the self-concepts of the survey's participants who seem to favor a low level of originality for copyright protected formats but claim the freedom to adapt preceding formats.⁴⁰⁸

While the recitals of the Copyright D reflect the basic approaches of the copyright theories, especially, the Democracy based Theory prescribed, the **European Court of Justice makes only superficial and recursive use of the recitals to justify its definition** of copyright protected work. In the first case ECJ C-5/08 "Infopaq vs. DDF", focuses on the term "originality" that an intellectual creation meets if it is an "author's own intellectual creation". Therewith, the court affirms the requirements of "intellectuality" and "form" on the ground of recitals 4, 9 and 11 Copyright D stating only that a high level of protection is important in particular for authors to enable them to receive an appropriate reward for the use of their works.⁴⁰⁹ There is no further reasoning that only intellectual creations expressed in a certain form are able to maintain and develop markets for the exchange of ideas or, in terms of recital 9 Copyright D, help to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large.⁴¹⁰

With regard to the "idea-expression-dichotomy", the requirement of "free and creative choices" and the work-centric definition of the term "originality", the European Court of Justice states in the cases ECJ C-5/08 "Infopaq vs. DDA" and ECJ C-292/09 "BSA vs. Ministerstvo kulture" as well as ECJ-C 145/10 "Painer vs. Standard" that the term "originality" is only fulfilled, if the creator "was able to express his creative abilities in the production of the work by making free and creative choices." Thereby, it is "only through the choice, sequence and combination" of the work's elements that the author may express his creativity. That is not the case if the elements are "differentiated only by their technical function (...), since the different methods of implementing an idea are so limited that the idea and the expression are indissociable."⁴¹¹ The European Court of Justice justifies these definitions by referring to the precedent cases, respectively, that means to recitals 4, 9 and 11 Copyright D, and, in addition, to recital 21 Duration of Copyright D. There is no further reasoning that markets, such as the single market for the exchange of cultural goods, focus on the exchange of products and not the personality of the author of the intellectual creation. The court does not consider, at least not explicitly, that lacking free and creative choices do not maintain and develop creativity and, as consequence, do not meet the purposes of recitals 4 and 9 Copyright D.⁴¹² Indeed, the judgment ECJ-C ECJ C-403/08 and C-429/08 "Murphy vs. FAIR" considers that even "sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works, and

⁴⁰⁷ Cp. point E. II. 8. "Gap of transformation".

⁴⁰⁸ See at point C. II. 9. "Final feedback about copyright's effects on innovation practice" and III. "Conclusion – Democracy based Theory and stakeholders' feedback".

⁴⁰⁹ See at point E. III. 1. b) "Fostering creativity and competitiveness".

⁴¹⁰ Cp. point D. III. "Conclusion – Democracy based Theory and stakeholders' feedback".

⁴¹¹ See at point D. II. 2. "Free and creative choices" and 3. "Idea-expression-dichotomy".

⁴¹² Cp. point D. III. 2. b) "Fostering creativity and competitiveness" with point C. III. "Conclusion – Democracy based Theory and stakeholders' feedback".

that protection can be granted, where appropriate, by the various domestic legal orders.”⁴¹³ Here, the court seems to respect that also ideas and methods such as rules of games can be worth to be protected, at least, comparably to copyright. But the **European Court of Justice does not weigh itself the pros and cons of copyright protection**, comparable to the production and structural functions of the Democracy based Theory, for the creativity and innovation, growth and increased competitiveness of European industry. The European Court of Justice rather delegates such weighting to the Member States.⁴¹⁴

The European Court of Justice implicitly decides in favor of a broad meaning of “innovation” taking the term “originality” into account that is only met by free and creative choices that the creator made in the production process. Any re-creation is, as consequence, protected, if it meets the criteria prescribed. Albeit recital 4 Copyright D mentions explicitly both terms “innovation “ and “creativity”, a more nuanced distinction would have been interesting. Instead, **no examination** in any of the cases prescribed **whether or how** its definition of **the copyright protected work** concretely **serves to foster investments in creativity and innovation**, especially, with respect to new Internet enabled business models such as of the defendant in the case ECJ C-5/08 “Infopaq vs. DDF”.⁴¹⁵

Regarding the level of originality, the European Court of Justice decides in the cases ECJ C-145/10 “Painer vs. Standard” and ECJ C-604/10 “Dataco vs. Yahoo!” that, firstly, mere skills and labor are not sufficient to meet the criteria of “originality”. Instead, the creator must make free and creative choices by the selection and arrangement of the work’ elements. Even if the intellectual skill and labor concerns such selection and arrangement of the elements, it does not “as such justify the protection of it by copyright (...), if that labour and skill do not express any originality”. Since those criteria are met, there is no different level of originality for different kinds of works.⁴¹⁶ The definition is very interesting with respect to the self-concepts of the survey’s participants who considered time and manpower invested in the piece of work, after the “selection and arrangement of the work’s elements”, as most important criteria for the copyright protected work. The distinction drawn by the European Court of Justice does not neglect time and manpower invested in the piece of work as such, but rather respects it under the condition that it expresses originality. Given a low level of originality how it is favored by the Democracy based Theory and the Transaction Costs Economics, the clear distinction elaborated by the court serves well to respect both the various incentives for creativity (and innovation) and the avoidance of costs caused by uncertainty.⁴¹⁷ Indeed, the European Court of Justice does not exemplify why its criteria meet the purposes of, especially, recitals 4 and 9 Copyright D. As explicit justification serves here recital 21 Duration of Copyright D that **mainly pursues legal certainty**.⁴¹⁸

Finally, the **adaptation right** and, therewith, the gap of transformation that is necessary for the non-restricted usage of pre-existing works are **not treated in the cases** prescribed. Albeit the computer animation of the photographic portrait concerned in the case ECJ C-145/10 “Painer vs. Standard” was an

⁴¹³ See at ECJ C-403/08 and C-429/08, cip. 100.

⁴¹⁴ Cp. point E. I. 3 “Murphey vs. FAPL” with point C. III. “Conclusion – Democracy based Theory and stakeholders’ feedback”.

⁴¹⁵ Cp. point E. I. 1. “Infopaq vs. DDF” and III. 2. “Fostering creativity and competitiveness” with C. III. “Conclusion – Democracy based Theory and stakeholders’ feedback”.

⁴¹⁶ See at point E. II. 7. “Level of originality”.

⁴¹⁷ Cp. point C. III. „ Conclusion – Democracy based Theory and stakeholders’ feedback”.

⁴¹⁸ See at point E. III. 1. c) “Personality and broad reproduction right”.

adaptation, the European Court of Justice did not decide on the corresponding adaptation right.⁴¹⁹ Therewith, one of the most important questions about the balance of interests between authors of copyright protected works and subsequent re-creators remains open.⁴²⁰

⁴¹⁹ See at points E. II. 8. “Gap of transformation” and III. 1. c) “Personality and broad reproduction right”.

⁴²⁰ Cp. point C. III. „ Conclusion – Democracy based Theory and stakeholders’ feedback” and A. I. “Copyright between Culture Industry and Participatory aka. Remix Culture”.

F. Summary: Copyright protected formats and future decisions on their adaptation

Formats on the way from Culture Industry to Participatory aka Remix Culture: **Does copyright law correspond to the current cultural and economic developments?** The discussion illustrated how the Internet transformed copyright law from a mere protection instrument for artists to an institution regulating democratic civil societies in the digital age. Copyright law has to balance the interest of all stakeholders of cultural markets, in other words, of markets for the exchange of ideas: Creators, producers, distributors, users, and, consequently, re-creators. Nowadays, these markets do not only build upon commercial economies but also on sharing economies. Here, not the price but the quality of participation defines the value of the good exchanged. In the future, not only software markets might build upon both, so called, hybrid economies, but also format markets.⁴²¹ While formats base, more and more, on the user participation and, consequently, on the exchange of ideas, their development and production follows mainly economic rules. The commercial format market is driven by strict cost-benefit-ratios and risk-minimization. The price paid for format licenses mirrors not only the success as well as the development and production costs of the traded format but also the sunken costs of unsuccessful formats that were and/or do not have to be produced. Thereby, formats are especially interesting for the European Single Market. The opportunity to adapt formats to the respective language, current prices, habits or other cultural circumstances let buyers will investing more, namely, in both the licenses for the production package as well as for the re-production, than in a ready-made with foreign language, participants from abroad etc.⁴²² But does the European Single Market provide the right legal framework for the unhindered exchange of formats between the Member States?

The European Commission established an action plan, named **Digital Agenda 2020**, which claims to “update EU Single Market rules for the digital era.”⁴²³ In this Agenda, the Commission identifies that “**Europe lacks unified and efficient markets in creative content sectors** (and, that) Europe's copyright framework is falling behind digital developments.”⁴²⁴ “European audiovisual markets are very fragmented, preventing market players from realizing economies of scale and becoming viable global competitors.”⁴²⁵ The Commission will hence “look into mitigating the effects of (copyright) territoriality in the single market; agreeing appropriate levels of harmonization, limitations and exceptions to copyright in the digital age”.⁴²⁶ Thereby, the EU has to “strike the right balance between protection of Intellectual Property Rights and the general public's access to content and knowledge”.⁴²⁷ Indeed, while the economic rights are widely harmonized, there is neither a common definition of the copyright protected work nor an adaptation right provided for by EU copyright directives. Regarding formats, such harmonization is

⁴²¹ Cp. point A. I. “Copyright between Culture Industry and Participatory aka. Remix Culture”.

⁴²² See at point B. I. “Format markets: From television to transmedia formats”.

⁴²³ See the introducing header for “Pillar I: The Digital Single Market” at <http://ec.europa.eu/digital-agenda/en/our-goals/pillar-i-digital-single-market>, re-called the 22nd May 2013.

⁴²⁴ <http://ec.europa.eu/digital-agenda/en/pillar-i-digital-single-market/action-4-wide-stakeholder-debate-further-measures-stimulate-european>, re-called the 22nd May 2013.

⁴²⁵ <http://ec.europa.eu/digital-agenda/en/pillar-i-digital-single-market/action-5-simplifying-distribution-creative-content>, re-called the 22nd May 2013.

⁴²⁶ <http://ec.europa.eu/digital-agenda/en/pillar-i-digital-single-market/action-4-wide-stakeholder-debate-further-measures-stimulate-european>, re-called the 22nd May 2013.

⁴²⁷ <http://ec.europa.eu/digital-agenda/en/pillar-i-digital-single-market/action-6-protecting-intellectual-property-rights-online>, re-called 22nd May 2013.

essential for both to grant legal certainty on format markets as well as to balance between the interests of the markets participants. So far, creators, producers, distributors, users, and re-creators have to take the respective copyright provisions of, principally, 28 Member States into account if they want to know whether their respective act of usage is, given the lack of corresponding licenses or even knowledge thereof, legal or not.⁴²⁸

Thereby, the question about format's copyright protection is especially difficult to answer because **formats can**, oversimplified, **be located between private property and public domain**. Do formats, for example, in cases of reality or scripted reality shows, alternate reality games, flash mobs or happenings, only reproduce facts? Do formats, given they contain game structures or role plays, only consist in styles and methods? Or are formats, such as concepts or paper formats, more idea than expression? And even if they are expressions, are formats sufficiently original? Hence, shall formats be copyright protected or shall they belong to the public domain?⁴²⁹

Copyright theories serve a structure to find the right criteria for the definition of the copyright protected work as very first entry point for the balance of interests between the stakeholders of format markets.⁴³⁰ Amongst them, the Democracy based Theory corresponds best to integrate all different kinds of interests and, given a broadened understanding, even different economies. The Transaction Costs Economics also provides important structuring elements.⁴³¹ Irrespective of these copyright theories, the European legislator defined in its recitals, especially, of the Copyright D such purposes of copyright protection, too. Thereby, they basically correspond to the theoretical approach of the theories prescribed as far as they promote fostering investments in creativity and innovation in the interest of the society at large and to abolish national legal differences that hinder “economies of scales”. Indeed, both copyright theories as well as the recitals focus on commercial economies, at least, as far as the term “investments” is understood only as financial one.⁴³² In contrast, not only the promoters of sharing economies and the open software movement but also the self-concepts of the survey's participants illustrate that there are further incentives that should be safeguarded by copyright.⁴³³ Indeed, there is an essential difference between the recitals and the theoretical approach of the copyright theories. While the Democracy based Theory leaves the question about the level of copyright protection open for the weighing, the recitals explicitly require a high level of copyright protection. Even if both approaches lead, with respect to the criteria of the copyright protected work, to the conclusion that already a low level of originality is justified, the tendency in the recitals make it difficult to re-balance such broad definition of the copyright protected work in a later step again. While the structuring function of the Democracy based Theory tends to narrow the adaptation right, the recitals promote a high level of protection also with regard to adaptations. In view of these provisions, the fair balance of interests how it is foreseen in the Digital Agenda 2020 remains a declaration of intent.⁴³⁴

⁴²⁸ See at point C. III. „Conclusion – Effects on European format markets”.

⁴²⁹ Cp. point A. II. “Relevance of formats for the discussion about copyright”.

⁴³⁰ Cp. point A. IV. „ Utilitarian theories as theoretical scale”.

⁴³¹ See at point D. III. “Conclusion – Democracy based Theory and stakeholders' feedback”.

⁴³² See at point E. III. 2. “Comparison with utilitarian copyright theories”.

⁴³³ Cp. point A. I. “Copyright between Culture Industry and Participatory aka. Remix Culture” and D. III. “Conclusion – Democracy based Theory and stakeholders' feedback”.

⁴³⁴ See at point E. III. 2. “Comparison with utilitarian copyright theories”.

Technically, the broad definitions provided for by the directives enable the European Court of Justice to interpret these provisions in correspondence to the current situation. **The broader the legal definitions are**, such as for the copyright protected work or of the adaptation right, **the more flexible is the court in adapting the legal framework** to social, cultural and economic innovations and, especially, future technologies. Of course, the broader the definitions are the more important are the purposes provided for in the recitals that serve to lead the court in its decisions. The European Court of Justice must not substitute the legislator.⁴³⁵ Unfortunately, the European Court of Justice uses the recitals, at least in the judgments prescribed, in a rather superficial and recursive way. The recitals serve more to justify its decisions as such than the concrete criteria for the copyright protected work. The court does not examine whether or how copyright protection actually fosters creativity and innovation in the concrete case. Neither, the court weighs the pros and cons of copyright protection with regard to the different interests of the participants involved.⁴³⁶ Instead, in the center of its reasoning stands mainly the creator. Thereby, the court does not even differ between the creator and the industry exploiting the creator's work.⁴³⁷ In conclusion, defining the criteria for the copyright protected work, the European Court of Justice fails in terms of balancing the interests but succeeds in increasing legal certainty.

Finally, **pursuant to the European Court of Justice's definition of the copyright protected work, formats can be copyright protected.** Their protection depends, first of all, on the combination of their elements. These do not have to be as such copyright protected but must convey to the user the originality of the respective format. Thereby, the elements may belong to different media as well as take part of subsequent intellectual creations. Paper formats can, thus, principally be protected even if they are developed to and/or adopted by subsequent pilots, iterative shows and over a multitude of media platforms.⁴³⁸ As far as they consist in games, it is decisive whether the rules of the respective game are pre-existent, with the result that they belong to the public domain, or whether creators invented or re-created them in a way that they express the creators' free and creative choice. Games and, more general, formats are not the result of free and creative choice if they solely follow their technical function, in the meaning that the methods applied for their creation are so limited that the idea and its expression are indissociable. In consequence, as far as the invented or re-created format is one out of different possibilities to express the idea behind, it can be copyright protected.⁴³⁹ Thereby, the work-centric definition of the copyright protected work enables the creators of the format to make the judicial prove that the format results from their creative process, even if it is, following the economic rules of media industries, highly standardized and does not reflect their personalities. The creators have to prove that they made free and creative choices during the process of creation by selecting, combining, arranging and/or configuring the decisive format's elements.⁴⁴⁰ Indeed, the investment of mere skills and labor cannot justify copyright protection, even if creators made it during the process of development. But is once the originality of the format determined, the format is copyright protected like any other work. For

⁴³⁵ See introduction of point E. III. 1. with further references.

⁴³⁶ See at point E. III. 2. "Comparison with utilitarian copyright theories".

⁴³⁷ See at point E. I. 1. "Infopaq vs. DDF" and III. 1. a) "Fostering creativity and competitiveness".

⁴³⁸ See at points E. II. 2. "Author's own intellectual creation".

⁴³⁹ See at point E. II. 4 "Idea-expression-dichotomy".

⁴⁴⁰ See at point E. II. 5. "Author- or work-centric originality".

different kinds of works, there are no different levels of originality so that formats are, equally, protected.⁴⁴¹

This result corresponds to the purposes of copyright theories as well as to the self-concepts of the survey's participants. Indeed, the participants claimed that comprehensive copyright protection must not hinder the development of new formats, neither. **The solution for the right balance between a low level of originality and the possibility to freely adapt formats** might be a narrow adaptation right or, how the Dutch Supreme Court did it, a precise definition which elements combined meet the required originality and which elements are finally adopted.⁴⁴² The solution **belongs**, in any case, **to future decisions of the European Court of Justice**.

⁴⁴¹ See at point E. II. 6. "Level of originality".

⁴⁴² See at point C. II. 1. b) "Reasoning: „Combination of elements“.

Appendix