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ABSTRACT

of a dissertation

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Balance between copyright and the public interest: consistency of EU policies.

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2. General characteristics of the dissertation

The dissertation has a total length of 333 pages, including an introduction, five chapters, a conclusion and a list of references. The bibliography contains a total of 371 sources, of which 146 primary and 225 secondary sources.

The study focuses on several key mechanisms of the Directive (EU) 2019/790 on copyright in the digital single market[1] relevant for balancing the competing fundamental rights of authors and users, the trends regarding national transposition of these mechanisms, including in Bulgaria, and their relationship with pre-existing legislation and institutes from other legal sectors.

In view of the nature and specificities of the digital market, the directive under consideration covers areas of regulation that go far beyond the interests of rightsholders in a strict sense and affect a large number of new industries and areas of public life. These include online education, the digitisation of cultural heritage and the operation of cultural institutions, the online distribution of news and user-generated content, etc.

The copyright reform is examined precisely through the prism of the balance between, on the one hand, the interests of the author and the holders of neighbouring rights, and, on the other hand, the interests of the users of culture and information or, in other words, the public interest.

According to some authors, the EU intellectual property law has been "constitutionalised" over the last two decades[2] , in the sense that the system of fundamental human rights has a strong influence on secondary legislation in this field at EU level. It largely determines the interpretation that the CJEU gives to various key concepts, specific institutes and relationships in copyright law, and has its reflection in the national legislation and EU Member States' case law. According to commentators, now more than ever, discussions on the scope and limitations of intellectual property rights also include their

[1] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC (PE/51/2019/REV/1, OJ L 130, pp. 92-125).

[2] Pollicino, O., Riccio, G. and Bassini, M. (2020). *Copyright and Fundamental Rights in the Digital Age, A Comparative Analysis in Search of a Common Constitutional Ground*. Edward Elgar Publishing.

underlying constitutional justifications and their impact on other fundamental rights[3] . In the context of the digital environment, the concept of “digital constitutionalism” has also been introduced insofar as the activities of economically powerful private actors have significant implications for the exercise of citizens' constitutional rights[4].

At the constitutional level, as far as fundamental human rights are concerned, intellectual property is considered a form of property. This is established in Article 17(2) of the EU Charter of Fundamental Rights[5], as well as in Article 1 of the First Protocol 1 to the ECHR[6]. In practice, these rights are often competing with other fundamental rights and freedoms, e.g. the freedom of expression, the right to privacy, the right to artistic expression, etc. In the context of copyright law, this raises the question of how a fair balance is struck between intellectual property rights on the one hand and competing rights, both of users and the public interest in general.

The main instrument which, both at EU and national level, serves to promote a fair balance between the competing interests in the above context is the so-called "exceptions and/or limitations to copyright and neighbouring rights". These are hypotheses enshrined in the law in which, under certain conditions, a certain range of beneficiaries, and in some cases all citizens, are entitled to use works protected by copyright and related rights without the consent of the rightsholder and, in many cases, without having to pay remuneration. The classic exceptions and limitations to copyright are quotation, use for illustration in teaching, free dissemination of news, use of protected works for the purposes of caricature and parody, etc. The exception as a mechanism sets limits to the exercise of copyright by limiting the rightsholder's monopoly and absolute control over the fate of the work for the benefit of the public interest. In this sense, the intervention of the new EU copyright legislation in areas such as education, access to culture, additional protection of press publications, reinforcement of the liability of platforms for infringements perpetrated by their users, etc. directly or indirectly affects the regulation of the institute of exceptions and limitations in each of these sectors.

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[3] Geiger, C., (2021). Building an Ethical Framework for Intellectual Property in the EU: Time to Revise the Charter of Fundamental Rights. Innovation law and Policy, Which Reforms for IP Law?, Cheltenham, UK/ Northampton, MA, Edward Elgar, 2022 (Forthcoming). Available at: https://ssrn.com/abstract=3938873.

[4] See e.g. Pollicino, O. (2021). *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism?* Bloomsbury Publishing.

[5] Charter of Fundamental Rights of the European Union (2016/C 202/02).

[6] European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Already in the proposal phase, Directive (EU) 2019/790 was the subject of extensive criticism, which continued after its adoption, in the process of transposition by Member States. The issues most acutely raised in relation to the implementation of the new EU legislation at national level relate to suspicions that the solutions contained therein are not well designed and thought through and will negatively affect the exercise of freedom of information by internet users, as well as the existing toolkit for the balancing of the interests of rightsholders and the public interest.

In this sense, the **subject of** the dissertation is the content, consistency and expected effects of the copyright reform at the EU level in several aspects, refracted through the institute of exceptions and limitations of copyright and neighbouring rights as a key instrument for balancing conflicting rights and interests, namely: (i) free use of protected content for the purposes of distance and cross-border education, (ii) free use for the purposes of digitisation of cultural heritage, (iii) free use for the purposes of distribution and access to news and journalistic content and (iv) free use by online platform users in view of the right to free expression and access to information.

The goal of the study is to establish whether the ongoing European copyright reform is conceptually and technically, as well as internally and externally consistent in the context of reconciling the interest of rightsholders with the public interest, and in particular - how the legislative decisions within the reform would affect the balance between the rights of authors and publishers on the one hand, and the communication rights of users and consumers on the other. As a result, the study highlights the main contradictions in the new framework and identifies potential conflicts with the existing one - both at EU and national level. Recommendations are made to improve the legislative solutions, mainly in the direction of mitigating the adverse effects of some imperfect institutes in the context of the ongoing transposition in Bulgaria.

The dissertation reflects the following research **objectives**:

- a thorough study of the existing rules and case law of the CJEU on the balance between the interests of rightsholders and the public;
- a comparative study of the way in which the exceptions and limitations regulated in EU law until 2019 have been transposed into national legislation in all EU Member States, with an emphasis on the Bulgarian interpretation;

- an in-depth analysis of the instruments that Directive (EU) 2019/790 introduces at EU level;
- study of the current transposition of Directive (EU) 2019/790 in the national legislations of the Member States; analysis of the level of harmonisation of copyright law achieved by the Directive compared to the previous Directive with horizontal effect in the field since 2001;
- an analysis of the conceptual, technical, internal and external consistency of the reform, focusing on the question of whether the latter succeeds in preserving and improving the balance between intellectual property rights and the public interest, above all with regard to the exercise of freedom of information.

Through the analysis carried out in the dissertation, the following **research thesis** is proved: the new legislative solutions within the copyright reform are unbalanced in terms of the clash between the interests of rightsholders, and in particular - publishers, on the one hand, and the public interest, on the other. The new legislative solutions conflict with previous regulations at European level in the field of copyright, such as the regulation of the institute of exceptions and limitations under previous directives and the corresponding national legislation. The new solutions are conceptually inconsistent. In practical terms, the new mechanisms are likely to create more problems than solutions.

To achieve the tasks in the dissertation the normative, formal, dogmatic, systematic, historical and comparative[7] **methods** are used. The thesis includes an analysis of the current legal framework at EU and national level, as well as case law of the Court of Justice of the European Union and national case law.

For the purpose of gathering information on the pre-existing legislation, the judicial interpretation of certain institutes in different EU Member States and the available proposals for transposition of Directive 2019/790 at different stages of the legislative process in different Member States, was also used the raw data from mapping projects in which the author is personally involved, as well as direct questionnaires to legal experts from several national jurisdictions.

[7] According to Mark van Hoecke, it is wrong to consider "comparison" itself as a method in comparative law studies. Van Hoecke proposes the term "toolbox" to denote the set of methodological options that a researcher can draw on in comparative law research. These are (i) the functional, (ii) the analytical, (iii) the structural and (iv) the historical methods, as well as the so-called (v) "law in context" (interdisciplinary approach). See van Hoecke, M., "Methodology of Comparative Legal Researc"', LaM December 2015, DOI: 10.5553/REM/.000010.

The relevance of the topic is conditioned by the novelty of the subject-matter, as well as the need to place the new mechanisms in the perspective of the general principles of balancing opposing fundamental rights and interests. There is an unfinished discussion on a number of fundamental issues in this area. Of course, the matter is extremely dynamic and has yet to be explored in depth at EU and international level. In the last month alone, dozens of articles have been published by leading European IP experts, analysing the adopted legislation in the context of fundamental human rights and previous applicable European legislation and CJEU case law.

The study was also performed by keeping some limitations related to its specific focus and tasks in mind. Firstly, although the dissertation examines the regulation of analogous issues worldwide in order to explore specific legal institutions, it is generally limited geographically to the European Union and its Member States. The copyright reform in the EU is examined in the context of the balance between the interests of rightsholders and the public interest. Outside of the study remains the aspect of the interplay between the interests of the creators and intermediaries in the creative industries (publishers, producers), which is also affected by the reform. Next, the study focuses mainly on the technical solutions to balancing competing rights and in particular - on the institute of exceptions and limitations to copyright. Other institutions remain outside the scope of the study, despite their importance for the "balancing exercise", such as e.g. the figure of abuse of right as well as the direct enforcement of fundamental human rights. Given the limited scope of the present work, specific aspects of the application of the exceptions that determine their dynamics with copyright, such as the requirement for lawful access, the application of technical protection measures, etc., are excluded or only briefly touched upon. The study of the application of exceptions is limited to groups of societal relations directly affected by the EU reform. Finally, the newly introduced mechanisms are examined in terms of their interaction with the pre-existing legal framework. Despite the importance of a number of EU legislative projects currently on the agenda, such as the Digital Services Act, the study, due to its limited scope, does not cover an analysis of the complex dynamics between these projects and Directive 2019/790.

3. Brief outline of the thesis

3.1. Introduction

The preface of the dissertation introduces the topic of the study by giving an overview of the history of the adoption of the copyright reform in the European Union. The introduction also illustrates the problems of the lack of internal and external coherence of the approach chosen by the European legislator with a general presentation of the two legal mechanisms trying "to achieve a well-functioning marketplace for copyright" that have attracted the most public attention and intense criticism from the academic community[8]. These are the new neighbouring right for press publishers under Article 15 and the new regime of intermediary liability for illegal user content under Article 17 of the Directive.

Next, the introduction contains information about the object, subject, goal and objectives of the study. It sets the research thesis and specifies the methodology used. The limitations of the study are outlined.

As the last, third part of the introduction, some terminological clarifications are set. Insofar as the topic of the balance between conflicting interests in the context of copyright law and in particular - the institute of exceptions and limitations to copyright and its rapid recent development has not been thoroughly studied in Bulgaria, it is necessary to specify and establish appropriate terminology for the purposes of the study.

3.1.1. Theoretical conclusions

As part of the dissertation's introduction, an in-depth review of the concepts signifying the mechanism under consideration for balancing competing interests in the context of copyright, as used in doctrine and by EU and national legislators and courts, is included. The concepts are systematised according to their connotation in relation to the importance of the embodied public interest.

3.1.2. De lege ferenda proposals

Suggestions are made to find an accurate translation in Bulgarian of the concept of *user rights*. The necessity of defining the concept is assessed and the need of outlining such a concept without delay is assumed, as the first unambiguously formulated subjective rights of

[8] "Measures to achieve a well-functioning copyright market" is the title of Title IV of Directive (EU) 2019/790. This Title contains the most controversial mechanisms introduced by the Directive - Articles 15 and 17.

users of protected works are already part of the EU positive law in the context of the transposition of Article 17 of Directive (EU) 2019/790. Due to the difficulty to introduce an entirely new concept that correctly conveys the content of *user rights*, it is proposed to use the term "*ползвателски права*". Due to the traditional association of the term "user" with commercial users, it is proposed that targeted amendments be made to the Bulgarian law so that users within the meaning of Title II "a" of the Act (Collective Management of Copyright and Neighbouring Rights) are "renamed" as "commercial users", by making the general term *user* "exempt" for all persons lawfully using another's work, regardless of the basis, including beneficiaries of exceptions and limitations to copyright and neighbouring rights, and persons using creative content that is not subject to copyright, e.g. because of expired term.

3.2. Chapter One - General Overview

Chapter One outlines the theoretical framework regarding the issues of establishing a fair balance between copyright and the public interest, placing the general regulatory changes introduced by Directive (EU) 2019/790 in the context of EU *acqui*. The study includes an in-depth analysis of the main tool for balancing competing interests in this context - copyright exceptions. The chapter contains (i) an overview of the theoretical propositions on the legal nature of exceptions; (ii) the ideological and political rationale underlying these instruments and the implications that rationale has on their legal force; (iii) the extent to which these instruments are binding and harmonised at the EU level; and (iv) the extent to which they constitute imperative or dispositive norms and the means available to override and circumvent them.

3.2.1. Theoretical conclusions

Chapter One of the thesis contains a detailed analysis of the *factors that determine the strength and stability of* exceptions at EU and national level, systematising them into four broad categories. The first category analyses the doctrine on the *legal nature* of exceptions as an instrument of positive law, and traces the practical challenges faced by each of the theoretical propositions presented. The second category of factors affecting the strength and stability of exceptions is their political and ideological *justification*. As a result of the research, it is assumed that this is essentially the most relevant factor, which upon implementation outweighs the other ones examined. The third and fourth factors are related to the explicit force that the legislator itself gives to an exception - on the one hand, regarding the Member States, i.e. whether the exception is regulated at EU level as a *mandatory or an optional one*, and on the other hand, for private law actors, i.e. whether the exception is regulated *by an imperative or a dispositive rule*.

- legal nature of exceptions as a mechanism of positive law

Chapter One first examines the legal nature of exceptions and limitations, grouping the different views in theory into three categories: (i) exceptions as a balancing tool, (ii) as a privilege, and (iii) as a subjective right.

Concerning exceptions as a *balancing tool*, it is submitted that they represent a very imperfect one. This is because, firstly, due to a combination of factors, exceptions are not a

neutral instrument, but rather one that heavily favours the rights of the author at the expense of the public interest, and secondly, because due to their lack of harmonisation and stability, as well as their extreme rigidity, exceptions are also a particularly *inflexible* tool whose application contributes to increased legal uncertainty.

With respect to the view of exceptions as *privilege*, it is submitted that this interpretation is also flawed insofar as it compromises the concept of fair balance between competing rights and interests. It is concluded that the perception of the exception as a limited form of passive protection only harms the principle of equality between conflicting fundamental rights at the constitutional level and violates the *right to effective remedies* for the fundamental communication rights of users. Moreover, the limitations on user rights safeguards are introduced by norms inferior to the EU Charter, respectively - the ECHR or national constitutions - such as directives and national law in the field of copyright. This precludes the direct application of fundamental rights embodied in exceptions, and therefore said fundamental rights have no route to active protection.

It is thus submitted that the only viable option under the current EU regime of exceptions is to consider them as *user rights* of the same order as copyright and neighbouring rights regulated in secondary legislation. This follows in particular from the so-called 2019 Trilogy of seminal judgments of the CJEU in *Funke Medien*, *Pelham* and *Spiegel Online*[9] , which in effect holds that the only tool a national court has access to in striking the balance between copyright and other competing human rights are the relevant exceptions as interpreted by the national legislature and to the extent that they exist at all in national law[10]. Direct application of the fundamental right embodied in the exception is not permitted. As a result of the study, it is found that the national court has the following options as regards to enforcement: (i) in the event that the national legislature has not transposed the relevant exception existing in EU law, the court should accept the unappealable primacy of copyright over the counterpart user's fundamental right affected; (ii) in the event that an exception strictly covering the hypothesis of the specific unauthorised use is transposed into national law, the national court has the right to assess the balance of competing interests solely in the

[9] Case C-469/17 Funke Medien NRW GmbH v Bundesrepublik Deutschland [2019] EU:C:2019:623; Case C-476/17 Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben [2019] EU:C:2019:624; Case C-516/17 Spiegel Online GmbH v Volker Beck [2019] EU:C:2019:625.

[10] In Bulgaria, for example, a basic exception for the exercise of freedom of expression - the one for the purpose of caricature, parody and pastiche, has not been transposed.

direction of further limiting the hypothesis of free use in accordance with the modern interpretation of the function of the three-step test. The only possibility for a national court to overcome an exception that is too restrictive for the user and that exists in national positive law is not to apply it as contrary to EU law and, respectively, to the national Constitution. In this sense, the only possibility to comply with the condition of equal treatment of reciprocal rights of a constitutional order in the copyright context is to perceive exceptions as subjective user rights.

- justification of exceptions

Next, Chapter One contains a detailed analysis of the *justification of* free use hypotheses, concluding that justification is the *most essential criterion* in assessing the strength and stability of an exception. This is because, in some of the cases examined in the thesis, the interpretation of the EU legislator's intention in formulating the case of permitted use is able to overcome the explicit designation of the norm as mandatory or optional, respectively as imerative or dispositive. In particular, the stronger the "reason" for the existence of the exception, the more stable its relationship with the relevant model clause at EU level. In this sense, the analysis of the rationale is particularly relevant in relation to *optional* EU exceptions, where the intentions of the legislator as to the expected degree of harmonisation achieved have a significant impact on the ultimate discretion of national jurisdictions in applying these exceptions. The exceptions are grouped into three distinct categories according to their justification: (i) exceptions embodying fundamental rights, (ii) exceptions embodying public interest in a broader sense and (iii) *de minimis* exceptions. The categories are found to be dynamic, as an exception may belong to several categories, and its justification may evolve in the light of developments in technology and social relations. The classification completely rejects "market failure" as a possible justification, since it is submitted that the dynamics of market mechanisms are unable to provide doctrinal support for, in this case, a user right. As an economic criterion in this sense, the study adopts the absence of substantial harm to the rightsholder's sphere as a result of the unauthorised use in question. Exceptions that in lesser extent embody fundamental human rights or overriding public interest, but that do not have the potential for market substitution, are distinguished in a *de minimis* category.

- the nature of the exceptions in terms of binding effect on Member States

Next, the thesis implies an in-depth study of the dynamics in the relationship between the Union and the Member States with regard to the latter's discretion to define the scope of national exceptions and limitations. In particular, it is sought whether there is a certain pattern in the formation of the policies of the EU legislator regarding the mandatory, respectively optional, effect of EU rules containing exceptions to copyright. It is submitted that references to the *relevance of the exercise of specific exceptions for the internal market* are arbitrary and justified solely by the need to justify the Union's legislative intervention in the specific regulatory field. It is accepted that EU policies in this area are rather *ad hoc* and largely based on pressure from specific stakeholders rather than evidence and a focused strategy. Legislative solutions are introduced without strategic assessment concerning the scope of free use and its impact on the single market.

In addition, the study concludes that by fixing a maximum number of hypotheses of permitted use without fixing a minimum number or without setting a uniform scope, the EU *is harming the cause of harmonisation* of copyright law. Such a legislative solution is driven entirely by the objective of providing enhanced protection of intellectual property rights, not by the objective of approximating Member States' laws with a view to removing obstacles to the functioning of the internal market.

The study also concludes that the criterion of the "importance" of an exception for the digital single market as a factor for its stability is *completely arbitrary* and in practice justifies the Court of Justice of the European Union to pass on the responsibility for assessing the strength and degree of public importance of the exceptions to the legislator. On the other hand, the Court of Justice falls into the trap of circular reasoning, basing its conclusions on the *insufficient importance* of an exception for the internal market on the lack of binding character conferred by the legislator. It is submitted that by refusing the national courts to balance competing rights, such as copyright on the one hand and freedom of expression on the other, results in an unfair advantage in favour of copyright. Indeed, the right to an opinion is not unlimited, but in the present context, the Court's invocation of this fundamental human right is a priori limited by the double "chain" of largely uncoordinated legislative decisions, first at EU level and then at national level.

Next, this part of the dissertation contains a detailed analysis of the European Union's *current attempt* to give consistency to its harmonisation policies, concluding that this attempt is entirely unsuccessful. In addition, a comparative legal analysis of approaches to the

transposition of the new directive at national level is carried out, concluding that the introduction of the mandatory exceptions of Directive 2019/790 is developing disastrously and is expected to exacerbate, rather than mitigate, the fragmentation of the legal framework. It is generally submitted that the rigidity of existing permitted uses, their casuistic nature, combined with the tendency at EU level for exceptions to formulated as optional rules in relation to Member States, inevitably leads to further fragmentation and legal uncertainty, as *inter alia* national courts are not free to converge their interpretation of the mechanisms for balancing competing rights.

- imperative or dispositive nature of the exceptions

The final factor explored in Chapter One is the nature of the EU rules governing exceptions in terms of whether they are *imperative or dispositive*. The importance of the operation of the rules in this context is highlighted, insofar as, if the exceptions are dispositive, the rightsholder can unilaterally, by its general terms, derogate from the entire balancing mechanism, leaving citizens without a path to exercise their fundamental rights. As a result of the analysis, it is held that the regime of Directive 2001/29/EC is determinative as to whether the general exceptions are imperative or discretionary. Its literal and systematic interpretation leads to the conclusion that the restrictions contained therein, with the exception of those expressly provided for to be overridden by contractual means, are to be regarded as imperative in nature.

Notwithstanding the above conclusions, it is submitted that the EU legislator has ultimately created an internally contradictory regime without any deliberation or strategy as to what the nature of the interaction between statutory exceptions and private agreements should actually be. The conclusion is that the question of whether exceptions are imperative or not should be decided at national level. Member States, in the absence of consensus at EU level, are left to determine the basic principles for balancing competing fundamental rights. Accordingly, they may or may not introduce a rule of non-derogability of exceptions by contract in their domestic legislation. On this fundamental issue, the EU legislator is making an *"implicit" delegation* in favour of the national legislator, which, as a result of the study, is considered to be yet another factor of fragmentation of the regulation, and which harms legal certainty.

Finally, this issue is analysed in the context of the attempt of Directive (EU) 2019/790 *mandatory* to give some exceptions it provides for explicite imperative nature. It is submitted that (i) the Directive itself contains mechanisms for derogating from the declared imperative exceptions, which largely nullifies the provision of Article 7, (ii) Article 7 does not apply to all the exceptions introduced by this new piece of legislation and (iii) the provision avoids clarifying the status of the core catalogue of exceptions under Article 5 of Directive 2001/29/EC.

The study also covers two more mechanisms overriding copyright exceptions. One is the *unilateral "reservation" of rights* by the rightsholder. After an analysis of the practical application of this mechanism, it is submitted that it is a different mechanism from contractual override. Cases that may arise in connection with the parallel application of the two institutions are identified.

Another such mechanism that serves to unilaterally limit the scope of copyright exceptions is the one of *technical protection measures*. It is concluded that it constitutes another aspect of disturbing the delicate balance between the interests of rightsholders and the public interest.

3.2.2. De lege ferenda proposals

In connection with the general theoretical study of the institution of exceptions to copyright at EU and national level, some *de lege ferenda* proposals are made.

- regime of the new exceptions introduced by Directive (EU) 2019/789

In view of the conclusion that the EU legislator has approached every single exception introduced by the Directive in a different way - both at the conceptual and practical level, in terms of legislative technique - a proposal is made to unify the approach by integrating the new norms into the existing system of exceptions at national level.

- legal consequences of the conflict between statutory exceptions and conflicting contracts

Following an analysis of imperative exceptions in Directive (EU) 2019/789, it is submitted that in the context of Bulgarian law, the consequence to be associated with the

existence of a contractual arrangement that prevents or restricts the right to free use is *nullity*. Support is expressed for the content of Article 26l(2) in the draft Act amending and supplementing the Copyright and Neighbouring Rights Act[11], the fruit of the work of the Working Party on the transposition of Directive (EU) 2019/789 into national law, as its wording overcomes the ambiguity contained in the original text of the Directive and prevents any difficulties for the courts as to what legal consequences to apply in enforcement. This, in turn, means that any person who has legal interest in and draws rights from the nullity will have the right to invoke it, as the court will of its own motion monitor the invocation of the nullity in the event of a lawsuit, and the procedural means to declare the nullity and invoke it will not be limited in time.

- possibilities for contractual and unilateral override of the exceptions in Bulgarian law

Regarding the newly introduced mechanisms for unilateral invalidation of legal exceptions by rightsholders, attention is drawn to the already existing Bulgarian case law in the context of the *press review* exception. One worrying aspect of the established judicial practice is the fact that it is assumed that, although the author has not expressly prohibited the free use of their work under this exception, they are allowed to validly express their disagreement to use *after the fact*. A *de lege ferenda* suggestion is made that the requirement to reserve rights in advance should be *explicitly* included in the law, both in the transposition of the two new exceptions in Directive (EU) 2019/790 containing the possibility to reserve rights, and in the hypothesis of Article 24(1)(5) of the CNRA. Next, attention is drawn to the existing practice in Bulgaria of "reserving" rights *en gros* by the relevant media outlet. It is reasonably submitted that, despite the practical convenience for content providers such as publishers, web portals, repositories and libraries to prohibit the use of works in their collections as a whole within the exceptions containing the possibility of unilateral reservation by the rightsholder, such an interpretation and in-practice application should not be allowed. The requirement that the rightsholder prohibit free use only by a direct declaration of intent should be expressly enshrined in the law.

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[11] The draft law, together with the explanatory memorandum, the preliminary partial impact assessment and the opinion of the Directorate for Modernisation of Administration, can be found on the website of the Public Consultation Portal of the Council of Ministers. Available at: https://www.strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=6348

Next, the existing mechanism in the law allowing override by technical protection measures is analysed. A proposal is made for the introduction of an effective mechanism for the removal of technical measures preventing lawful uses, which would limit the possibilities of unilateral overriding in cases of free use. While the Ministry of Culture has adopted the proposal to make the response of rightsholders to the removal of technical remedies blocking lawful use subject to a time limit, the Amendment Act does not provide for sanctions for rightsholders who refuse lawful access according to that time limit. This seriously compromises the effectiveness of the measure. Possible sanctions or other procedures for granting access could be introduced with subsequent negotiations between the parties concerned. The limitation of the obligation to react within a certain timeframe to the exception under Article 26g, which transposes Article 3 of the Directive, is also criticised. The exception as per Article 4 of the Directive also falls under Article 7(2) and, although it can be unilaterally revoked by the rightsholder, its application should not be technically limited either. It is proposed that, as with the implementation of Article 3, the legislator ensures that a transparent procedure is laid down for the rapid access to content blocked by technical protection measures. The measures proposed for in the case of Article 3 should apply to both exceptions. It is proposed to introduce a 72-hour time limit for legal access under all exceptions as per Article 25a of the CNRA.

- improving the general regime of pre-existing exceptions

In addition, a *de lege ferenda* proposal is made to change the requirement for "publication" to one for "*disclosure*" in both the existing educational exception under Article 24, p.3 of the CNRA and the library exception under p. 9. The latter criterion is considerably more favourable in relation to the potential limitation of the subject matter of the exception and is not discriminatory in relation to digital dissemination.

It is proposed to *streamline the existing system of reference rules* with a view to applying the free use hypotheses to all neighbouring rights in a non-discriminatory manner**.**

3.3 Effects of the reform on education

The following Chapter III explores the newly introduced instruments by Directive (EU) 2019/790, their history, dynamics vis-à-vis the pre-existing framework and its practical application, in the context of policies promoting access to education. The focus is on the arrangements introduced by Directive (EU) 2019/790 for the illustration for teaching exception (Article 5).

3.3.1. Theoretical conclusions

Chapter III of the dissertation contains a detailed analysis of the provision of Article 5 of the Directive in the context of the existing regime. It traces the background, rationale and process of adoption of the educational exception. It notes how, in the course of the preparation and enactment of the Directive, due to the intervention of multiple stakeholders seeking to replace the exception with licensing schemes, as well as Member States' desire to maintain their existing mechanisms, the text of Article 5 underwent amendments that compromised both the mandatory and peremptory nature of the exception.

The already *delicate balance* between copyright and the public interest has been *disturbed*, insofar as one of the most important exceptions, embodying fundamental human rights such as the right to education, expression and access to information, and protecting an essential public interest, has been allowed to be completely overridden. Moreover, the override may occur not simply by virtue of a private agreement to the contrary, but in the presence of certain market realities that are in no way dependent on either the beneficiary of the exception or the justification for the use, by the mere offer of "suitable" licences. As a result of the study, the *contradiction* between the norm of Article 5(2) and the EU *acqui,* in particular the judgement of the CJEU in the *Ulmer* case[12] is established.

Next, the study focuses on the claims that the new teaching exception will overcome barriers to (i) digital and (ii) cross-border use of protected works for educational purposes. As a result, the study finds that these claims have given rise to *two 'myths' about the novelty and revolutionary nature of the educational exception*, which ultimately lead to further fragmentation. Because of the unclear message of the EU legislator, the new exception is

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[12] Judgement of the Court of Justice of the European Union in Case C-117/13, *Technische Universität Darmstadt* v *Eugen Ulmer KG* [2014] ECLI:EU:C:2014:2196.

largely seen not as a mandatory minimum for the harmonisation of an already existing basic user right, but as something new in the context of EU *acqui*. At the same time, the "mandatory" nature of the norm declared by the legislator apparently leads many Member States to "play it safe" by transposing the text of Article 5 independently of the already existing legislation on the same subject. A number of European countries are currently setting up *parallel* and largely, but not completely, overlapping mechanisms to regulate the same social relations. The fact that, in addition, the Directive contains several *options* that compromise the legal certainty sought by the whole reform in the context of cross-border digital teaching leads to the reasonable conclusion that the new provision is not able to overcome any aspect of the legacy fragmentation of the EU legal framework, with one exception - Article 5 would remove the analogue-only application as it makes digital use mandatory.

3.3.2. De lege ferenda proposals

As regards the transposition of Article 5, a proposal is made to integrate its requirements into the existing framework. This is to be done by extending the scope of the existing provision of Article 24(1)(3) of the CNRA.

In the event that a separate exception is to be introduced under the parameters set out by the Bulgarian proposal from September 2021, there is great need to regulate the matter in detail, as well as to establish a *public funding mechanism* for the use of educational materials and music scores for the purpose of illustration for teaching.

3.4. Effects on access to cultural heritage

Chapter IV explores the instruments introduced by Directive (EU) 2019/790 in the context of promotion of access to culture, as well as the history of these mechanisms, their dynamics with the legacy framework and their practical application. Recommendations are outlined to improve their effectiveness within the national implementation process.

3.4.1. Theoretical conclusions

Chapter IV includes a detailed analysis of the capacity of cultural heritage institutions to digitise and exploit both copyrighted content as well as content in the public domain.

In relation to the *protection of the public domain*, the content of Article 14 of the Directive as well as the Bulgarian proposal for its transposition are analysed. It is concluded that, as far as the problems related to the effective use of the public domain including by cultural heritage institutions, are concerned, the regulation of Article 14 is woefully inadequate and Directive (EC) 2019/790 does not offer a systematic solution. At the same time, it is acknowledged that, in parallel with the regulation in Article 14, the Directive in actuality creates a set of new problems with regard to the use of works and other subject-matter that are not creative by nature or subject to copyright. Examples in this respect are the provisions of Article 15, which introduces a new neighbouring right on press publications which may not be original, and Article 17 which creates a real risk of hindering the free use of public domain material by internet users.

Next, the study covers the solution given in the framework of the reform for the *digitisation of protected works for preservation purposes*. The new arrangements are again examined in detail in the light of their probable interaction with the pre-existing ones. It is found that the harmonisation efforts of the EU legislator in the context of Directive (EU) 2019/790 have not been quite convincing and cover a very narrow hypothesis of the activities of libraries - essentially an existential minimum, beyond which one can speak of criminal negligence towards Europe's cultural heritage when the latter cannot even be preserved due to existing intellectual property rights. Attention is drawn to cultural institutions' opportunity to cooperate with other cultural institutions as well as third parties for the purposes of mass digitisation.

The interaction between the new provision of Article 6 and the long-standing reproduction exception in favour of cultural heritage institutions under the InfoSoc Directive is explored, as well as CHI's other faculties established by specific acts or by the Court of Justice with its interpretative case law. Analysing this issue in relation to the use of digital objects in general and the lending of e-books by public libraries in particular, it is concluded that in light of the CJEU's *Ulmer* judgments of 2014[13] and *V.O.B.* of 2016[14], the ability of libraries to digitise can also be seen as an "ancillary right" in the context of the so-called derogation from the rental and lending right under Article 6 of the Directive 2006/115/EC.

In relation to the new regulation of the *use of out-of-commerce works*, the study focuses on the notion of a "*sufficiently representative"* collective management organisation and the many potential practical problems it raises. It also analyses the issue of competition between a rightsholder and the CMO representing it concerning the exercise of the same right, which appears to be an increasingly common conflict in practice and can potentially damage the exercise by the author of their freedom of contract. In this light, a number of issues regarding the legitimacy of CMO representation in extended licensing schemes are examined.

3.4.2. De lege ferenda proposals

The following proposals *de lege ferenda* are made in Chapter IV

- public domain

As a result of the analysis of the draft transposition of Article 14 of the Directive into Bulgarian law, it is recommended that a general provision in the form of paragraph 2 of Article 34 of the CNRA be introduced, which explicitly specifies that no copyright and neighbouring rights may arise over faithful reproductions of copyrighted works which are in the public domain, unless the copies or reproductions themselves are original as a result of the creative activity of their author.

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[13] Judgement of the Court of Justice of the European Union in Case C-117/13, *Technische Universität Darmstadt* v *Eugen Ulmer KG* [2014] ECLI:EU:C:2014:2196.

[14] Judgement of the Court of Justice of the European Union in Case C-174/15, *Vereniging Openbare Bibliotheken* v *Stichting Leenrecht* [2016] ECLI:EU:C:2016:856.

Alternatively, in the event that the transposition of Article 14 remains in Article 4 of the CNRA, it should be expressly referred to each of the neighbouring rights in the relevant rules for application by analogy.

- use of protected works by libraries

Regarding the ability of public libraries to lend protected works to the public, as well as the possibility to lend ebooks, it is found that cultural heritage institutions rarely make use of the *V.O.B.* judgement of the CJEU and do not actually lend digital copies of works. The reasons for this state of affairs are complex, but ultimately they all focus on the *lack of interest from publishers* for libraries to lend books on the basis of the public lending right, which consequently leads to a *refusal* on the part of publishers to sell ebooks to cultural heritage institutions. It is submitted that Bulgarian libraries could lend ebooks to their audiences under Article 22a of the CNRA. Moreover, in view of the Court's conclusions in the *Ulmer* judgement of 2014 [15], it is submitted that libraries have the ability to digitise objects for lending purposes, taking advantage of the exception in question as an "ancillary right" also in the context of the so-called derogation from the rental and lending right under Article 6 of Directive 2006/115/EC.

It is criticised that the existing reproduction exception for libraries, archives and museums, as well as educational establishments under Article 24(9) of the CNRA is introduced only for copyrighted content but does not apply to the rights of performing artists (Article 84 of the CNRA), producers of sound recordings (Article 90 of the CNRA), film producers (Article 90c of the CNRA) and radio and television organisations (Article 93 of the CNRA). A proposal is made to unify the regime.

With regard to the mechanism for the *use of out-of-commerce works* it is submitted that, following from the provisions of the Directive, the out-of-commerce status of collections should be determined by their owners, the cultural heritage institutions, by applying reasonable effort. This is particularly relevant given the fact that in many cases, in view of the underdeveloped collective licensing ecosystem in Bulgaria, cultural heritage institutions can be expected to make very active and predominant use of the exception under Article 8(2) of the Directive as a more accessible and preferred method of clearance of rights. In view of

[15] Judgement of the Court of Justice of the European Union in Case C-117/13, *Technische Universität Darmstadt* v *Eugen Ulmer KG* [2014] ECLI:EU:C:2014:2196 [32-35].

this, it is proposed that CHIs take control over the identification of out-of-commerce works, insofar as a large part of collections will not be subject to collective licensing at all.

Further *de lege ferenda* proposals are made for the purpose of establishing sufficient representation of the relevant CMOs to carry out extended collective licensing under the mechanism. It is proposed that the assessment should cover both the number of authors represented in the country concerned, the mandate of the CMO for the particular use and the existence of reciprocal agreements with similar organisations abroad for the representation of their foreign repertoire. It is submitted that the criteria should be absolute and not related to a broader representativeness for the collective management of such rights compared to another similar organisation according to the wording of Article 94c of the CNRA. The use by analogy of the criteria for determining the representative users' organisations for each type of use under Article 94r of the CNRA, which fix 50% + 1 as the required quantitative threshold, are also rejected. The declaration of representativeness and the fact that there is only one CMO for a given use are also rejected as criteria for representativeness. Criticism is made of the approach set out in the CNRA amendment proposal to *re-enter CMOs in the register* maintained by the Ministry of Culture. The procedure is seen as *formalistic*, insofar as it introduces an irrebuttable presumption that listed CMOs "will be considered representative", and not meeting the requirements for actual representativeness in the spirit of the Directive. A CMO must actually represent a very substantial proportion of rightsholders in order to be entitled to represent non-members without the risk of a high number of rightsholders leaving the scheme.

To the extent that the new mechanism targets works that qualify as "cultural heritage" and are contained in the collections of memory institutions, it is proposed that the representativeness of the CMO be assessed against the number of rightsholders whose *works constitute the bulk of the "cultural heritage"* or that representativeness be determined against the digitised collections of libraries and museums.

3.5. Effects on news dissemination

Chapter V explores the instruments introduced by Directive (EU) 2019/790, their history, interaction with the legacy framework and their practical application, in the context of news dissemination. It analyses the copyright reform in terms of access to journalistic content. It outlines recommendations to improve the effectiveness of the relevant instruments in the national implementation process.

3.5.1. Theoretical conclusions

Chapter V provides an in-depth analysis of Article 15 of the Directive. In this part, the dissertation examines the problematic legislative technique used in regulating this mechanism, highlighting the conflict of the new legal regime with the existing copyright law, as well as the interaction with other branches of law, including the protection of fundamental human rights and the protection of competition. Particular emphasis is placed on the hitherto little explored limitation of the new neighbouring right to certain addressees.

In this part, the study focuses on (i) the *effectiveness* of the newly introduced law with respect to the intended outcome and (ii) the unintended as well as *undesired consequences* that its introduction might have on other institutions and social relations. It is considered that the purpose of the new law is to force *Google* to pay for the intellectual property it "takes" from Europe. As a result of the study, and by analysing the recent French experience with *Google*, it is first of all established that in this particular task the new neighbouring right *is not sufficient* as a legal tool on its own, but must be applied in the context of a complex set of measures from the arsenal of other areas of law, such as competition law. It identifies issues that the French solution to use competition law to *fill legislative gaps* raises both in terms of permissible ways of enforcing an intellectual property right and the largely perverse use of competition law tools. The paper analyses the imposition of a *de facto* prohibition for Google's refusal to demand the rightsholders' product, analysing this effect in analogy with other competition law institutes such as the refusal to supply, the doctrine of "essential facilities" and the obligations of providers of services of *general economic interest* to provide their service regardless of their economic interest.

Next, the risks of introducing a neighbouring right on news publications are considered in two aspects. On the one hand, a problem is identified in (i) the subject-matter of

the new right - the so-called “press publication”. It is an object of intellectual property which is not identical but largely overlaps with the object of copyright - a journalistic article, a reporter's photograph, another protected subject-matter such as a video report. As a result of the study, it is first of all submitted that, when applying the new right, the user would in principle have to carry out (i. *a*.) a double clearance of the rights in one piece of content, concluding two licensing contracts or compensating two rightsholders - the author and the publisher. Next, the risk of copyright protection (i. *b*.) spreading to non-original content, including machine-generated content, is reasonably inferred, insofar as there is no requirement for press publications to have a creative element or a modicum of personal creative contribution. It is concluded that modern copyright protection is moving further and further away from the core concept of protection over creative works. The instruments of copyright, and neighbouring rights respectively, are increasingly concerned with regulating social relations peripheral to their sphere, with the aim of economically stimulating certain ancillary roles in the production chain within the creative industries, such as producers and publishers. A parallel is drawn between the new neighbouring right of news publishers and the EU databases regulation, which introduces parallelly existing copyright for the database author and a *sui generis*, in its essence - related right in favour of investors in the database production process. It is established that the sole purpose of creating the press publishers' right is to receive licensing revenue from online search engines and news generators. At the same time, however, this new tool creates a significant risk of monopolising the distribution of news, traditionally explicitly exempted from copyright protection.

Next, Chapter V explores in depth the issue of (ii) the addressees of the new law. It concludes that by defining “online rights” as rights necessary for the provision of “online services”, the EU legislator again resorts to circular reasoning. It is submitted that all acts of use necessary for the provision of an online service would fall within the scope of online use, therefore the limitation to online use in Article 15 is redundant and the relevant criterion for determining the scope of the right, in view of the manner of regulated use, is its addressees. It is noted that such a criterion outlining the scope of the right has not been applied in the two previous attempts to regulate the right in favour of news publishers at national level, in Spain and Germany[16] .

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[16] The restriction of the relevant German legislative instrument is for commercial use only. See Section 87f (1) of the German Copyright Act - Urheberrechtsgesetz (UrhG). The Spanish solution is a specific modification of the national quotation exception.

A thorough analysis of the term *Information Society Service Providers* (ISSPs) leads to the conclusion that the norm of Article 15 covers more stakeholders than its original purpose. In particular, *ISSPs* may include media service providers themselves, including online newspapers, news portals and individual website operators, and in some cases independent journalists.[17] . It is argued that, despite the narrative that the new law protects the interests of content providers, and more specifically journalists, against large US technology companies, in reality it restricts, *inter alia,* the use of press publications among news providers themselves. In this sense, *de lege lata* commercial news providers and users of press publications belong to the same category of interested parties when it comes to the addressees of Article 15.

These two groups of market participants are also *beneficiaries of* various specific exceptions to copyright law regarding the free re-use of articles and other material of a journalistic and informative nature. From the perspective of the addressees of the new right, the conflict with traditional mechanisms guaranteeing free use of protected subject matter in the public interest, such as the grandfathered information exceptions under Directive 2001/29/EC, is examined.

In addition, it is reasonably concluded that insofar as the beneficiaries of the two information exceptions are often the "mass media", news aggregators and, *de lege ferenda* social networks and online sharing platforms should also fall into this category. In this sense, there is an even greater overlap between the range of addressees of Article 15 and that of the beneficiaries of the informatory exceptions. It is therefore submitted that these flexibilities may become an arena of clash of interests for significantly more consolidated and economically significant players. As a consequence, the chaotic application of the exceptions may further distort the media landscape and create additional legal uncertainty.

The analysis of legacy exceptions, including at national level, also takes into account the case law of the CJEU in *Spiegel Online*[18], where the CJEU found that "reporting of current events" and, by analogy, the "press review" exception have "limited" economic

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[17] For a definition of "journalist" in several member states, see Czarny-Drożdżejko, E. (2020). *The Subject-Matter of Press Publishers' Related Rights Under Directive 2019/790 on Copyright and Related Rights in the Digital Single Market* (IIC 51, 2020) 624-641.

[18] Judgement of the Court of Justice of the European Union in Case C-516/17, *Spiegel Online GmbH* v *Volker Beck* [2019] EU:C:2019:625.

significance and do not merit full harmonisation. The study concludes that in mapping the application of national exceptions, particularly in the context of the new press publishers' right, account must be taken of the fact that some of the national instruments designed to maintain the balance between copyright and freedom of information may exist in conflict with the EU *acquis*.

3.5.2. De lege ferenda proposals

With regard to the existing Bulgarian press exceptions, it is proposed to extend the scope of the hypotheses of Article 24(5) and (6) of the CNRA so as to increase their effectiveness and bring them closer to the EU model clause.

Particular attention is drawn to the clarification of the mechanism for "reservation" of rights under item 5, in view of the contradictory jurisprudence in the application of the provision.

3.6. Effects on online user content

The final Chapter VI explores the instruments introduced by Directive (EU) 2019/790, their history, relationship with the legacy framework and practical application, in the context of freedom of information on online platforms hosting user content. In this part, the study focuses on the liability regime of online intermediaries introduced by Article 17 of the Directive. It outlines recommendations to improve the effectiveness of the relevant instruments within the national implementation process.

3.6.1. Theoretical conclusions

The chapter analyses the mechanism for holding online platforms liable for illegal content uploaded by their users. As a result of the detailed analysis of the highly controversial provisions of Article 17, a reasonable conclusion is drawn that the new provisions *lacks consistency* both at the legal-technical and conceptual level.

Additional factors complicating the controversial regime are considered, such as the fact that the EU institutions are unable to provide an authentic interpretation of the provision as formulated by themselves. An example of this is the European Commission's own lack of clarity as to what form of communication to the public is the one tackled by Article 17. In the European Commission's final consultation document of July 2020[19], the latter, referring to the text of Recital 64, states that Article 17 constitutes *lex specialis* in relation to Article 3 of Directive 2001/29/EC and Article 14 of Directive 2000/31/EC, and that Member States *will not be able to rely on either of these two earlier Directives in implementing the concepts of "authorisation" and "communication to the public"*. In the Commission's final guidelines on the implementation of Article 17, however, the institution takes the opposite view[20]. It is submitted that the interpretation currently required is that the addressees of the provision are

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[19] European Commission, (2020). *Targeted consultation addressed to the participants to the stakeholder dialogue on Article 17 of the Directive on Copyright in the Digital Single Market*. Available at: https://digital-strategy.ec.europa.eu/en/news/directive-copyright-digital-single-market-commission-seeks-views-participants-stakeholder-dialogue.

[20] European Commission, (4 June 2021) Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, COM(2021) 288 final.

carrying out acts of communication to the public and making available to the public under Article 3 of the 2001 Directive.[21]

As in the other chapters, this legal institution introduced by the Directive is analysed in the context of the exercise of the existing exceptions and limitations in favour of users. To this end, the mandatory exceptions introduced at the last stage of the legislative process in Article 17(7) are examined in detail. The purpose of these exceptions is to ensure the exercise of user rights within the mechanism. Although the attempt to introduce effective safeguards for civil rights and freedoms in Article 17 is welcomed, the lack of internal and external consistency of the regulation is again identified. This is because the legislator does not rely on an integrated approach to the application of the exceptions, but introduces a brand new regime of originally formulated exceptions that only apply to use in the context of user content uploaded to online platforms.

By examining the legislative technique used in introducing the two new special exceptions, it is reasonably concluded that they are mandatory and imperative in nature and are closest to the status of user rights. The exceptions for quotation and parody are considered in relation to the relevant pre-existing cases of permitted use.

3.6.2. De lege ferenda proposals

Chapter VI traces the use of the term "best efforts" in Bulgarian jurisprudence. It is found that said term is associated with the content embedded in the concept of *force majeure* under the provision of Article 306(2) of the Commercial Act. The term is also used in the context of the due diligence to be applied by the court when carrying out certain procedural acts, such as, for example, ascertaining the whereabouts of a person, ascertaining the circumstances of a case, for summons and personal examination.

It is criticised that in the draft law on amendment and supplementation of the Copyright and Neighbouring Rights Act for the transposition of Directive 2019/790, prepared by the Ministry of Culture, the key term concerning intermediary liability - *best efforts,* is replaced by the traditional term in Bulgarian law, the *care of a good trader.* The new

[21] The notion of public is fundamental both in EU legislation and in the case law of the CJEU. One of the most topical and most frequently addressed issues in the CJEU's interpretation of the basic concepts of "communication to the public" and "making available to the public" is precisely the meaning of the terms "public". On the doctrine of the "new public", see e.g. Cases C-306/05; C-607/11; C-466/12; C-348/13; C-160/15; C-610/15; -C174/15; C-263/18; C-753/18, etc.

regulation is contained in §7 of the draft Amendment to the CNRA, which introduces a new Article 22b into the law called "Use by online content sharing service providers". Accordingly, “due care of a good trader” is the standard of due care introduced in paragraph 5 of the new Article. In the course of drafting the text, the Working party with the Ministry of Culture considered that the term “best efforts” is more characteristic of the Anglo-Saxon precedent system, while “the care of a good trader” should be the preferred standard, as it represents a well-known formulation in our country and in continental law in general, including where case law is concerned. The dissertation concludes that the care of a good trader is a concept that has been developed for decades in national case law and has a certain content and an established interpretation in the Bulgarian context. On the contrary, *best efforts* under Directive 2019/790 is a new mechanism of EU law whose content is very specifically outlined in the Directive. The scope of the term is explained in detail in the Guidelines for the implementation of Article 17 of Directive 2019/790 issued by the European Commission[22] and it does not overlap with a general standard of due diligence in Bulgarian law, such as the due diligence of a good trader.

Further, it is found that no *procedure for the safeguard of exercise of the subjective right* of users under paragraph 10 of Article 22b has been developed in the proposal. It is considered that without such an addition there will be uncertainty for both the court and the users as to how exactly the latter can exercise their rights in a general court procedure. It is proposed that such a special procedure be provided for in Part III of the CNRA, which currently regulates in detail the remedies available to rightsholders in the event of infringement.

Furthermore, with regard to the exceptions introduced by paragraph 7 of Article 17, a recommendation is made to introduce them into Bulgarian law as general technology-neutral norms. It is noted that Bulgaria is one of the few EU Member States which has not yet transposed, at least partially, the exception for the purposes of caricature, parody or pastiche. The presumed reason for this is the fear expressed at the time of the introduction of Directive 2001/29/EC that the latter would be misused to justify copyright infringements. It is submitted that such an argument is not only invalid but dangerous insofar as it can be used in

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[22] European Commission, (4 June 2021) Communication from the Commission to the European Parliament and the Council, *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, COM(2021) 288 final.

relation to virtually any exception. It often comes out of the mouths of representatives of the rightsholders by inertia, but its uncritical replication by the academic community and especially by the legislator is a cause for concern.

The Ministry of Culture's request for a holistic and technology-neutral approach to the introduction of the parody exception in its entirety in the wording of Directive 2001/29/EC and without limiting its application to the mechanism of Article 17 is welcomed.

Attention is drawn to the pastiche exception, where there is an incompleteness and a slight discrepancy in the translation in the Bulgarian versions of the two Directives, as in Directive 2001/29 the French term *pastiche* is translated as "the imitation of another's literary work", and in the Bulgarian translation of Directive (EU) 2019/790 - as "imitation". The term "imitation" raised concerns among the representatives of the right holders in the course of transposing the text into Bulgarian law. The solution proposed by the Ministry of Culture to translate the term *pastiche* by the more descriptive but far more accurate term "imitation of the character or style of another work" is welcomed. In view of the CJEU's findings on parody, it is accepted that pastiche is more focused on imitation of one or more original works and need not have a critical or mocking purpose. It is concluded that this type of free use has yet to be developed, as some authors believe it has the potential to "accommodate" consumer remix[23] .

Finally, the addition of the exception for the incidental inclusion of a work or other subject matter in another subject matter in the general rule of Article 24 is taken into account.

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[23] See e.g. Senftleben, M. (2019). Bermuda Triangle-Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market. *Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market* (April 4, 2019). See also Senftleben, M. (2020). User generated content: towards a new use privilege in EU copyright law. In T. Aplin (ed). *Research Handbook on Intellectual Property and Digital Technologies*. Edward Elgar Publishing.

3.7. Conclusion

The conclusion of the dissertation contains a summary of the theoretical contributions of the dissertation and *de lege ferenda* proposals. It reports on the achievement of the tasks set in the introduction and the achievement of the stated objectives as a result of the study, to highlight the main contradictions in the new framework and to identify potential conflicts with the existing one - both at EU and national level; as well as to make recommendations for improving the legislative solutions, mainly in the direction of mitigating the adverse effects of some imperfect institutes in the context of the ongoing transposition in Bulgaria.

The dissertation concludes with a summary on the consistency and effectiveness of the EU copyright reform under study. The goal of the thesis is achieved by identifying the deficits both at the conceptual and at the technical level, both internal contradictions in the newly introduced institutes themselves and conflict with the existing sectoral legislation and the regulation of other legal branches.

4. Proving the research thesis. Conclusions

Directive (EU) 2019/790 is one of the EU acts that has attracted the most controversy in recent years. It is an expression of the EU legislator's desire to completely reform and modernise copyright law in the EU, as well as to harmonise the currently highly fragmented access to information and culture regime. Unfortunately, the reform carried out by the directive suffers from too many shortcomings, to the extent of calling into question the very meaning and logic of its existence.

- **lack of vision**

As a result of the study, it can be submitted, first of all, that one of the deficiencies of the copyright reform carried out at the EU level is the *lack of a consistent vision* regarding the objectives that this reform sets itself.

In view of the analysis of the existing European framework in the field of copyright and neighbouring rights, two main objectives can be identified that should be achieved in order to define such a legislative intervention as necessary and successful. Firstly, given the prevailing state of severe fragmentation of national rules, EU copyright law is in dire need of *harmonisation.* This need translates into the elevation of the creation of a digital single market to the top priority of EU policies and its repeated prominence as a key objective of reform in general. However, this objective clashes with the tendency to give Member States a great deal of freedom to maintain existing and amend new mechanisms[24] .

Secondly, I would identify as a key objective of the reform *improving balancing mechanisms* for competing fundamental rights and generally clarifying the dynamics between the interests of copyright holders and the public interest. This objective can be found in each of the three pillars of the Digital Single Market Strategy for Europe, namely ensuring *better access* for consumers and businesses to online goods and services in Europe, creating the right conditions for the successful *development of digital networks and services*, and maximising the *growth* potential of Europe's digital economy. In particular, under Directive (EU) 2019/790, this objective translates into the stated tasks of ensuring *broad accessibility*

[24] See e.g. recital 23 of Directive (EU) 2019/790.

to creative content across the EU, as well as ensuring *balance with other public policy objectives* in education, research and innovation. This second main objective clashes with the clear policy of the EU legislator to serve the interests of large rights holders in the creative industries. While the support of European culture is a worthy and important objective, in its concrete manifestations in the context of copyright law, the policy of guaranteeing a high level of protection of copyright and neighbouring rights leads to a continuous strengthening of the position of rightsholders vis-à-vis that of civil society in the exercise of fundamental human rights and compromises the scarce existing balancing mechanisms between copyright and the public interest.

The existence of conflicting objectives would not be a deficiency at all, if the reform proposed a toolkit for balancing and interacting between them and was clear about the expected effects of its implementation. This, however, is not the case.

- **lack of a strategy to achieve the set objectives**

Next, in every aspect of the reform, there is a lack of a strategic approach to designing modernised legislation.

Above all, what stands out vividly as a result of the present research is the fact that most of the legal institutions introduced as part of the reform have been introduced *ad hoc,* without a strategic plan and without any attempt to see the bigger picture. The prioritisation of political and economic objectives has led to the abandonment of well-established copyright doctrines and to unpredictable, contradictory results in the definition of fundamental issues such as the limits of exclusive rights, their balance with other private and public interests and the scope of freedom of contract in this context.

In addition, many of the newly introduced mechanisms are essentially *facultative*. The EU legislator gives the impression that it is not in a position to introduce binding rules for all. It is a reluctant balancer of different private interests - those of Member States and/or powerful industries.

As part of this deficiency, the apparent *lack of economic and legal justification* for the substance of the newly introduced mechanisms should be highlighted. Neither the new news

publishers' right under Article 15, nor the intermediary liability mechanism under Article 17, are designed on the basis of evidence and strategic objectives.

- **inconsistent use of basic legal instruments**

At the next level, the reform suffers from the flaw of inconsistent and incoherent use of traditional legal institutions.

Particularly painful is this lack of coherence with regard to the *exceptions to copyright*, each of which is regulated in the Directive by a different legislative technique. There is no shortage of initiatives at the European, and indeed global, level that aim to systematise and conceptualise the tools for balancing countervailing rights, and in particular, exceptions and limitations to copyright. The task of developing a proposal for a global approach to exceptions was initiated as early as 2008 by Professors Hugenholtz and Okediji in the framework of an IViR project. They propose a new *International Instrument on Exceptions* to coordinate, harmonise and balance the heightened (and new) standards of protection set out in successive revisions of the Berne Convention, the TRIPS Agreement and the WIPO Internet Treaties[25]. Two years later, the academic community is proposing a draft *European Copyright Code* under the Wittem project[26], which includes an attempt to codify exceptions at European level. More recently, a group of renown copyright experts under the umbrella of the Max Planck Institute have developed a draft of the so-called *International Permitted Uses Instrument* to codify exceptions at the global level[27]. Experience has shown that these expert elaborations have little, if any, weight in standard-setting at EU level.

Another example of the inconsistent use of legal instruments in the framework of the reform is the regulation of *imperative and dispositive norms* and, in particular, the fact that certain provisions are proclaimed as mandatory, while providing that their effect may be revoked not simply upon contractual override, but upon the existence of *an offer* to grant a license - a concept contrary to both the explicit interpretative case law of the CJEU and the general principles of legal certainty and autonomy of will.

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[25] Hugenholtz, P.B. Conceiving an International Instrument on Limitations and Exceptions to Copyright. Study supported by the Open Society Institute (OSI), Amsterdam Law School Research Paper No. 2012-43, Institute for Information Law Research Paper No. 2012-37, Available at http://dx.doi.org/10.2139/ssrn.2017629.

[26] Wittem Group (2010). European Copyright Code. Available at: www.copyrightcode.eu

[27] Hilty, R., Köklü, K., Moscon, V., Correa, C.M., Dusollier, S., Geiger, C., Xalabarder, R.. et al. (2021). International Instrument on Permitted Uses in Copyright Law and Explanatory Notes. *Max Planck Institute for Innovation & Competition Research Paper*, (21-06).

A further example in this direction is the strange *mechanical amalgam* of legal instruments, used in jurisdictions with different legal traditions, introduced for the purpose of the use of out-of-commerce works.

There is a conceptual deficiency in many respects in both of the new mechanisms for compensating rightsholders for the online use of content by big platforms. Both instruments under Article 15 and Article 17 have a problem with the precise definition of their addressees. The new neighbouring right for press publishers is for the first time in the history of intellectual property limited to certain addressees rather than operating *erga omnes*. In addition, Article 17 introduces such a *vague concept of communication to the public* made directly by intermediaries that it remains debatable whether it overlaps with the same concept enshrined under the *InfoSoc* Directive.

- **non-compliance with the existing regime**

At a further level, there is a serious deficiency in terms of positioning the new legislation in context.

The Directive uses well-established legal institutions in a completely unprincipled way. As an example in this respect, one can again point to the regulation of intermediary liability, which is at odds with the accumulated case law of the CJEU on the issue of the new public and which introduces an “innovative” and too chaotic system of fictions to justify the attempt to achieve a certain economic result.

The new legislation also flagrantly violates well-established principles. It contravenes the existing prohibition in EU law on *general monitoring* of user content, and ignores the right to effective legal remedies in relation to the lack of a viable route for the exercise of users' fundamental rights, etc.

The reform does not take into account a number of specificities of *the existing legislation* - e.g. the already existing regulation of certain *exceptions* or the already existing *protection of journalistic publications*. The Directive creates new rules without regard to how they will be applied in conjunction with legacy ones with partially overlapping subject matter.

In addition, the new legislative solutions do not take adequate account of existing *policies* at EU level, such as targeted support for open access, continuing and other forms of non-formal education, etc.

- **abdication of the EU institutions from their law-making powers**

It is submitted that the amount of delegation that the Directive effectively makes to national jurisdictions is worrying. The EU legislator is transferring to the Member States the obligation *to specify a number of concepts* on which there was no consensus when the Directive was adopted or which were introduced at the last moment of the legislative process, including terms fundamental for the purposes of the digital single market such as "sufficiently representative organisations" under Article 8 or "very short extracts" under Article 15. In the framework of the implementation process, it is evident that Member States have taken the opportunity to be creative and regulate these concepts in radically different ways.

Other examples of bad legislation in this respect are the compromising of *"mandatory" exception* and the formal, meaningless *collision rules* in Article 24 of the Directive.

Particularly indicative of this trend is the Union's approach to specifying the Article 17 mechanism. In the first place, the Commission has been entrusted with clarifying the application of this chaotic amalgam of contradictory rules. Accordingly, the Commission's delay of almost a year between the publication of the preliminary recommendations on the transposition of Article 17 into Member States' national law, drawn up as a result of the stakeholder dialogues, and the issue of the final recommendations is, I would say, scandalous. This approach has left a distinct impression of chicanery, as well as that the Commission has waited for the deadline for the transposition of the directive to expire, hoping that Member States would implement the provisions of Article 17 *verbatim*.

- **the rather negative effect of the new regulation with regard to its practical application**

Given the *ad hoc* approach of the reform, it could be expected that, despite the lack of conceptual consistency and despite the use of a not very elegant legislative technique, the

introduced innovations would at least provide practical solutions to pressing problems to the functioning of the single market. Unfortunately, the potential practical effect of the directive does not appear to be good either.

At the level of practical application, the fragmentation of the regime of exceptions and limitations is expected to worsen. Article 5 of the Directive not only introduces possibilities to derogate to different extents, but even encourages Member States to introduce different hard criteria as to the scope of the relevant national exception, e.g. as to the volume of use. In the case of Article 6, even the regulation of this absolute existential minimum for the activities of cultural heritage institutions is not in the position to set a uniform minimum protection to reproduction for the purposes of preserving cultural heritage, but conditions further fragmentation because it is introduced in parallel with an already existing similar mechanism.

The reform is also expected to have the effect of further compromising the balancing exercise when striking a fair balance between the interests of rightsholders and the public interest. A particularly glaring example is the failure to reconcile the competing rights of authors and users and the corresponding competing obligations of intermediaries as per Article 17.

As a result of the study, it can be concluded that currently problematic legislative solutions build in a particularly malignant way on the already existing unfocused system of reconciling copyright with a number of fundamental human rights. In a process led by a set of uncoordinated forces, EU copyright law is being developed without coherent principles and dogmas, and with no real intention of building a coherent system. It can be reasonably concluded that the copyright reform will not achieve the objectives thus summarised of (i) harmonising copyright across the Union and (ii) clarifying mechanisms for balancing competing rights. On the contrary, the likely overall effect of the reform is (i) further fragmentation of the legal framework, with consequent increased legal uncertainty, and (ii) worsened conditions for conducting a balancing exercise in the context of competition between copyright and the public interest.

5. Scientific contributions of the thesis

- Introducing an original system for the assessment of the strength and stability of copyright exceptions under the EU *acqui* under four factors.
- Systematising copyright exceptions at EU level with a view to their ideological/political justification.
- Demonstrating the irrelevance of the criterion of the "impact" of the exceptions on the smooth functioning of the internal market as a basis for their degree of harmonisation, respectively as an indication of their strength and stability.
- Identifying specific deficiencies of the copyright reform at EU level in terms of its conceptual, technical, internal and external coherence.
- Identifying risks in the application of the new legislation in the light of the existing EU and national law and in the light of the application of legal institutions from other branches of law.
- Suggestions for establishing relevant terminology.
- Proposals *de lege ferenda* for optimal transposition of the investigated legal institutions in Directive (EU) 2019/790 into Bulgarian law and improvement of the current legislation.
- Suggestions for the practical application of a hitherto neglected case law of the CJEU.

6. List of publications on the topic of the dissertation

Publications in Bulgarian (in alphabetical order):

1. Lazarova, A., (2021). Book-like, broadcast-like, like nothing at all in the world. The legal nature of e-books. *BBIA online*, issue 1/2021, ISSN 1314-4944 (electronic edition), ISSN 1314-7285 (print edition);
2. Lazarova, A., (2022). Contractual override of copyright exceptions. *Contemporary Law*, issue 4/2021;
3. Lazarova, A., (2021). Control over online content - the intractable conflict. *Proceedings of the Sixth Joint Doctoral Conference on " The (im)possible European Union - Time of Solutions for the Common Future".* Sofia 2021, ISBN 978-619-7611-00-7;
4. Lazarova, A., (2020). Control over news dissemination: will the new right of press publishers limit freedom of information? *Proceedings of the Fifth Joint Doctoral Conference on The EU and the New Normal - From Social Isolation to Civic Awareness.* Sofia 2020, ISBN 978-619-7611-00-7;
5. Lazarova, A., (2021). EU copyright reform and the right to education. *Contemporary Law*, no. 2/2021, available at: https://www.ceeol.com/search/article-detail?id=999533;
6. Lazarova, A., (2020). The use of out-of-commerce works under the new Directive on Copyright in the Digital Single Market. *BBIA online,* issue 4/2020, ISSN 1314-4944 (electronic edition), ISSN 1314-7285 (print edition);

Publications in English (in alphabetical order):

7. Lazarova, A. (2022). Bulgaria falls into all the traps set by Article 5 of the CDSM Directive. *Journal of Intellectual Property Law & Practice, DSM Special Issue*, jpac029. Available at: https://doi.org/10.1093/jiplp/jpac029
    - (the manuscript is available under open access on the SSRN platform at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4071381);
8. Lazarova, A., Houang, A., Vézina, B., De Angelis, D., Jacques, S., Nobre, T., Simon, V. et al. (2021). Creative Commons Copyright Platform Working Group on User Rights' Position Paper. Creative Commons. Available at: https://medium.com/creative-commons-we-like-to-share/working-group-on-user-rights-position-paper-9c5e589f1c9b;
9. Lazarova, A., Margoni, T., Matas, A., Pearson, S., Reda, J., Vézina, B., Walsh, K. and Wyber, S. (2021). Creative Commons Statement on the Opt-Out Exception Regime / Rights Reservation Regime for Text and Data Mining under Article 4 of the EU Directive on Copyright in the Digital Single Market. Available at: https://creativecommons.org/wp-content/uploads/2021/12/CC-Statement-on-the-TDM-Exception-Art-4-DSM-Final.pdf;
10. Lazarova, A. (2021). Re-use the news: between the EU press publishers' right's addressees and the informatory exceptions' beneficiaries. *Journal of Intellectual Property Law & Practice,* Volume 16, Issue 3, March 2021, Pages 236-246, Available at: https://doi.org/10.1093/jiplp/jpab049
    - (the manuscript is available under open access on the SSRN platform at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4071438);

11. Lazarova, A. (2021). The EU Copyright Reform's great disservice to free use for educational purposes. Europeana Pro. Available at: https://pro.europeana.eu/post/the-eu-copyright-reform-s-great-disservice-to-free-use-for-educational-purposes;
12. Ozge Yildirim, E., Lazarova, A., Van Houweling, M., Houang, A., Wolfe, M., Vezina, B., Stihler, C. (2021). Freedom to Share: How the Law of Platform Liability Impacts Licensors and Users. Available at: https://zenodo.org/record/5837508#.Yg0zVpMzaRs.