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**HOW TO BALANCE INTERESTS:  
COMPARATIVE LEGAL ASPECTS  
ON THE LIMITATION OF  
COPYRIGHT IN INTERNATIONAL  
LAW**

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## **HOW TO BALANCE INTERESTS: COMPARATIVE LEGAL ASPECTS ON THE LIMITATION OF COPYRIGHT IN INTERNATIONAL LAW**

The present article is motivated by the growing interest in the problem of copyright limitation and the comparatively low interest in the problem of legal system connections. Despite the fact that differences in regulation have been recognised for a long period of time, there is still no harmonization in the field. Although recent research works are numerous, it is still not agreed whether common law family or continental law family is better for international use. The issue at hand is influenced by the significant importance of the internet and electronic commerce. Moreover, it addresses the more fundamental question of the division of legal systems. This paper analyses both approaches; shows doctrinal differences in copyright limitation principles; reveals the connection between regulatory frames and existing legal systems; describes the current and potential pitfalls of framework clashes; and identifies modern global legal trends. The findings demonstrate the dependence of recent legal decisions and norms on the philosophical approach applied in a country. In addition, the paper suggests different steps and models of regulatory unification. The theoretical contribution of the work can help the development of new copyright limitation schemes and harmonize international law on this issue.

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Keywords: copyright, copyright limitation, common law family, continental law, intellectual property, intellectual rights, “open” regime, “close” regime.

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## INTRODUCTION

The technological environment makes the ease of data sharing so obvious that space, time and language differences are no longer significant. As a result many artistic works such as movies, music and books, do not depend so much on the language of their target audience. Moreover, because of the digital technology's ability to store and transmit huge amounts of information, a great number of the copyrighted works are available all over the globe simultaneously in several languages.

Such availability of data has prompted various discussions and studies among lawyers<sup>2</sup>. It would be reasonable to say that authors and rights holders suffer some economic losses because of the wide and uncontrolled availability of their works<sup>3</sup>. Moreover, they have a strong interest in protecting their moral rights, which often cannot be transferred into financial value.

Authors, in the widest sense, have exclusive rights under intellectual property legislation mostly as reward and stimulation. The creators of intellectual property items presumably want to commercialize their rights in different ways. Some of them use their ideas in business in order to make products. Others gain money from licensing their creations. While another group of owners can simply sell the rights or copies of their work. However, limitations and exceptions limit their ability to gain as much profit as they are entitled to. That is why authors often seek an exclusive monopoly for their creations.

In order to create a stable balance between the interests of intellectual property rights holders and users of protected works, copyright laws and regulations allow certain limitations on economic rights. In other words, protected works are sometimes used without the authorization of the rights holder and without compensation provided the users do not commit any infringements. To examine the exceptions to copyright, one needs to determine the edges of literary and artistic property and the basic theoretical (even philosophical) issues. Technical development and the expansion of the internet in size and power has created a new object of transboundary usage study<sup>4</sup>. All these issues complicate the research process.

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<sup>2</sup> For example: Determann, L. Importing Software and Copyright Law. *The Computer & Internet Lawyer*, 2013, 30(5); Depoorter, Ben. Technology and uncertainty: the shaping effect on copyright law. *University of Pennsylvania Law Review*. Jun2009, Vol. 157 Issue 6; Kalyatin V. Legislation on intellectual property: development dynamics// *Legal insight*. 2012. № 10; Yoo C. Law and Technology: Toward a Closer Integration of Law and Computer Science. *Communications of the ACM*. Jan2014, Vol. 57 Issue 1.

<sup>3</sup> Braouezec Y. Customer-class pricing, parallel trade and the optimal number of market segments. *International Journal of Industrial Organization* 30 (2012) 605–614

<sup>4</sup> Sirinelli P. Exceptions and limits to copyright and neighboring rights. *Workshop on implementation issues of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, 1992

The word “exception” itself covers legislative decisions that remove certain original works from the owner’s monopoly. Despite the large coverage of copyright protection, there are still many cases when copyright is not applied because of the limitation rules. For instance, under the general rules, facts, ideas, functional works, news, official documents and speeches are not copyrightable. The question of balancing interests is in the number of clauses and conditions on the free use of a copyrighted work (concerning both moral and property rights).

There are some well-known and widely used theories that split the legal community into separate parts and schools. The ‘first sale doctrine’ (exhaustion doctrine<sup>5</sup>) limits owner control of the secondary market. The USA and EU are clear examples of legal families and they take different approaches to this topic. The doctrine of fair use allows some uses for specific purposes. These purposes, and the list of such limitation clauses, also indicate comparative information on the question. There are many recent studies<sup>6</sup> concentrated on the limitation rules of particular legal families, but considerably less attention<sup>7</sup> has been paid to the comparison of limitation regulation in legal families.

Such limitations and exceptions to copyright and related rights differ from country to country because of the various objective conditions. Existing international treaties recognize such varying regulation and therefore provide only general recommendations and regulatory frames. They let the countries determine certain issues of national implementation themselves. There are three major multilateral agreements containing general rules: Berne Convention, WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. The Berne Convention established three conditions for the exception to the exclusive owner

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<sup>5</sup> Vile, John R. *Bobbs-Merrill Co. v. Straus* (1908). *Encyclopedia of the First Amendment*. 2009, v. 1

<sup>6</sup> For European studies, see: Cook, T. *Exceptions and limitations in European union copyright law*. *Journal of Intellectual Property Rights*. (Journal of Intellectual Property Rights, May 2012, 17(3); Madeleine De Cock Buning, Lucky Belder, Roeland De Bruin. *Research Exceptions in EU Copyright Law*. *European Review of Private Law*; 2012, Vol. 20 Issue 4, p933-960.; Mazziotti, Giuseppe. *The legal treatment of copyright exceptions under secondary EU law*. *EU Digital Copyright Law & the End-User*; 2008, p77-109, 33p.; Special Libraries Association. *European states urged to discuss copyright exceptions*. *Information Outlook*. May-June, 2014, Vol. 18 Issue 3. For Common law studies, see: *Copyright Act of 1976 -- First Sale Doctrine -- Kirtsaeng v. John Wiley & Sons, Inc.* *Harvard Law Review*. Nov2013, Vol. 127 Issue 1, p348-357. 10p.; Dennis, Johanna K.P. *What's mine is mine and what's yours is mine too: Converging U.S. intellectual property exhaustion doctrines*. *Computer Law & Security Review: The International Journal of Technology Law and Practice* February 2014 30(1):55-66.; McIntyre, Stephen. *Game over for first sale*. *Berkeley Technology Law Journal*. Spring2014, Vol. 29 Issue 1, p1-60. 60p.;

<sup>7</sup> Such studies examined certain examples of limitations and exceptions in particular countries, not the general concepts of legal families. For example, see: Christophe Geiger, Daniel Gervais, Martin Senftleben. *The Three-step test revisited: how to use the test’s flexibility in national copyright law*. *American University International Law Review*. 2014, Vol. 29 Issue 3, p581-626. 46p.; Davies, Philippa. *Access v Contract: Competing Freedoms in the Context of Copyright Limitations and Exceptions for Libraries*. *European Intellectual Property Review*; 2013, Vol. 35 Issue 7, p402-414, 13p.; Papadopoulou, Maria Daphne. *Copyright limitations and exceptions in an e-education environment*. *European Journal of Law and Technology*. May 2010, Vol. 1 Issue 2.

rights. These conditions are known as the “three-stage test”, which is believed to be the most common criteria and is used in many other treaties<sup>8</sup>.

There are several ways to limit owner copyright that can theoretically be used. Here are some of them, taken from different documents and regulations:

- 1) Private copies;
- 2) Public use;
- 3) Quotation;
- 4) Teaching purposes;
- 5) Libraries and archives;
- 6) Disabled persons;
- 7) Exhaustion doctrine (first-sale doctrine);
- 8) Freedom of speech;
- 9) User rights such as fair dealing.

The diversity of limitation opportunities is obvious and rather large. Different lists and principles are implicated in the range of international documents and national legislation. One of the primary factors affecting this legal phenomenon is the legal effect of the roles of the author or rights holder and users in society. The middle ground comes from the history of a legal system and determines its modern condition.

Moreover, the internet brings different legal systems close and mixes them, which necessitates building bridges between separate legal systems of countries and communities (mainly civil law-common law).

It is necessary to investigate the historical background of the main legal families and the countries representing them to demonstrate modern trends in the intellectual property movement and to forecast copyright limitation issues. Concerning possible solutions, it seems the best way to unify international rules is to state the main point of author protection at an international treaty level and to change existing doctrinal principles of legal systems in favour of creating harmonized regulation.

The purpose of this paper, therefore, is to investigate the relationship between rights owners and the limitations imposed on their rights by the doctrinal ideas and legislation of different legal systems. This paper will focus on some fundamental and practical differences

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<sup>8</sup> See, for example, Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement); EU Directive on the legal protection of databases; Directive on the harmonisation of certain aspects of copyright and related rights in the information society (EU Copyright Directive)

existing between regulation on copyright limitation in an “open system regime” of Common law (using United States law as an example) and a “closed system regime” of Romano-Germanic law (using the legislation of the European Union). Furthermore, supranational law regulating copyright limitations will be an example of the influence the legal families have nowadays. Some findings on recent international implementation and potential paths for international unification are suggested.

The paper is divided into several parts. Firstly, I will show doctrinal and historical differences between legal systems. Then, next part will demonstrate modern approaches and legal trends coming from discussed background. Finally, conclusion will present the summary and main findings of the work.

## **1. LIMITATION ON COPYRIGHTS IN LEGAL DOCTRINE**

Intellectual property as a whole system and, particularly, the concept of copyright appeared to protect the interests of right holders. Copyright is a monopoly, which legally belongs to the author, or rights holder. The presence of such a monopoly encourages the creative and innovative progress, science and education, because third parties have only limited opportunities to use protected works<sup>9</sup>. Such limited access works in two directions: authors are stimulated with the protection granted, while third parties have to create something brand new in the market. The theory of copyright limitations exists primarily to meet the interests and needs of society in access to knowledge.

In modern law copyright includes property (exclusive) and the author's moral rights<sup>10</sup>. Exclusive rights are the right of the reproduction and the right of distribution. As a rule, the greatest number of legal disputes<sup>11</sup>, and, accordingly, normative and doctrinal developments arise in the area of author's exclusive rights. Apart from national particularities, moral rights usually include the right of authorship and the right to protect the work from alteration and distortion that can harm the honour or reputation of the author<sup>12</sup>. It would be reasonable to say that moral rights are currently a more complex and undeveloped doctrinal problem. In

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<sup>9</sup> Sudarikov S.A. intellectual property rights: a textbook. - Moscow: Prospekt, 2014. - P.34

<sup>10</sup> The fact moral rights protection is recognized widely by modern law arises from the protections contained in Article 6bis of the Berne Convention. See, Landau, Michael. Copyrights, moral rights, and the end of the right of attribution under US trademark law. *International Review of Law, Computers & Technology*. Mar2005, Vol. 19 Issue 1, p37-64, P. 38.;

<sup>11</sup> See, for example: Copyright Act of 1976 -- First Sale Doctrine -- *Kirtsaeng v. John Wiley & Sons, Inc.* *Harvard Law Review*, supra 6.; Leistner, Matthias. Europe's copyright law decade: recent case law of the European Court of Justice and policy perspectives. *Common Market Law Review*; Apr2014, Vol. 51 Issue 2, p559-600, 42p.; Margaret Esquenet, John F. Hornick, Brian R. Westley. Seven cases changing copyright protection in the US. *Managing Intellectual Property*. Oct2013, Issue 235.

<sup>12</sup> Berne Convention for the Protection of Literary and Artistic Works, article 6bis

some legal systems moral rights are historically insufficiently protected<sup>13</sup>, restrictions and limitations imposed on legally fixed moral rights are not described<sup>14</sup>.

General practice is that copyright restrictions are divided into sub-categories depending on various criteria. For instance, restrictions on the exclusive rights involve property relations, therefore, include examples of unpaid free use and examples of compensated free use of a work. However, in order to analyse the current position of the theory of copyright limitations in Romano-Germanic law, it is necessary to turn to its historical background.

The principal distinction between civil law and common law families regarding limitation of copyright lies in the understanding of copyright nature.

### **1.1. Limitation of copyright in the legal doctrine of civil law countries**

The theoretical division of intellectual rights is rooted in the theory of natural rights, which recognizes the right of the author of a work as integral and inseparable from the personality of the author<sup>15</sup>. However, this concept has evolved over a long period of time, and the philosophical development has created new categories that are implemented in the doctrine and basic ideas of each legal system. Modern continental theory is composed of ideas, descending from the works of Hegel and Kant on the problems of property<sup>16</sup>.

In the context of Hegelians and Kantians, private property appears due to the resort of individual work on an object and, what is more important, individual will. Consequently, a thing becomes a reflection of the individual traits of the author, but after the alienation of such an object, the subject is no longer bound to their personal will. However, only such objects, which are exteriorly for the subject, can be alienated. At the same time, the objects that make up the “essence of the identity of an author”, are inalienable. This identity includes moral values such as the personality of the subject (in the modern interpretation, they are an author or copyright holder), free will, moral and cultural beliefs. Accordingly, the

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<sup>13</sup> For example, in the US moral rights recognition still causes lively discussions among scholars of utilitarian and deontological theories. See, Fromer, Jeanne C. Expressive Incentives in Intellectual Property. Virginia Law Review. Dec2012, Vol. 98 Issue 8, p1745-1824.

<sup>14</sup> In the USA, Visual Artists Rights Act of 1990 was the first federal copyrights legislation act protecting moral rights. Before that year, only fragmentary state norms had existed.

<sup>15</sup> Popov R. Legal regulation on exhaustion of exclusive rights an parallel import in Russia and abroad // Law and economics, 2012, N 2.

<sup>16</sup> Volfson V. Moral (personal non-property) rights of an author and their scope in the common law countries and the countries of continental system: dissertation on fulfillment of PhD degree, Saint-Petersburg, 2006

dependence of an object on a subject is the cornerstone for dividing all the exclusive and moral rights in the doctrine of the Romano-Germanic system of law.

Kant's interpretation of copyright as a personal and inalienable right emerged in the late 19<sup>th</sup> century legal school which recognized the author's authority to allow the use of his work, but prohibited the assignment or full waiver of the work<sup>17</sup>. The philosophical idea of Kant, as embodied in the advanced theories of Gareis and Ulmer, eventually became the basis for German copyright law<sup>18</sup>. Currently, Germany has a monistic system, under which copyright is treated as a single right where personal non-property and exclusive property rights represent the inseparable unity<sup>19</sup>.

The basis for the legislation of France, which has a dualistic system, consisting of the philosophical ideas of Hegel, which are expressed in the works of Kohler<sup>20</sup>, who recognizes the author's authority to dispose his product rights. However, there is a provision on inalienability due to the subject personality author rights<sup>21</sup>. This model of copyright was based on the rigid distinction between economic and moral rights. According to this theory, the product after being created is separated from the author and becomes an object of property turnover.

According to Kohler, the author has personal rights, which were called individual. This right to the work is justified mainly due to its historical origin. However, the independent property nature of the copyrighted object defines the nature of the property rights. These objects, consequently, are treated as the intangible objects of turnover. Copyrights gain their transferability and alienability from the author<sup>22</sup>. This theory gives birth to the copyright dualism: some rights reflect the property interest regarding intangible objects and works; others lie beyond the limits of copyright as purely non-material, which can survive its creator by many years<sup>23</sup>. This classification still exists in the positive law of France<sup>24</sup>.

It will be reasonable to say that in the frames of the Romano-Germanic family, French law and German law themselves are clearly different. However, despite the differences and

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<sup>17</sup> Andreeva E. Kant's philosophical views on copyright // Bulletin of Sevastopol national technical University, 2008, N86

<sup>18</sup> Russell J. DaSilva, Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States, 28 // Bull. copyright society, U.S.A. 1, 2 (1980)

<sup>19</sup> Ulmer E. Urheber- und Verlagsrecht. 3 Aufl. 1980. S. 116

<sup>20</sup> Franz Bernhöft, Josef Kohler, Grazhdanskoe pravo Germanii. Perevod s niemetskago B.M. Bramsona pod redaktsiei V.M. Nechaeva. S.-Peterburg : Senatskaya tipografiia, 1910.

<sup>21</sup> Kashanin A. Evolution of views on correlation of personal non-property and property author rights in the copyright doctrine // Russian laws: experience, analysis, and practice. 2010, N7. P. 88-99

<sup>22</sup> Kashanin. Op. cit.

<sup>23</sup> Kheifets I. Copyright. Moscow, 1931. P.103

<sup>24</sup> TITLE II – Authors' rights, aw on the Intellectual Property Code (Legislative Part) (No. 92-597 of July 1, 1992, as last amended by Laws Nos. 94-361 of May 10, 1994, and 95-4 of January 3, 1995)

doctrinal contradictions between these national systems, they are closer to each other than to the common law countries which have an economically oriented system. Moreover, the harmonisation of European Intellectual Property law lets us speak about the Roman law family as a whole without dividing it into separate legal systems. Globalization in economy, politics and law brought together European legal systems with the principles of a dualistic intellectual property system, based on the French model.

In civil law systems, a “closed” regime of copyright limitation is commonly used. The main principles are a clear fixation of all the circumstances and conditions for limiting a normative legal act<sup>25</sup>. This approach can be found in the existing legal acts of France, Belgium and Spain<sup>26</sup>. Generally, the scope of copyright is extensive and favourable to the author or copyright owner. On the other hand, the list of limitations that users can apply is restrictive.

There are issues with such a regime, and recently common law methods have been used in exceptional cases. However, the countries of the Romano-Germanic law family have not changed their approach in the regulation of copyright limitations. Further, exceptions from the general principle did not change the whole mechanism of copyright limitations. Therefore, the main way to overcome the difficulties of enforcement is to develop new grounds for the limitation of copyright and to amend existing instruments by expanding the “closed regime” list.

## **1.2. Limitation of copyright in the legal doctrine of common law countries**

In common law systems, in contrast to the countries of the continental legal family, copyright is seen as a tool for the protection of a work which is recognized as a product and a method of investment. This understanding was firstly reflected in the Statute of Anne 1710<sup>27</sup>, which established a fourteen-year term of copyright protection of a text (i.e. the right to copy the text using a printing press). The same document contained the initial outlines of the limitations on copyright. The right owner was obliged to send some copies of the work to the libraries.

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<sup>25</sup> Sirinelli P. Op. cit. p. 17

<sup>26</sup> French Intellectual Property Code of 1992, article L122-5 [Mode of access: <http://www.wipo.int/wipolex/en/details.jsp?id=14082>]; Consolidated text of the Law on Intellectual Property, regularizing, clarifying and harmonizing the Applicable Statutory Provisions of 1996, title III, chapter 2 [Mode of access: [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=126704](http://www.wipo.int/wipolex/en/text.jsp?file_id=126704)]

<sup>27</sup> An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned (Copyright Act 1709) [Mode of access: <http://www.copyrighthistory.com/anne.html>]

Later, this approach was adopted in US law. Paragraph 8 of section 8 of article 1 of the US Constitution gives Congress the power “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”. We can conclude that US copyright has a positivist nature and recognizes legislation, not natural legal doctrine, as the primary source of regulation. Here the balance of the interests of the parties is in the hands of the legislators, to stimulate the development of culture, art, science and education by means of copyright.

The legal technique of copyright regulation also differs from the Romano-Germanic law system<sup>28</sup>. For example, common law does not provide the author with wide exclusive rights to the object of intellectual property. The common mechanism is to specify only a comprehensive list of exclusive authorities of the author<sup>29</sup>.

The importance of investment protection was reflected in the subjects of copyright. As an investor may be both a physical and legal entity, U.S. law provides companies with the opportunity to be equal copyright owner from the moment of creation of a work<sup>30</sup>. Moreover, because of the economic orientation of legislative protection, the protection of the author’s personal non-property rights did not have sufficient protection<sup>31</sup>. Logically, an object of intellectual property in common law is similar to other material goods. It does not have any connection with the intellectual development of a personality. That is why neither doctrine, nor statutes and cases contained personal non-property rights of the author appeared until the end of the 20<sup>th</sup> century.

The economic approach to balancing the interests of copyright holders and public interest has formed a distinctive doctrinal and normative system of copyright limitation. Accordingly, less attention is paid to the moral rights of the author; property rights are not wide, but consist of a number of strictly fixed competences; a harmonious balance between the interests of the public and the protection of the rights holder is achieved by using general provisions.

The application these general provisions puts USA to the “open” regime of copyright limitations<sup>32</sup>. Countries of the common law system usually appeal to the general principle of

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<sup>28</sup> Radin M.J. Copyright defection // *Industrial and corporate Change*, Vol. 15, Number 6 p. 981

<sup>29</sup> § 106, An Act for the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes // Public Law: Pub. L. 94-553 [Mode of access: <http://www.copyright.gov/title17/circ92.pdf>]

<sup>30</sup> Epstein R. A., Ben-Shahar O., Masur J.S. The licensing of intellectual property // *The University of Chicago Law Review*, 2011. Vol. 78, № 1.

<sup>31</sup> Roeder, Martin A. The Doctrine of Moral Right : A study in the law of artists, authors and creators. 53 *Harv. L. Rev.* 554. 1940

<sup>32</sup> Sirinelli P. Op. cit

copyright limitation. In the US, Israel and Canada, for example, doctrine of “fair use” is seen as such a provision<sup>33</sup>. In the UK and Australia, this provision is called “fair dealing”<sup>34</sup>.

The approach used in common law countries is less precise and specific than an exhaustive list of copyright limitations. However, this system is more flexible and can adapt to rapidly changing economic realities and legal norms.

## 2. LEGISLATIVE PRINCIPLES OF COPYRIGHT LIMITATION

A historical prospective shows that the majority of countries in some measure follow one of the two main theoretical movements in law—common law and continental law. As discussed, common law countries such as UK, US, Australia, use an economic basis for copyright and copyright limitation<sup>35</sup>. That is why even moral rights are understood as parts of the property rights, similarly to dealing with tangible rights<sup>36</sup>. Civil law systems, in their origins recognize the strong personal connection between an author and their work, so copyright has a more individualized meaning.

### 2.1. Modern international implementation

There are two main ways to establish cross-border rules in the regulation of international copyright limitation. They come from different theoretical angles and the different origins of copyright itself. They imply opposite ways of setting the rules: strict enumeration of possible limitation versus general rules which can be interpreted by both courts and users. Both of these principles can be found in modern regulations.

To start with, international treaties and organizations are often discussed as a major source of law<sup>37</sup>. They set only very general rules and let the countries make their own laws. For example, the “Berne Convention or the Protection of Literary and Artistic Works” imposes general recommendations for the countries. Article 2, (2) says:

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<sup>33</sup> § 107, The Copyright Act of the USA. Op. cit; Section 19, Copyright Act of Israel, 2007; Section 29, Canada Copyright Act (R.S.C., 1985, c. C-42)

<sup>34</sup> Sections 29 and 30 of the Copyright, Designs and Patents Act 1988 [Mode of access: <http://www.legislation.gov.uk/ukpga/1988/48/contents>]; Sections 40, 41, 41A of Australia Copyright Act 1968 (consolidated as of 24 June 2014)

<sup>35</sup> Kulagin U. Limitation of subjective copyrights in the legislation of Russia and some foreign countries: dissertation on fulfillment of PhD degree, Moscow, 2010.

<sup>36</sup> Volfson, Op. cit.

<sup>37</sup> Standing Committee on Copyright and Related Rights. Report on the Questionnaire on Limitations and Exceptions, 2010 N 21/7 [Mode of access: [http://www.wipo.int/copyright/en/limitations/questionnaire\\_01\\_10.html](http://www.wipo.int/copyright/en/limitations/questionnaire_01_10.html)]; Lanning G. Bryer, Angela Lam, Lorena Mersan. Protecting Trademarks and Copyrights Internationally--Part I. Licensing Journal. May2014, Vol. 34 Issue 5, p1-9. P. 2

“It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form”.

Such possibilities for national legislation appear in other parts of the document. Usually these clauses are minimum warranties and are put to raise the standard of regulation and to take into consideration important national and regional peculiarities. However, sometimes countries use such open wording to make such standards lower<sup>38</sup>. As international regulation is seldom specific and strict, national regulation is supported by some scholars as more detailed and suitable for practical implementation<sup>39</sup>.

On the other hand, there is international regulation enumerating certain cases of copyright limitation and holding it close to changes by the participating parties<sup>40</sup>. The EU Directive is obligatory only for the members of the European Union, and is not a universal international document itself. However, though many countries are not bounded by EU Directives, they still reproduce the norms of these documents in their national legislation as a higher standard of legal theory and technique.

This approach is obviously less flexible and gives countries less freedom in creating national and regional rules suitable for them. It has become less popular and is not viewed as a possible solution to existing problems<sup>41</sup>.

It will be reasonable to say that the first approach is more suitable for the reality of modern international law. In the context of non-harmonized international regulation, this fits the need of both business and governments. It has the possibility to implement self-executive norms and to connect sometimes confronting legal systems. However, from the point of long-term development, it is more reasonable to create unified rules. Globalization is a major trend affecting the law and economy. It will bind all the existing legal systems and diminish those theoretical obstacles underlying the division between legal systems. This approach, even though it is not commonly used now, has more potential for future harmonization.

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<sup>38</sup> Declaration on the TRIPS agreement and public health, 2001 [Mode of access: [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm)]

<sup>39</sup> Even Y. Appropriability, property, innovation, antitrust – on the scope of property and intellectual property rights // A thesis ... with the requirements for the degree of DSL, Columbia University, 2009. p. 113

<sup>40</sup> For example, EU Copyright Directive, 2001. Op. cit.

<sup>41</sup> The Washington Declaration on Intellectual Property and the Public Interest, 2011 [Mode of access: <http://infojustice.org/washington-declaration-html>]

## 2.2. US legislative implementation

One of the main arguments for the national regulation of copyright limitation is based on how a country legislates and resolves disputes. The US is the largest player in the field of international intellectual property regulation and strongly defends the national interpretation of courts and contract parties as a means of flexible international regulation. Other common law countries generally adhere to the same idea. This approach suggests that countries having a long history of legal development and, therefore, very different systems of rules. Thus, the first sale doctrine from a historic perspective interprets the original intent of legislation<sup>42</sup>.

Moreover, common law countries often use court practice as a primary source of law while nowadays Roman law countries tend to refer to codifications and particular laws. This difference is so fundamental that cannot be overcome even in the era of unification and globalization<sup>43</sup>

Finally, the question dividing the countries on the basis of copyright limitation regimes is a question of a balance of interest. For example, in the United States it is a commonly used practice to discuss public benefit and balance of interests. Parties name all the factors worthy of consideration, and the judge decides the outcome for the society. Bearing in mind the general legal framework and policy, a court can apply an approach different from legislation in order to create a generally advantageous outcome<sup>44</sup>.

However, this pro-national approach does not seem to benefit electronic commerce, which is believed to be one of the most important instruments of the globalized economy<sup>45</sup>. First, the internet opens the borders for foreign businesses and start-ups. Therefore, that harsh separation of national regulation creates additional difficulties such as different rules on private use, exhaustion, copying, which potentially lead to disputes and court hearings. Second, because of the existing distinctions in regulation, sometimes sellers provide special terms and schemes for carrying out business in a particular region. This way, some segment-

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<sup>42</sup> *Kirtsaeng v. John Wiley & Sons, Inc.*, 2013 // US Lexis 2371 (Mar. 19, 2013) [Mode of access: [http://www.ca2.uscourts.gov/decisions/isysquery/5724f4fd-528f-4337-82df-9a388bb35579/3/doc/09-4896\\_complete\\_opn.pdf](http://www.ca2.uscourts.gov/decisions/isysquery/5724f4fd-528f-4337-82df-9a388bb35579/3/doc/09-4896_complete_opn.pdf)]; Chung-Lun Shen. Intellectual property rights and international free trade: new jurisprudence of international exhaustion doctrine under the traditional legal system. *Journal of International Commercial Law and Technology*. 7.3 (Summer 2012): p176.

<sup>43</sup> Determann, L. *Op. cit.*; David R. *Major legal systems in the world today: an introduction to the comparative study of law*. London : Stevens, 1978. 2. ed.

<sup>44</sup> Band J.Issue Brief. *The Impact of the Supreme Court's Decision in Kirtsaeng v. Wiley on Libraries*, 2013 [Mode of access: <http://www.librarycopyrightalliance.org/bm~doc/issue-brief-kirtsaeng-post-analysis-02apr13.pdf>]

<sup>45</sup> According to the forecast, in 2014 worldwide business-to-consumer (B2C) e-commerce sales will reach \$1.5 trillion: <http://www.retailcustomerexperience.com/articles/global-e-commerce-sales-to-hit-15-trillion-driven-by-growth-in-emerging-markets/>.

specific market and license agreements appear<sup>46</sup>. These factors are not likely to support international trade especially among small businesses. Therefore, the more open the regime, the more advantage e-commerce companies gain. For the purposes of balancing the interest of users, owners and society as whole, the law is a good instrument to open regulation and create better conditions for both businesses which represent authors and rights holders (as they see clear rules of playing in the industry) and users that represent public wealth in innovation and creative activities (as they see the whole range of possible usage and negative consequences of extra usage).

### **2.3. EU legislative implementation**

Another way of solving the problem of copyright limitation may be seen in stronger international cooperation. The United Nations represents the whole range of economic power and theoretical principles. It is a good example of international cooperation where the needs of all the members are taken into consideration while creating a comprehensive listing of copyright limitation.

Some researchers believe that the harmonization of international law on intellectual property can create a means of regulation for those instances and situations when the limitation of copyright is essential<sup>47</sup>. The pro-international approach of balancing these interests supports international dispute resolution instead of separate national court cases. From this point of view, primary national frameworks are less attractive for the needs of the modern economy.

First, a unified policy meets the current stage of international cooperation. The World Intellectual Property Organization (WIPO) is said to be the largest institution of intellectual property services and policy. It includes a large number of members; it creates different treaties and scientific studies<sup>48</sup>. Among other activities, WIPO reports on the issue of copyright limitation. The most common trends in this area are exhaustion rules, educational exceptions, digital opportunities for infringements, and exceptions for disabled people<sup>49</sup>. The main conclusion is that if countries enter large institutions and organizations and undertake

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<sup>46</sup> Skolkovo foundation research. Intellectual Property and Development: Time for Pragmatism, 2013 [Mode of access: <http://community.sk.ru/news/m/skmedia/6600.aspx>]

<sup>47</sup> Guibault L., 'Why Cherry-Picking Never Leads to Harmonisation. Journal of Intellectual Property, Information Technology and E-Commerce Law. 1, 2010; Ringnald A. National and International Dimensions of Copyright Law in the Internet Age. European Review of Private Law 5-2009, Kluwer Law International BV.

<sup>48</sup> See, for example, WIPO Copyright Treaty and WIPO Performances Treaty. Op. cit.

<sup>49</sup> WIPO Report, 2010. Op. cit.

obligations under the treaties, they also tend to apply harmonized legislation with certain limits, responsibilities and limitation rules.

Second, international law can support national implementation instead of contradicting it. Countries from both common law and continental law families may bargain for the exceptions and rules suitable for them and implement such frameworks into the country's policy. This approach eliminates the necessity to create their own norms that can be potentially difficult for understanding and usage internationally. For example, the underlying theoretical differences make the terms "moral rights", "personal non-property right", "economic rights", and "exclusive rights" overlap and confuse doctrine and legislation.

Third, a codified document with a strict listing of copyright limitation clauses would create a stable balance of interest and expand international transactions in the globalized economy. If there is a piece of legislation containing specific rules of copyright limitation and it limits, it will be easier to use the copyrighted works. At the same time, it will be beneficial for the rights holders to profit from their property without suffering from unauthorized access.

To sum up, the strongest and most important motive for creating unified norms lies in the field of the protection of electronic commerce, an important part of the modern economy; a great number of countries are interested in the development of a strong e-commerce network. The creation of a codified document with all the limitation of copyright possible serves this purpose and such a document needs to contain obligatory not advisory provisions, which the participating countries will have to comply with in order to create an effective regulatory mechanism.

### **3. CONCLUSION**

The historical and doctrinal differences between legal systems are becoming less pronounced. From a global perspective, the mismatch and clashes of philosophical theories underlying the Romano-Germanic understanding of copyright and limitation on certain copyrights and legal principles of the common law system is not longer critical. On the contrary, there is a tendency toward a unified, doctrinal approach. Despite historically distinctive characteristics of copyright limitation, nowadays there is an opportunity to use legal techniques and concepts typical for an opposing legal systems.

National legislation has a more developed legal technique in finding a stable balance of interests, while the provisions of international treaties contain less detailed and numerous reasons for copyright limitation favouring the interests of persons with disabilities than the laws of the countries of the civil law family and the family of common law<sup>50</sup>.

However, it is reasonable to say that these similar results of legal evolution have historically and methodologically different preconditions. Countries of both legal families show similar characteristics in their recent development, which, on a global scale, attain similarity with the main tendencies of the opposite legal family.

In particular, common law countries, applying an “open” regime of copyright limitation, shows a number of similar features:

- The high level of legal regulation in the field of copyright is a logical continuation of the main features of the this system (the importance of a precedent; the mostly positive nature of copyright; the consideration of copyright as a way of protecting investments and human capital).

- The search for a balance of interests of right holders and the public is modified in response to evolving issues and trends of social development.

- Legislation fills theoretical and doctrinal gaps.

- The introduction of the principles of Roman family, the implementation of a converged approach.

The countries using continental law show similar features: integration and globalization to join separate national legal systems into a single family. In the framework of the European Union as a common supranational entity for countries such as France and Germany, Directives provide a unified approach to the alteration of some national rules. Among the main characteristics of the Romano-Germanic family are:

- Fixing the most basic concepts and making the Members of the European Union determine certain rules fills theoretical gaps and solves problems in regulation on copyright restrictions.

- A convergent approach is embodied in the application of broad principles that provide additional opportunities for interpretation and enforcement.

It would be logical to assume, that for the effective regulation of the on going changes in the economy and the field of law, a mixed method of regulation would be the most

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<sup>50</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, 2013 [Mode of access: <http://www.wipo.int/treaties/en/ip/marrakesh/>]. This Treaty has general provisions and guarantees, which are less detailed than in the legislation of the US created prior to the adoption of the Act.

effective. This method should include prevailing features of the “closed” limitation regime and one or two wide statement to make this approach more flexible.

The same doctrinal idea, projected on the level of international regulation, also demonstrates the need for the creation of a unified international document obligatory for participating parties and containing a strict list of possible limitation clauses.

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