Fair use in USA Copyright v. EU InfoSoc Directive closed list of exceptions and limitations

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Maria Vitória Rocha, Catholica Porto Law School

Abstract: Anglo-American Copyright and Continental Copyright are two great systems that though having a common origin, with the evolution, mainly because of the French Revolution, became very different from one another. Anglo-American Copyright being considered positivist, and pragmatic, without a philosophical foundation, and Continental Copyright having a strong philosophical foundation, considered a natural right of the human being. Nevertheless, things are not so black and white because Copyright issues, namely in the Information Society are global and demand similar answers. Because of International Treaties, and EU Directives, the two systems are converging in many aspects.

In this article we want to address a subject in which USA and EU still have different approaches, which is Fair Use v. the closed list of limitations and exceptions contained in **Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, usually** named InfoSoc Directive.

There is much discussion about copyright wars, but regardless of our position defending closed list of exceptions and limitations, a general clause of Fair Use, or a mixed system, we must point out that InfoSoc Directive is total error, in the way the exceptions and limitations were legislated. There are very few exceptions and limitations regarding Information Society, there is no harmonization, there is also no certainty, and the technological protection measures and rights management information, which cannot be circumvented for free uses, further limit the interest of the Directive and create an disequilibrium harmful for users.

The limits and exceptions are also subject to the three step rule, which, in interpreted in a strict sense, as the Directive seems to contemplate, is not adequate to the digital environment.

The ultimate decision is of the courts, that don't have the same interpretations of the exceptions and limitations, some times the interpretation goes to far, sometimes it is to narrow.

It is true that in USA, with Fair Use, as in EU, with the closed list of limitations and exceptions, courts have the last word. But while in USA there is the precedent principle, that doesn't happen in Continental Copyright. The problem in EU is that the InfoSoc. Directive is a total error, which creates much greater level of uncertainty. We can observe that certain court decisions that openly go against InfoSoc Directive. Because of this lack of security, and because of the way InfoSoc exceptions and limitations were ruled, we think that in the EU InfoSoc Directive should be revoked a solution closer to the fair use USA solution would be better. Europe could adopt a general clause like the Fair Use one, solution that we believe is

the best, or establish an equilibrate interpretation of the three step rule, it could also allow analogy when the same interests meet and the situation is not in a list of limits and exceptions. It is important to approach the court decisions from the law, which will not happen if this issue is not properly addressed.

Key Words: Anglo-American Copyright; Continental Copyright; Limits; Exceptions; InfoSoc. Directive; Fair Use; three step rule.

Summary: 1. Introduction 2. Common origin and evolution of Anglo-American and Continental Copyright Systems 3. Convergences and divergences between both systems 4. InfoSoc limitations and exceptions. 5. USA Fair Use. 6. Conclusions

1. Introduction

The distinction between the two major systems of copyright is many times assumed as a "dogma": Continental Copyright (Droit d'Auteur) and Anglo-American Copyright are considered to be two separated worlds, which, in fact, is not true. Also, within these to major systems there are subsystems. For example, German Copyright is different from French Copyright, though both belong to Continental Copyright. American Copyright is, in many ways, different from English Copyright, namely in what regards formal requirements, though both belong to the Anglo-American System.

Nevertheless, Anglo-American Copyright and Continental Copyright are in many ways different.

The terminology itself is diverse. In the countries of the Roman-Germanic tradition, it is called "Direito de Autor" (Portugal), "Droit d'Auteur" (France and Belgium), "Urheberrecht" (Germany) Diritto di Autore "(Italy)," Auteursrecht "(Holland)," Ophavsret "(Denmark)," Upphovsrätt "(Sweden), putting the emphasis on the creator of the literary and artistic work. In countries of Anglo-American tradition (eg, England, Ireland, the United States, Australia or New Zealand) the terminology is more pragmatic and limiting: "Copyright" (and not the literal translation "Author's Right").

Terminology is indicative of a different kind of attitude.[21]

The origin of the term "Copyright" is not clear. The very history of the Copyright is unclear. The Statute of Anne, of 1709, generally considered the first recognition of a "copyright" does not even mention the term. The oldest documents in which the term "copy right" appears, in two words, are the 1701 reports of the Stationers Company, a London society that brought together all agents involved in the book trade. It was, literally, a copy right belonging to the corporation, a right to reproduce a particular written work for the purpose of selling it[22].

[21] STROWEL, A., 1993, p. 18 ; ROCHA, M.V., 2008, pp. 735-750, footnote 2; for further details about the Stationer's Copyright, see ELLINS, J., 1997, pp. 36-40.

[22] SROWEL, A., 1993, pp. 18-18,ELLINS, J. 1997, pp. 36-40; ROCHA, M. V., 2008, p. 735 text and footnote 2.

The term "Droit d'Auteur", which originates in French law, does not appear in the revolutionary legislation of July 24, 1793, which marks the beginning of the "modern" protection of literary and artistic works. In that law the expression "propriété littéraire et artistique" is used instead. The expression seems rather to be due to A.C. Renouard, author who, in 1838 and 1839 publishes the famous treatise entitled *Traité des droits d'auteurs, dans la littérature, les sciences et les beaux arts*".[23]

In the second half of the nineteenth century the expression is generalized and adopted by legislators. In Bavaria, in 1865, with the codification of the copyright law, the term "property", used by the Prussian law of 1837, is replaced by the term "Urheberrecht". In the French law of 1866, on the rights of heirs and other successors of authors, the term "property" is also abandoned.[24]

The term "property" however, is never definitively abandoned. Thus, in the French law of 1957 and in the present Code de la Propriété Intellectuelle. The same is true of Spanish legislation, in the Texto Refundido de La Ley de Propriedad Intelectual. This has to do with a certain conception related to the Copyright nature as a special form of property[25].

In the case of copyright of Roman-Germanic tradition, we have a right that is thought in function of the author, in the sense of the natural person who creates the work. In the case of "Copyright", we have a right based on the copy of the work, the product of creation that is preserved against the copy. In the first case, the center of gravity is the author, in the second, the work, the immaterial creation contained in physical support.

At the origin, Copyright appears as a right that is intended to prevent copying, that is, reproduction. It has a philosophical foundation, if at all, rather humble, in comparison with the philosophical foundations of Continental Copyright. It is simply a right to oppose copying of the physical medium and the purpose it pursues is to protect the copyright holder against any unauthorized reproduction of such material[26].

In the Continental tradition the work is the expression of the personality of the author. Attempting against the work implies an attempt against this personality that is reflected in the work. Hence the importance gained by the so-called moral rights of authors. In Anglo-American Copyright the work is totally separated from the personality of the author, acquires absolute legal autonomy. It is a product, which can have a free economic existence. Nevertheless, in Continental Copyright the expression "personality of the author" is misleading because Copyright protects works that have a minimal creativity, that is, where

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[23] RENOUARD, A. C., *Traité des droits d'auteurs, dans la littérature, les sciences et les beaux.arts,* Tomo I, Jules Renouard and Cie., Paris, 1838, Tomo II, 1839, *apud* STROWEL, A., 1993, p. 18.

[24] STROWEL, A., 1993, p. 19 ff; ROCHA, M. V., 2008, p. 735, footnote 2.

[25] About the many theories related to the nature and structure of Copyright, see MELLO, A. SÁ e, 2016, pp. 353-376.

[26] STROWEL,A., 1993, pp.19-21, p. 26; ROCHA, M. V., 2008, pp 736-737, footnote 2.

we cannot see the personality of the author reflected in them, as is the case of the so called small change/Kleine Münze/petites monnaies/small change, that is, works that deserve to be protected because they are the result of an independent creation, but where creativity or originality is minimal. It was never intent of Continental Copyright to protect only the great works. Works such as TV guides, recipe books (the 100 ways of cooking rice), documented camping sites, and so on, all deserve protection, if there is a minimum of creativity/originality, that is, if they are not ordinary, in the sense that they are not used by everyone, and they are the result of an independent activity of the author[27].

Curiously, both expressions have the same ambiguity, and therefore lend themselves to more or less broad interpretations.

Continental copyright does not refer only to authors, it also covers publishers, and other economic intermediaries, to whom the patrimonial rights may be licensed or transmitted, namely in the case of works made for hire or under an employment contract. Related rights belong to performers, but also to audio and video producers and to broadcast entities. In Portugal, collective works may belong, from the beginning, to a company, which approaches our system, in this aspect, from Anglo-American Copyright (cf. arts. 16º and 19º of Código de Direito de Autor e dos Direitos Conexos-CDADC).

Anglo-American term “copyright” covers, besides the works of authors (that can be companies or physical persons), performances, audio and sound productions, broadcasts, and the activity of other economic intermediaries. Plus, “copyright” allows to oppose not only to unauthorized reproduction, but also to other forms of exploitation, namely communication to the public, making it available on line and on demand, broadcast, transformation in other type of work, translation, public lending and renting, to name the most usual forms of exploitation of patrimonial rights. The term remains "copyright" when these other forms of use become much more important than the literal copy with the evolution of technology and, particularly, Information Society[28]. Copyright has the advantage of not leading to the misleading idea that rights are legally recognized or only for the benefit of authors.[29]

Anyway, the philosophy behind Anglo-American Copyright and Continental Copyright still remains different and there are different approaches to some subjects like the one we will refer in this study: free uses. Nevertheless, in a global society as ours, we observe a constant convergence of both systems, though still with different approaches in many cases.

2. Common origin and evolution of Anglo-American and Continental Copyright Systems

[27] See, in detail, ROCHA, M. V., 2008, pp.733-792.ROCHA, M. V., *Portugal,* 2017, pp. 45-49.

[28] With further detail, STROWEL, 1993, pp. 17-28; ROCHA, M. V., 2008, p. 736, footnote 2.

[29] STROWEL, A., 1993, p. 25; ROCHA, M.V., 2008, p.736, footnote 2.

There is a similar origin of Anglo-American and Continental Systems. They were for the first time founded on literary works, because at the time it was in relation to these works that a reproduction, and therefore a counterfeit, was first possible, thanks to the invention of the printing machine by Gutenberg. It is well known that Copyright, either Anglo-American, either, Continental, has its origin and evolution directly related to the new technologies that appear and demand new approaches and answers to the new and defying questions that appear with these technologies.

At the beginning, in both cases there were no rights belonging to the authors, but privileges given by the crown to the printers/booksellers. That happened in England an in France, during the Ancient Regime.

2.1. In France, the privilege assured the publisher a monopoly, which protected him against a competition that other publishers could do to him, profiting from the exclusive privilege to print old works. In relation to new works, these were submitted to a pre-approved by the University, which worked for the crown as a means of censorship. In practice, over time, printers began to request (at the same time) permission to print and the privilege of having the exclusive. Privilege was not a consecration of copyright insofar as it was not a reward for the creation of the work. The goal was to cover the publisher of printing costs.[30] As a rule, who used to get the privilege was the publisher. It is true that sometimes, later, the privilege was granted to the author, but the author, in turn, had no choice but to transmit it to the publishers, since these had a monopoly on the manufacture and sale of books[31]. The system then in force had a dual function: economic and political. The first from the editors' point of view, the second from the crown's point of view.

To reinforce control over ideas, the king tended to grant no privileges except in the express condition that the publication be made in a bookseller from Paris[32]. This gave rise to the protests of the provincial booksellers, since the position of the booksellers of Paris was reinforced by the fact that they enjoyed numerous extensions of their privileges. This created a conflict between the booksellers of Paris and the booksellers of the province. In the beginning of the eighteenth century, in the midst of a conflict between these two groups of booksellers, the question of authors' rights finally arised. Oddly enough, the issue didn't even arise as a claim of authors, but is was raised by the lawyer of the Paris monopoly booksellers, Louis d 'Héricourt, in a text of 1725 (*Mémoire sur les vexations qu'exercent les libraires de Paris*) [33]

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[30] STROWEL, A., 1993, p, 83 ff.

[31] SROWEL, A, 1993, p. 83; ELLINS, J., 1997, p. 38; ROCHA, M. V., 2008, p.737-738, footnote 2.

[32] STOWEL, A., 1993, p. 84; ROCHA, M.V, 2008, p. 738, footnote 2.

[33] *Apud* STROWEL. A., 1993, p. 84. See also ROCHA, M.V., 2008, pp. 738-739, footnote 2.

It is not surprising that this lack of claiming attitude on the part of the authors, since at that time they accepted with gratitude the pensions or other benefits that the great masters of the world gave him, considered as unworthy to make commerce and to be enriched by the product of their works. There was still no interest in being protected by a right. The author still lived of the cult of the patron. However, evolution was already germinating. Many authors (like Balzac) thought that the money earned by publishing books by the bookseller was not ignoble, but legitimate.[34]

Louis d'Héricourt, in the text referred above, wrote that a manuscript which is not contrary to religion or the laws of the State, nor to the interests of individuals, is in the person of the author a good which is really proper to him because it is the fruit of his work. For this fundamental reason, the author must be able to dispose of it as he wishes to obtain, besides the honor that awaits him, a profit that satisfies his needs and those of his loved ones. Now, if an author is constantly the owner and sole owner of his work, only he or who represents him can transmit to others his right. Therefore, the king has no right over the work, while the author or his heirs are alive, and therefore cannot transmit the right to anyone in the form of a privilege, without the consent of the one to whom it belongs. Héricourt tries to assert the idea that there is a property right and not just a privilege conferred by the crown. With this thesis the booksellers of Paris had as objective to defend their interests under the cover of the property of the authors. As STROWEL recognizes, this thesis, was a double-edged sword, which, once the authors became aware of their rights, could turn against the booksellers themselves. And this, inevitably, and soon, happened, since the authors and, above all, their heirs, began to assert that the privileges could not be renewed in favor of the booksellers without their consent[35].

Héricourt's ideas were welcomed on several occasions. For example, in an arrêt of 1777, the council of the king decided to reenter in the family of Fénelon the privilege granted to its works. The “arrêts” of the council of the king, of 30.08.1777 recognized that the author had the right to publish and sell their works. STROWEL sees in them a real Code of the Intellectual Property[36]. In one these “arretês” it is said that the privilege of booksellers is a grace, but it is founded on justice. Its purpose is, when agreed by the author, to reward his work. If it is agreed to the bookseller, to ensure the reimbursement of the costs and the compensation of his costs (Arrêt du Conseil du Roi, portant règlement sur la durée des privilèges en librairie, of 30.08.1777)[37] It should be noted that there is a different legal qualification of the prerogative, depending on the different objectives and the different recipients. While the author "a sans doute un droit plus assuré à une grâce plus étendue", the

[34] STROWEL., A., 1993, p. 84: ROCHA, M.V., 2008, p. 739, footnote 2.
[35] STROWEL, A., 1993, p. 85; ROCHA, M. V., 2008, footnote 2.
[36] STROWEL, A., 1993, p. 85.
[37] *Apud* STROWEL, A., 1993, p. 85; also referred by ROCHA, M. V., 2008, p. 739, footnote 2.

bookseller has only "une faveur proportionée au montant de ses avances". That is why there are several deadlines for protection. The author enjoys his privilege for himself and his heirs perpetually. The bookseller (publisher) only for a limited time[38].

This “arretê” draws a clear line of separation between the author and the work, on the one hand, and therefore, the prerogatives of the author, and, on the other hand, the question and prerogatives of the booksellers Although still in the garb of a privilege, something more and different about the authors begins to emerge. It is even said that the privilege of the author is a "propriété de droit". On the other hand, there is already a concern to protect the investment, at the time, by the booksellers, and such protection is seen as a "libéralité". STROWEL considers that in this “arretê” one can see the progression of the copyright, along with the progression of the idea of property, of a preexisting right of its own, although covered by the name of privilege. The privilege, relative to the authors, appears here, clearly, not as constitutive, but only as declaratory of a preexisting right. We don’t agree with the author, we think he goes too far, we think that the change from privileges to rights only happens with the French revolution.[39]. For us, what happens is that more value is given to authors, and it is recognized that these have more legitimacy to have privileges than the booksellers do.[40]

The change in the concept of preferences in France can be said to be based on two fundamental reasons. One, which comes from the Ancient Régime, is the conflict between the booksellers, therefore, a factor of socio-economic order. The fight between the booksellers of Paris and the booksellers of province, and the defense of Héricourt turned in favor of authors. But another factor, rooted in the evolution of thought, which is the Enlightenment, emerges as a powerful force[41].

The thinkers of the time perceived well the connection existing in the emergence of a public sphere, indispensable for the development of a critical activity and a circulation of what was printed[42]).

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[38] STROWEL, A., 1993, pp. 85-86; also referred by ROCHA, M. V., 2008, pp. 739-740, footnote 2.

[39] STROWEL, A., 1993, pp. 85-86; ROCHA, M. V., 2008, p. 740, footnote 2.

[40] ROCHA, M.V., 2008, p. 740, footnote 2.

[41] STROWEL, A., 1993, pp. 86-89; ROCHA, M. V., 2008, pp. 740-742, footnote 2. For the general notions about Enlightment, see https://en.wikipedia.org/wiki/Age_of_Enlightenment (seen in 30.09.2017); in regard to the relation between Enlightment and the French Revolution, see CHARTIER, R., *Les origines culturelles de la Révolution française,* Paris, Seuil, 1990.

[42] See with detail, STROWEL, A., 1993, pp.86-88; ROCHA, M. V., 2008, pp. 740-742, footnote 2. But another factor, rooted in the evolution of thought, which is the Enlightenment, emerges as a powerful catalyst. (STROWEL 86).

The thinkers of the time perceived well the connection existing in the emergence of a public sphere, indispensable for the development of a critical activity and a circulation of what is printed. (Cf. DIDEROT, CONDORCET).

Diderot, in, *Lettre historique et politique adressée à un magistrat sur le commerce de la libraire, in Oeuvres Complètes de Diderot, Paris, Garrier Frères*, 1876, T 18, pp. 5-75, affirms that there is no good that can belong to

With the French Revolution, in 1789, all the privileges, including those of the booksellers, ended. Copyrights became considered to be natural rights of the human being. The State had the duty to recognize them[43].

2.2. As to the origin of the Anglo-American copyright, we find many aspects in common. Usually to portray the history of copyright, one goes back to Queen Anne's famous English law of 1709, the Statute of Anne. But the Statute of Anne is only understood if we consider the events that preceded its edition.

It is necessary to understand three concepts of copyright: the stationer's copyright, that is, the copyright of the publishers/printers; the common law copyright, which is the copyright resulting from jurisprudence with force of precedent; the statutory copyright, the one consecrated in the Statute of Anne. The central question posed in England was whether the authors' rights were derived from common law or whether they originated from a statute[44]

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man if he does not belong to the work of the spirit, the only fruit of his education, his time, his research and observations, his most beautiful hours, his thoughts and feelings (*apud* STROWEL,1993, p.87).

Interestingly, this Diderot text had implied the legitimation of the rights of the Parisian booksellers who, restless, since the 1760, by a continuous suppression of their privileges, ordered Diderot to write a text to present his complaints. Understanding the author as owner of his work, it is emphasized that the author has the power to dispose of the work. With this argument, Diderot legitimizes the assignment in favor of the booksellers.

Condorcet, in Fragments sur la liberté de la presse, 1776 (Condorcert, M.J.C., *Ouevres*, Paris, Firmin Didot Frères, 1847, T11,p. 312*, apud* STROWEL, p.88) stresses the importance of proper regulation of the press to the effect of how truths expand. He defends freedom of opinion and impression by regulating the activity of books trade. Condorcet considers the privileges of the booksellers of the time as prejudicial to the progress of the Enlightenment.

Thus, while Diderot was concerned with defining private prerogatives in relation to the work, Condorcet put in the foreground the fact that the progress of the Enlightenment depended on public access to works.

[43][43] An Assembly first established, by decree of January 13 and 19, 1791, the right of representation. On this occasion, the Rapporteur of the decree, Le Chapelier, marked as statements that have become famous and are read repeatedly in the doctrine, in which it seems to underline the absolute character of literary property. According to Le Chapelier "La plus sacrée, la plus légitime, la plus inattacable , et, si je puis parler ansi, la plus personnelle des propriétés, est l'ouvrage fruit pensée d'un écrivain". (*Apud* STROWEL, p.90 and LUCAS., A., LUCAS, H.J., 2001, p.10).

By the decree of 19 and 24 July 1973 the exclusive right of reproduction is established. This time the reporter is Lakanal, who considers that "De toutes les proprietés, la moins susceptible de contestation , celle don't lacroissement ne peut blesser l 'égalité, ni donner d'ombrage à la liberté, cést sans contredit celle des productions du génie et si quelque chose doit étonner, c'est qu'ill ait fallu reconnaitre cette prorriété, assurer son libre exercice par une loi positive; c'est qu'une aussi grande révolution que la nôtre ait été nécessaire pour nous ramener sur ce point comme sur tant d'autres aux simples éléments de la justice plus commune" (*apud* LUCAS., A., LUCAS, H.J., 2001, p.10). In detail, regarding the origin and evolution of french Droit d'Auteur, see LUCAS., A., LUCAS, H.J., 2001, pp.3-18.

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[44] See, STROWEL, A., 1993, p. 112 ff; ELLINS, J., 1997, p. 36 ff.; ROCHA, M. V., 2008, pp. 743-745, footnote 2.

The assumption that the Statute of Anne is the origin of copyright is justified because it is the first law on literary property edited by Parliament and that, for the first time also, a Copyright Act does not contain provisions on censorship.

Between 1557 and 1709, a period of relentless religious fighting, censorship was a policy of government, and the stationer's copyrights granted by the sovereigns were therefore a privileged instrument. By giving booksellers' corporations the power to control printing and publishing, and eventually to destroy books not conforming to the laws of the time, sovereigns used these corporations to model opinion. On the other hand, the stationers were happy to receive these privileges, which allowed them to regulate effectively the commerce of the books.

In summary, stationer's copyright was an instrument of regulation of the books trade and political censorship, running in the interest of publishers and government.

Over time, the role of censorship diminished, but under stationer's copyright the editors' monopoly developed.

It was precisely to limit this monopoly that arised the Statute of Anne of 1709. There were two major differences between them in this respect: the stationer's copyright was perpetual and limited to members of the corporation; statutory copyright was provided for a limited period of 14 years, with the possibility of renewal open exclusively to the author; this legal copyright could be held by anyone, not just an editor.

The Statute of Anne did not immediately abolish stationers' copyright, which persisted on a transitional basis for 21 years. At the end of this period the publishers of London, who were the owners of almost all titles published before 1710 and entered in the register of the stationers' company, attempted to extend their monopoly against the editors of the province that began to publish various titles, since Queen Anne's law had put an end to copyright and these titles were in the public domain. The conflict became known by the battle of booksellers and developed before the courts.

This is where the concept of common law copyright enters. The argument of the stationers, as in France, the dominant editors' strategy that masked their interest behind the figure of the authors, was that the author had a common law copyright, the existence of which was independent of the statutory copyright and prior to this. Thus, the authors could license or transmit it to the publishers, and there was a presumption that it occurred. That is, under cover of this common law copyright, the publishers could maintain the monopoly that the stationers' copyright previously assured them.

The conflict gave rise to a first decision of the House of Lords, in 1769, in the case Miller v. Taylor. Miller was the editor of James Thompson and owned the copyright of his poem "The Seasons." Following the expiration of the first 14-year period provided for in the Statute of Anne, defendant Taylor decided to publish the same text. Miller presented a claim based on the rights of the author deriving from his work The House of Lords accepted this idea, based

on a principle of natural justice, according to which it is up to the author to choose the manner and time of publication, the number of copies, volumes, for those who want to entrust the printing, etc., because it is fair that the author maintains the pecuniary profits of his work.[45]

In the case Donaldson v. Beckett, in 1774, the stationers' monopoly came to an end. The House of Lords decided in opposition to what was decided in the Miller v.Taylor case. Once again there was a case opposing the London Stationers against the province printers, in this case the Scottish printers. Is was considered that the stationers were trying to manipulate the law, against the public interest. There was no common law related to published works, only a time limited monopoly. When the term of this monopoly ended according to the Act of Anne, the work became free. The natural property conception of copyright came to an end. Copyright was not based in a natural right but it was in positivist conception, it only existed if regulated in an Act, like the Act of Anne[46].The spirit of the time had turned against monopolies and protectionism. That's why the Stationers had no luck in trying to pass a new law in Parliament that would protect them. With this, the battle of booksellers ended[47].

The Anglo-American system, never got to have the natural foundation, like the French post revolution one. Until now, it is much more pragmatic and based in a positivist conception[48].

3. Convergences and divergences between both systems

[45] See STROWEL, A., 1993, pp. 114-115, with more details, describing Stationaries' Copyright, the Act of Anne and the battle of booksellers, and all the evolution until the Copyright, Designs and Patents Act of 1988, ELLINS, J., 1997, pp. 36-58. About the Millar v. Taylor case, see pp. 47-48.

[46] ELLINS, J., 1997, pp. 48-49.

[47] ELLINS, J, 1997, p. 49.

[48] The English copyright story is the prehistory of American copyright. The first federal law of 1790 is modeled on the Statute of Anne. However, the various positions taken at the end of the 18th century and various legislative texts suggest that, at least initially, American jurists did not subscribe to the thesis of the House of Lords in the Donaldson case. For example, between 1783 and 1786, twelve states adopted copyright laws that appear to be built around the idea that it is important to encourage knowledge and under the idea that the author has natural rights over his work.

Most of the time American copyright is described as a legal monopoly. Monopoly, by its origin and legal because the monopolistic position results from the attribution of a right, not a factual power. There is, however, an alternative conception, which considers copyright a natural right, or a property of the author, which finds its origin in the act of creation (STROWEL, A., 1993, p. 128). At the level of jurisprudence there is an oscillation between the two conceptions, with predominance for the first in the Federal Supreme Court, while lower jurisdictions tend to see copyright as "the primarily proprietary in nature" (STROWEL, 1993, p. 129). With detail, see STROWEL, A., 1993, pp. 117-129.

About the evolution in other countries, for Germany see ELLINS, J. 1997, pp.58-74; for Portugal, see ASCENSÃO, J. de OLIVEIRA, 1992, pp. 12-20 ff; LEITÃO, L.M. de MENEZES, 2011, p. 31-36: REBELLO, L.F., *1993,* pp. 34-48. Every Manual on Copyright has a part dedicated to the origin and evolution of Copyright, so there are many options different of ours.

The differences between "Droit d'Auteur" and Copyright are traditionally emphasized, much more than convergences. But one must not forget that the issues caused by new technologies, namely in Information Society, are global, thus, global answers are needed, and similar solutions are desirable.

It is true that Continental Copyright originates from the mere fact of creation, through the exteriorization of it by any means. On the contrary, in Anglo-American Copyright, especially in the American system (not in English law, where no formalities are required, because England was since the beginning part of the Berne Convention) is conditioned by the completion of formalities. These have, however, been mitigated because, since 1989, USA is also member of the Berne Convention.

As for rightsholders, there is a marked disagreement. According to the principles guiding the Continental Copyright, only the author, in the sense of creator, can be the original owner of rights. Not legal entities, because they create nothing. Therefore, only natural persons can be holders of rights. In Copyright, in American doctrine, there is no obstacle to moral persons having rights. But, once again, the situation is more complex than this, since the Continental Copyright regimes make investment concessions, constructed and articulated in various ways, but with similar results. And in Portugal, for example, collective works might originate from a company (see arts. 16º and 19º of CDADC)[49].

Another apparent difference lies in the criterion of originality. Usually it is considered that under Anglo-American law the work is protected, that is, it is original, when it is simply not copied from another work. The basic idea of the system of Copyright is to protect the products resulting from intellectual activity, from the most sublime and personalized, to the humblest ones that sometimes require modest efforts and little originality. But if we study well both systems, there is not much difference, because works with very small amount of creativity are protected in EU and in Anglo-American In USA copyright was denied for works that required much labor, investment and effort, but that lacked creativity. The case Feist v. Rural Telephone Service Inc. is an example of that approach. Copyright was denied because though there was much effort, investment and labor (*sweat of the brow*) to create a database with the telephone numbers in alphabetical order, but copying this database was not considered infringement of Copyright because it lacked creativity[50]. Because not all countries of EU have an identical protection against unfair competition, this case is in the basis of the Directive on databases, that created a *sui generis* right for manufactors of databases. Many countries include this right within related rights, but Portugal protects is in a separate law

[49] With further detail, ROCHA, M. V., *Portugal,* 2017, pp.50-54 pp. 56-58.

[50] Feist Publications Inc. v.Rural Telephone Service Co. Inc. 111, S. Ct. 1282, 18, USPQ 2d, 1275 (1991).

(DL 122/2000, of 4 July), because it is considered that the nature of this right is not clear.[51] Another apparent difference lies in the criterion of originality. Usually it is considered that under Anglo-American law the work is protected, that is, it is original, when it is simply not copied from another work. The basic idea of the system of Copyright is to protect the products resulting from intellectual activity, from the most sublime and personalized, to the humblest ones that sometimes require modest efforts and little originality. But if we study well both systems, there is not much difference, because works with very small amount of creativity are protected in EU and in Anglo-American Copyright. In USA copyright was denied for works that required much labor, investment and effort, but that lacked creativity. The case Feist v. Rural Telephone Service Inc. is an example of that approach. Copyright was denied because though there was much effort, investment and labor (*sweat of the brow*) to create a database with the telephone numbers, in alphabetical order, copying this database was not considered infringement of Copyright because it lacked creativity. But, as we saw above, in Continental Copyright a very small of creativity is required, thus there is protection of the so called "Kleine Münze/petite monnaies/small change/ calderilla. The work is protected because it is the result of an independent activity of the author and it is not ordinary, in the sense that it is not something usual to everybody. This approach has been emphasized by EU Directives[52].

Another difference lies in the so-called moral rights. These were developed by French courts over the years, before they were legally recognized, but became very important in Continental Copyright. The Anglo-American Copyright didn't give them the emphasis they have in the Roman-Germanic tradition. Because there is a link between the attribution of moral rights and the nature of copyright conceived as a natural right, inherent to man. On the contrary,

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[51] See, ROCHA, M. V., *Portugal*, 2017, pp. 34-39. Computer programs are also protected in a special law (DL 252/94 of 20 October, and, contrary to what the Directives on computer programs, they are not considered literary works, but works analogue to literary works, and the norms contained in CDADC are not, therefore, directly applicable to computer programs, but require a case-by-case analysis to check that the analogy of the situation is such that they can justifiably be applied (further details in ROCHA, M. V., *Portugal,* 2017, pp. 29-34.

[52] See ROCHA, M., V., 2008, pp.748-757. ROCHA, M. V., *Portugal,* 2017, pp. 45-51; Directive 91/250/EEC, of 14.05, on the legal protection of computer programs, amended by Directive 2009/24/EC, of 23.04.; Directive 96/9/EC, of 11.03, on databases; Directive 93/98/EEC, of 29.10, revoked by Directive 2006/116/EC of 12.12, as amended by Directive 2011/77/EU, of 27.09, all regarding on the term of protection of copyright and certain related rights. In all these Directives creativity/originality is the result of an independent activity of the author, no other criteria are accepted; see, in detail, ROCHA, 2008, p. 733 ff. pp. 763-765 and p. 792; ROCHA, M.V, *Portugal,* 2017, pp. 29-39, pp.92-94, pp. 98-99. For further information, SAIZ GARCIA, C., 2000, pp. 106 -118. The only aspect still open to discussion is to know if more creativity is needed in so called works of applied art. We think these works should be treated equally, but there are different opinions in the doctrine and in court decisions since there may be an overlapping protection with models and designs, protected under Industrial Property Law. See, with detail, ROCHA, M. V., 2008, pp. 755-757; ROCHA, M.V, 2017, p. 16 ff.

because the Copyright is conceived by reference to the materialized work, the moral or personal dimension is said to be forgotten here. Nevertheless, this is not the case, as demonstrated by the recent English laws of 1988 and the United States of 1990, where moral rights are contained[53]

As for the term of protection of copyrights, the application of the traditional category of property to copyright, linked to the concept of natural law would imply that, in theory, it should be perpetual, as shown by the intense debate generated in France in the nineteenth century on the matter. But, even for those that consider Copyright a form of property, it is recognized that is is a special form of property that must be limited in time because, otherwise, it would be unacceptable. There must be a balance between rightsholders and public interest, public domain. Thus, in all Systems Copyright is limited in time. Though, in our opinion, the term of protection of patrimonial rights, namely in the EU, is too long, creating an unbalance that harms users and cultural development.

Oppositions also appear to be on licenses. In Continental Copyright, restrictions on authors' rights, such as non-voluntary licenses, are only accepted in exceptional circumstances, because the status of creator, which is at the heart of these schemes, requires, in principle, the recognition of exclusive rights. In Anglo-American copyright, the essential economic dimension and the investment protection function would legitimize, more easily, the proliferation of legal licensing regimes. Nevertheless, we see in EU Directives many cases of legal licenses in relation to Information Society.[54].

There are also issues concerning the regulation of copyright contracts. This regulation is born of the disparity of forces between the author and the users in the negotiation level of the primary author contracts. The goal of legislation of Continental tradition has been to remedy this disparity. During the twentieth century, several restrictions were placed on the principle of contractual freedom. The regulations, however, are minimal in countries with an Anglo-American tradition[55].

Related rights, in the Continental Copyright are distinguished from Copyright; in Anglo-American systems the distinction is not made in the law. Nevertheless, what is important is to see it they are regulated in the same way.

It is not our purpose to address all these issues in this study. We will only deal with the distinction between Fair Use and the closed list of limitations and exceptions that exists in the EU because of InfoSoc Directive.

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[53] STROWEL, A., 1993, p. 31 ff.

[54] See STROWEL, A., 1993, p. 32.

[55] See STROWEL, A., p. 32.

Nevertheless, we must emphasize that there has been an approach of both major Systems because Countries of both traditions are members of the Berne Convention (in USA since 1989), members of the TRIPS-Agreement, members of the two WIPO Teatries of 1996 , and, in the EU, there as been a constant approach of solutions, because of several Directives, with the aim of creating an European Copyright Code[56].

4. InfoSoc limitations and exceptions

The InfoSoc Directive (Directive 2001/29) was implemented in order to update the protection of copyright and related rights in line with the issues due to the digital era and the obligations arising from the two 1996 WIPO Treaties.

The InfoSoc Directive grants authors, performers, phonogram producers , film producers and broadcasters the same level of protection for the right of reproduction (artº 2). Authors have the right of communication to the public, including the right of of making the work available on line and on demand of artº 8 of WIPO Copyright Treaty and the distribution right (arts. 3, nº1 and 4, nº1). Performers and phonogram producers have also the right making available their activities on line and on demand provided for in arts. 10 and 14 of the WIPO Performances and Phonograms Treaty (artº 3, nº2). But, as Patricia Akester points out, the InfoSoc Directive goes beyond WIPO Treaty, extending this right to film producers and broadcasters.[57] Artº 2 of InfoSoc Directive addresses all types of reproduction right, of authors, performers, phonogram and videogram producers, and broadcasting organizations. Artº3 is intended do cover dissemination of works and related subject matter on the Internet. Again, going beyond the WIPO Performances and Phonograms Treaty, covering not only audio but also audiovisual material that can be obtained on demand[58]. The question of exhaustion the already granted author's distribution right is addressed in artº 4. Of the wording of the article and the Considerations of the Directive we think that the exhaustion with the first sale is limited to distribution of physical copies[59].

4.1.We want to emphasize that the exceptions and limitations allowed in InfoSoc Directive because we are very critical about them.

Member States may provide for exceptions and limitations subject to the three-step rule of the Berne Convention (artº 9, nº2).

It is very important to bear in mind that art.5º of the InfoSoc Directive, unlike artº 10 of the WIPO Copyright Treaty and artº 16 of WIPO Performances and Phonograms Treaty, does not establish a general rule, but contains an exhaustive list of exceptions and limitations. As authors point out, although the goal of the InfoSoc Directive may be to avoid too wide

[56] With further details, ROCHA, M.V. 2017, 2nd ed., pp.79-97.

[57] AKESTER, P., 2005, p. 7.

[58] AKESTER, P., 2005., pp 7-8.

[59] In this sense, PEREIRA, A. L. DIAS, 2016, p. 28.

exceptions and limitations in the Information Society, one must argue that a general clause, or other more open solution, such as fair use, would more easily adapt to the rapid changes of digital technology.[60]

According to artº 5, nº1, certain technical acts of reproduction are exempted from the scope of reproduction right, if they have no separate economic significance. The InfoSoc Directive goes beyond the WIPO Treaties of 1996, providing one only mandatory exception of the list of 21 exceptions and limitations included: free service and access in what concerns incidental acts of reproduction[61].

According to artº 5, nº2, Member States may provide for exceptions or limitations to the reproduction right provided for in artº 2 in the following cases:(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightsholders receive fair compensation;(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightsholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;(d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;(e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightsholders receive fair compensation.

According to artº 5, nº3 restrictions to the reproduction and communication to the public may be established. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's

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[60] Cf. AKESTER, P., 2005, p. 8; PEREIRA, A. L. DIAS, 2016, pp. 21-49, particularly pp. 26-38; RENDAS, T. 2015, 2015, pp. 26- 39.

[61] This exception is in nº1 of artº 75º of Portuguese Copyright and Related Rights Code, but Portugal goes beyond the InfoSoc Directive when includes in the exception "acts that enable network navigation and temporary storage of information, as well as acts that enable the efficient working of transmission systems, provided intermediaries do not interfere with legitimate usage of technology judged according to good market practice, to obtain data regarding the use of information and, in general, technological processes of transmitting information". As AKESTER., P., points out, this provision establishes limitations on service providers in line with the Electronic Commerce Directive (Directive 2000/31), but it remains unclear whether the wording only covers the mere conduit, or wether is covers caching and hosting also. In detail, AKESTER, P., 2005., p. 8, text and footnote 8.

name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;(c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;(g) use during religious celebrations or official celebrations organised by a public authority;(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;(i) incidental inclusion of a work or other subject-matter in other material;(j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;(k) use for the purpose of caricature, parody or pastiche;(l) use in connection with the demonstration or repair of equipment;(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in art. 5..

Aticle 75º CDADC, nº2 contain the limitations and exceptions chosen of the catalogue of artº 5 InfoSoc Directive. It begins with reproduction, exclusively for private use, in paper or similar medium, effected by the use of any kind of photographic technique or other process having similar effects, with the exception of music sheet, as well as reproduction on any

medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial (a). Reproduction done in these circumstances implies the payment of a fair compensation to the rightsholders, according to artº 76º, nº1, (b). Such compensation must be paid to the author and, in the analogical level, to the editor, by the entity that makes the reproduction. This limitation is redundantly repeated in artº 81º, nº2 of the Code; it is also allowed the media's reproduction and making available to the public, for the purpose of information, of extracts or summaries of speeches, lectures or conferences given in public, so long they are not already included in artº 7, (b), because these are excluded from protection (b); regular sections of press articles, by means of press revue are also part of the exceptions (c); fixation, reproduction and public communication of short excerpts of literary or artistic works , by any method , in a news report, justified by the information purpose are also allowed (d);reproduction by photocopying or by other similar means , of the whole or part of a work already accessible to the public , so long as said reproduction is done by a public library, a public archive, a public museum, a non-commercial documentation centre, scientific or education establishments, and the reproduction and number of copies made are for internal use and are not destined to the public, are limited to the necessities of these institutions and do not pursue an economical or commercial advantage, direct or indirect, including the acts of reproduction needed to the preservation and to the archive of any works, is another limit (e). In this case art. º 76º, nº1 (b) is also to apply and the above-mentioned compensation is to be paid. Reproduction, distribution and availability to the public for teaching and educational purposes, of parts of a published work, so long as the copies are confined exclusively to the educational purposes of the respective establishment and are not for economical or commercial advantage, direct or indirectly is also an exception (f). Legitim without the author's consent are also quoting or summarizing works of other authors to support one's own thesis, for the purposes of criticism, discussion, or teaching in the manner justified by the goal to accomplish (g). The inclusion of excerpts or short passages of another author's work in one's own work of teaching is allowed (h), but a fair compensation must be paid to the author and editor, according to artº 76º, nº1, (c). Also allowed is the reproduction, public communication and the acts of making available to the public for the benefit of people with disability of a work directly related with the disability, to the extent required by the specific disability, provided those uses do not have, directly or indirectly, profit goal (i). Performing and public communication of hymns, or official anthems or works of an exclusively religious nature in the course of religious celebrations or practices is another exception (j). Also allowed is the use of flyers to advertise public exhibitions or sale of artistic works, to the extent necessary to promote de event, excluding any commercial use (l). Another exception is reproduction, public communication and making available to the public of current articles, or articles related to economic, political or religious debate, broadcast works or other items of the same subject matters, in cases where such use is not expressly

reserved (m). Another exception is being the use of the work for public security purposes or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings (n). The authorization for the use by communication or making available of works and other subject matter not subject to purchase or licensing terms, part of collections of libraries, museums, archives and educational establishments to individual members of the public for the purpose of research or private study, by dedicated terminals on the premises of such establishments, seems to us too narrow exception, and may be related to information society or be considered an old practice adapted to a new medium, thus we are in favor of a broad interpretation (o)[62].Reproductions to broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals and prisons are a limitation (p) because the rightsholders receive a fair compensation, according to artº 76º nº1, (d). It is allowed the use of works, such as works of architecture or sculpture made to be located permanently in public places (q). Another exception is incidental inclusion of a work or other protected subject matter in other material (r). Also exceptioned is the use of the work in connection with the demonstration or repair of equipment (s). Another exception is the use of an artistic work in the form of a building, or a drawing, or a plan of a building for the purposes of reconstructing the building (t).

The works reproduced or quoted in the cases outlined in art. º75 must be accompanied, whenever possible, by the mention of the author or the editor's name, the title of the work and whatever other indications are being required to identify them, according to artº 76º, nº1. Also, the works reproduced or quoted in the cases outlined in artº 75º, nº2, (b), (d), (e), (f), (g), (h) should not be confused with the works of who uses them, nor may the reproduction or quotation be so extensive as to affect the interest in such works (artº76º, nº2. Only the author has the right to compile in a single volume the works referred to in nº2, (b)of artº 75º, according to artº 76º, nº3.

Today another exception was added to artº 75º, nº2, related to the use of orphan works, due to the implementation of the Orphan Works Directive (artº 75º, nº2, u). We don't think that this exception makes much sense here because orphan works imply that there is no necessity to obtain the author's previous consent, either because one doesn't know who he/she is, or one doesn't know where the author is, after the diligent search done. It makes no sense to subject orphan works to the three-step rule, as art. º 75º implies. While they are orphan they may always be used. If the author is found he has the right to an equitable amount, but the works are no more orphan works, thus the exception of artº 75º, nº2, t) makes no sense.

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[62] In this last sense, AKESTER, P., 2005., p. 10. With more detail, in favour of a broad interpretation of this important exception, see EVANGELIO LORCA, R., 2008, pp.63-176. Artº 75º does not contain the exception inspired by French law relating uses for caricature, parody or pastiche. Portugal follows the German model. Parody is protected, even if inspired in another work, in artº 2º, nº1, n) of the Code. Also, we didn't implement the exception of cases of minor importance already in force according to national law.

The uses allowed, with or without payment, are subject to the three step test, according to artº 5, nº5 InfoSoc Directive and Portuguese artº 75º, nº4. These are the exceptions or limitations (the special cases) allowed and the use of them must not conflict with the normal exploitation of the work or other subject-matter and may not unreasonably prejudice the legitimate interests of the rightsholder.

To avoid unequal power of contracting between the parties, in what regards exceptions and limitations, artº 75º, 5 considers null any contractual provision that affects the normal exercise of the free uses[63].

Artº 82º CADCD, on private copying, is regulated by Law 62/98, of September 1, regarding fair compensation for private copying. Law No. 49/2015, of June 5 introduced important changes to this law adapting it to the digital world.

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[63] Other exceptions, not related to InfoSoc Directive also exist in other parts of the CDADC. Artº77 nº1, establishes that unauthorized reproduction of another author's work under the pretext of commenting or annotating it is not allowed; however, it is lawful to publish, as a separate offprint, commentaries or annotations that merely refer to chapters, paragraphs or pages of another's work. Artº 77º, nº2, establishes a special case of allowed use of another author's work based on reciprocity: the author who reproduces in a book or booklet, his own articles, letters or other texts that have been subject to controversy previously published in newspapers or magazines may also publish together with his own, texts of the opposing view. The opposing authors are entitled to do likewise, even after the first has been published.

Artº 80º allows reproduction in Braille or any other system for the the visually impaired, so long it is not for commercial gain, of works that have been lawfully published or otherwise divulged. Artº 81, (b) permits copying for strictly private use, so long as it does not affect the normal economic exploitation of the work and does not cause unjustifiable harm to the author's legitimate interests, whereby the copy may not be used for public dissemination or commercial gain. Artº 123º, nº2 permits the recitation or performance of works which were not included in the recital or concert programming response to the insistent requests from the audience, with no responsibility or onus for the organizers. Artº 152º allows radio broadcasting stations to record works which are to be broadcast for the exclusive purpose of broadcasting by its own stations. Such recordings must be destroyed within three months (except in case of exceptional public interest for documentation for official archives), during which time they may be used three times, notwithstanding remuneration due to the author. Artº 168º, nº1, permits, barring agreement to the contrary, the reproduction or publication of a photograph of a person made by hire, by the person who was photographed, the heirs or or persons to whom the work was transmitted without consent of the photographer. If the name of the photographer appears on the original photograph it should also be indicated on the copies (artº 168º, nº2).

Regarding related rights it is important artº 189º, nº1: private use is exempted (a); the extracts from a performance , a phonogram, a videogram or an emission of broadcasting, provided that recourse to such excerpts is justified by the purpose of information or criticism or any other case of those that authorize the quotations or abstracts referred to in (g) of artº. 75º, nº2 is allowed (b); (c) the use intended solely for scientific or pedagogical purpose is also allowed(c); the ephemeral fixation made by the broadcast entity is lawful (d); the fixations or reproductions carried out by public entities or concessionaires of public services for some exceptional interest in documentation or to file are also free (e); other cases in which the use of the work is lawful without the consent of the author are included (f). Limitations and exceptions on copyright shall apply to related rights, if it is compatible with nature of these rights (artº 189º, nº3).

4.2. In our opinion the InfoSoc Directive deserves sever criticism and ought to be revoked, because of several reasons

First, the title of the Directive is misleading. The Directive2001/29/EC of the European Parliament and of the Council, of May 2001, on the harmonization of certain aspects of copyright and related rights in the information society[64], does not deal with subjects only related to the information society. In fact, most aspects don't have any relation to the information society, that is, Internet.[65]

Second, the InfoSoc Directive creates an exhaustive list of the exemptions and limitations allowed (see consideration 32), some related to the reproduction right (artº 5, nº2) some related to both, the reproduction and the public communication right (artº5º, nº3).

There may be no more. In the Information Society it is especially important the new right of making the work, the performance, the audio or video or broadcast available to the public on line and on demand (artº3). The exceptions to this right are totally new.

Anyway, the exhaustive list is to strict. Lacks flexibility and the digital environment is always changing, besides having few exceptions and limitations directly related to Information Society.

Furthermore, the InfoSoc Directive allows the EU countries to choose, from the list, which exceptions or limitations they want to implement in the nacional laws. Of the list of 21 exceptions and limitations only the exemption regarding acts of incidental reproduction is compulsory. This means that each EU Country may have a very different list of exceptions and limitations, thus the aim of harmonization cannot be reached. That is, the Directive is a failure from this point of view. One may question its utility.

All the exceptions and limitations of InfoSoc Directive are subject to the three step rule of the Berne Convention. That is, the general clause of the Berne Convention related to the exceptions to reproduction right (artº 9º, nº2), extended to all intellectual property rights by the TRIPS Agreement (artº 13º) and implemented to all copyrights and related rights by the two WIPO Treaties of 1996 (arts. 10º of the Copyright Treaty and 16º of the Performances and Phonograms Treaty).

Because the three-step rule is a general clause it is subject to the different interpretations by the courts. Thus, it depends of the judges to restrict or enlarge the apparently strict list of exceptions and limitations, that is, each case may be decided differently. If the Directive says nothing, a too strict interpretation of the exceptions and limitations may prevail. As

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[64] OJ L 167/10-19, of 22.6.2001.

[65] In the same sense VICENTE, D. M., 2005, p. 162; PEREIRA, A. L. DIAS PEREIRA, 2016., p.26, amongst other authors.

HUGENHOLZ points out, the Directive as little or nothing to offer in terms of harmonization and in terms of certainty, or of anything else[66].

In the 44 consideration of the Directive seems to limit furthermore de exceptions and limitations. There, after a reference to the three-step rule, we can read: "The provision of such exceptions or limitations by Member States should duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain new uses of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.". As A. DIAS PEREIRA emphasises, some authors consider this one fourth step added to the three-step rule[67], and he considers that there are specialities in the digital environment, leading to a copyright system in two velocities.[68]

In this legal context orphan works could not be considered an exception, there could not be a presumption of agreement, although the author was unknown, or one didn't know where he was[69]. So, during the excessive period of protection (life of the author plus 70 years after his death, ending in 1 of January of the year after the death; in works of collaboration, after the death of the last co-author), the works couldn't simple be used, namely digitalized[70].

If we look to other numbers of the previous considerations of the Directive, like 40[71] and 42[72], for example, though knowing that these previous considerations are not compulsive, it is

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[66] HUGENHOLZ, P. BERNT, " 2000, pp. 499-501; ASCENSÃO, J. de OLIVEIRA, "O fair use no direito autoral", *Anais do XXII Seminário Nacional da Propriedade Intelectual: A inserção da Propriedade Intelectual no Mundo Económico,* ABPI, São Paulo, pp. 94-98. PEREIRA, A. LIBÓRIO DIAS, 2016., pp. 26-27; PEREIRA, A. L. DIAS, 2014, pp. 31-42.

[67] TRITTON, G., (ed.), 2002, p. 369.

[68] PEREIRA, A. L. DIAS, 2016, p. 30.

[69] Notice that this presumption exists in our Code, in Related Rights. When the rightsholder cannot be contacted there is a presumption of agreement (artº 196º)

[70] See PEREIRA, A. L. DIAS, 2006., for further details.

[71] (40) Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter. This Directive should be without prejudice to the Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.

[72] (42) When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.

clear that the InfoSoc. Directive pretends a stricter interpretation of limitations and exceptions in the digital world, that is, in the Internet.

But because the three step rule is a general clause, and the wording of some exceptions or limits allow different interpretations, InfoSoc Directive, in the end, leaves it all to the Courts to decide, in a case-by-case approach as we will see with further detail in the last section of this study.

4.4. But the InfoSoc Directive may be harmful for other reasons. Technological protection and information for the management of copyright and related rights regulated in Portugal, as in the other countries of the EU, have been established in accordance with the 1996 WIPO Treaties (respectively, arts. 11 and 12 of the Copyright Treaty and articles 18 and 19 of the Treaty on Performances and Phonograms) and InfoSoc Directive (arts. 6º and 7º). Nevertheless, in InfoSoc Directive technological measures and information systems have been regulated in a way that is so highly protective that they jeopardize the balance between protection and free use, creating a paradox because users can become worse off than in the the analog era. Infosoc Directive went further than the WIPO Treaties referred to, as regards technological measures, since it did not merely prohibit measures to neutralize technological devices but also covers acts preparatory to such neutralization, such as the manufacture and sale, rental, advertising for the purpose of sale or rental or possession for commercial purposes of such products. In addition, the covers not only infringement of author's rights and related rights but is extended to the *sui generis* right of the manufacturer of the database, which is not covered by the WIPO Treaties (cf. artº 6, nº1 and nº3 InfoSoc Directive; artº 217º CDADC is in line wit these provisions).

Artº 6, nº2 of InfoSoc, complementary to nº1, requires Member States to protect against the manufacture of, or dealing in, illegal circumvention devices and services. Thus, artº 218º CDADC provides that the act of circumvention implies criminal liability. When the circumvention of any effective technological measures is carried out in the knowledge, or with reasonable grounds to believe the goal of circumvention is being pursued, this may lead to imprisonment for a term up to one year or a fine up to 100 days. The criminal proceeding can be initiated even in the absence of any complaint. Artº 219º CDADC, in relation to preparatory activities deals with criminal liability, that can lead to imprisonment for a term up to six months or a fine up to 50 days. Criminal proceeding does not dependent of complaint.

Civil liability may also emerge from the violation of technological protection measures, according to artº226º.

Artº6,nº4 of the InfoSoc Directive addresses the disequilibrium that may occur in when the legal protection of technological measures affects the exceptions and limitations that imply that the uses are free.

The technological protection measures, as well as the criminalization of its circumvention, from the beginning raised the issue of being a serious change to the balance of interests provided by rightsholders and users. Artº6,nº4 of the InfoSoc Directive addresses the disequilibrium that may occur in when the legal protection of technological measures affects the exceptions and limitations that imply that the uses are free, because technological measures have a strong incidence on the limits or restrictions provided for in artº 5 of InfoSoc Directive.

If a work exists in the analogue world and we are faced with an exception or limitation on copyright or related rights, the user may access the work without having to request any authorization; however, if the work in question only exists in the digital domain, which is becoming more and more common, namely with e-articles, e-papers, and e-books, even if the law allows free access, the work cannot be used if it protected by technological measures, since the law doesn't allow to circumvent the measure, even for free uses.

It is true that the InfoSoc Directive seems to be concerned with the imbalance generated. Artº 6 (4) stipulates that if rightsholders fail to take appropriate measures, Member States should ensure that they are made available to users. But this does not prevent the InfoSoc Directive not to allow directly the circumvention of technological measures. In addition, the restrictions to which the aforementioned option applies are not all those contained in artº 5. Of the 21 restrictions typified in this article, only some are candidates for the application of the regime of article 6 , nº4. In other words, it was not enough for artº.5 to contain very few exceptions, the InfoSoc Directive tuned them ineffective in the digital age. It is not enough not to create new exceptions that are appropriate to the digital age, but are still eliminated in the digital context, by this indirect way, most of those that subsisted in artº 5, and which are common restrictions.

Artº 6º also fails to create a harmonized solution in the EU. Each may have very different approaches, which, again, leads to uncertainty.

The Portuguese law, in artº 221º, trying to ensure a balance between the rightsholders and users creates a solution that is well intended but totally ineffective. The solution of asking previous permission to the Inspecção Geral das Actividades Culturais (IGAC), for some of the uses, simply doesn't work. The system is so complex and slow that it doesn't function at all. More, not all the exceptions and limitations are covered by this system (because of art.º 6º of InfoSoc Directive), which implies, in practice, counterfeiting, conflict, giving up, or pay per view.[73] .

[73] See, for further details ASCENSÃO, J.de, OLIVEIRA, 2012., p. 110 ff. ASCENSÃO, J. de OLIVEIRA, 2008, p. 14 ff..; GARROTE FERNÁNDEZ-DÍEZ, I., 2007, p. 2047 ff., commenting art. 160º TRLPI; LEITÃO, L. M. TELES MENEZES, 2011, p. 366 ff.; LEITÃO, L.M. TELES de MENEZES, 2012, p. 137 ff, in particular, pp. 139-140; KOELMAN, J. K./HELBERGER, N., 2000, p. 165 ff.; ROCHA, M. V., 2012-2013, p. 429 ff.; VICENTE, D. MOURA, 2009, p. 506 ff; VICENTE, D. MOURA., 2009, p. 500 ff.

This may lead to a paradox. If a work exists in the analogue world and we are faced with an exception or limitation on copyright or related rights, the user may access the work without having to request any authorization; however, if the work in question only exists in the digital domain, which is becoming more and more common, namely with e-articles, e-papers, and e-books, even if the law allows free access, the work cannot be used if it protected by technological measures, since the law doesn't allow to circumvent the measure, even for free uses.

One of the examples that most shocks us is the right of quotation The supreme limit on copyright and related rights is not included in the digital domain for the purposes of art. 6 of InfoSoc Directive

If the rightsholder does not voluntarily make available free uses to the beneficiaries by keeping the protection by technological measures, the Directive does not impose any penalty. Moreover, each Member State does what it thinks is best. As the safeguarded restrictions have practically no economic interest, recourse to legal proceedings is not even a solution, as users will not be willing to bear the costs and delay of the process for a use which is most likely to have lost its topicality

The CDADC, from this point of view, appears with a solution, only apparently interesting, but devoid of any practical interest. Artº 221 requires holders of protected rights to deposit with the Inspecção Geral das Actividades Culturais (IGAC) free copies, that is, of the means by which users can benefit from the uses allowed by law, nº 2 of artº 75, in (a) reproductions for private purposes, in any medium, performed by a natural person; (e) reproduction and making available to the public for the purpose of informing speeches, speeches or conferences, which are not included in article 7, by extract or summary; (f) reproduction, distribution and public availability for exclusive teaching purposes in a given establishment, parts of a published work;(i) reproduction, public communication and making available to the public in favor of persons with disabilities and to the extent strictly related to that disability; (n) use of the work for the purpose of public security or to ensure the proper conduct or reporting of administrative, parliamentary or judicial proceedings; (p) reproduction of the work by non-profit social institutions, such as hospitals or prisons, when it is transmitted by broadcasting; (q) use of works, for example, of architecture or sculpture, made to be kept in public places; (r) episodic inclusion of work or other material protected in another material; (s) use of the work related to the demonstration or repair of equipment; (t) use of an artistic work in the form of a building, design or plan for the purpose of repair or reconstruction.

In any case, the rule of the three steps of the Berne Convention (artº 75º, paragraph 4) and the remuneration required in artº 76º, nº1 must always be respected, within the limits of als. (a), (e) and (p); in the case of (f) the works reproduced should not be confused with the work of those who use them, nor should the reproduction be so extensive as to prejudice the interest in such works

Also covered is (b) of artº 81º, that is, reproduction for exclusively private use, provided that the three steps of the Berne Convention met and artº. 151º, nº 4, that is, fixations of broadcast works having an exceptional interest in documentation.

Concerning the related rights, the limitations of (a) private use; (c) reproduction for purely scientific or educational purposes; (d) ephemeral fixation by a broadcaster; (e) fixations or reproductions made by public entities or concessionaires of public services for the exceptional interest of documentation or for archiving are also covered.

But a large number of limits and exception are not mentioned.

By way of example, these are not included: the reproduction of speeches, addresses and lectures given in public (artº 75, nº 2, b); the press magazines (art. 75º, nº 2, (c); the inclusion of fragments of literary or artistic works in reports of current events (art.75º, nº 2, (d); the insertion of quotations or summaries of others' works in support of their own doctrines (art.75º, nº 2,(g); the inclusion of short pieces or fragments of other works in one's own works intended for teaching (art.75º, nº2, (h). This, just to mention the limitations that, clamorously are not covered by artº 221º.

Private use is also affected since art. 221, nº8 states that the provisions of the remaining paragraphs do not prevent rightsholders from applying technological measures to limit the number of authorized reproductions relating to private use

Still, we have the serious question of artº 222º CDADC, which, if interpreted broadly, by its restrictive potential of free uses of works, services and products, in the overwhelming majority, available online, annihilates paradoxically free digital uses, with significant negative effects on the right of access to information and, consequently, on research and teaching. Artº 222º states that the limitations to the protection of technological measures foreseen in artº. 221 shall not apply to works, performances or productions made available to the public for access on demand. The situation would be even more serious if the artº. 221 had some practical utility, which it does not have.

In fact, according to artº 221, nº1, in fine, and nº 2 and nº 3 of that article, the interested party, although cannot withdraw the technological measure, may contact the Inspecção Geral das Actividades Culturais (IGAC) in order to achieve the intended use, since holders of rights protected by technological measures must deposit therein the means to benefit from legally prescribed forms of use (nº 1), and right holders should take appropriate voluntary measures. Such as agreements between themselves or their representatives and interested users to enable free access (nº 2). If IGAC is the entity to which the user is directed by requesting access to the resources deposited therein (nº 3), due to the omission of conduct by the rightsholder, the technological measure prevents or restricts free access.

The purpose of the rule is to enable the parties concerned to use a more expeditious and less expensive means than the use of normal procedural means, in situations where such a remedy will not even be justified, at least in the case of the limited situations provided for in artº 221.

However, the measured has no interest, or has a negligible interest, for several reasons. First and foremost, IGAC does not have the power to decide. In addition, the right holder is not sanctioned if he does not provide the means of free access by omission of conduct, therefore, the IGAC acquis will be zero or close, even in matters of national intangible goods. In addition to that, in the absence of standardization of such procedures at Community level, let alone worldwide, the acquis in question will not even cover foreign works, services or products. Moreover, the resolution of disputes is subject to the necessary arbitration by a Mediation and Arbitration Commission (whose members are designated by order of the Prime Minister, under the terms of article 30 of Law 83/2001, of August 3 , that is to say, the arbitrators cannot even be freely chosen by the parties, for which reason the use of voluntary arbitration would be more valuable), of which decisions can be appealed to the Court of Appeal, with merely devolutive effect (artº 221, the latter number concerning the Commission's regulation).

Failure to comply with the decisions of the Mediation and Arbitration Commission may give rise, at the most, to the compulsory sanction provided for in Article 829-A of the Civil Code (nº. 5 of artº 221), which is already very restricted. This means that artº 2221 removes, without any justification, the use of specific enforcement.

Finally, although the procedures foreseen are of an urgent nature, to enable them to be concluded within a maximum period of three months (nº 6), the urgency of such an action must be called in question if there is no penalty if the time limit is which, as the practice teaches us, will be highly probable. Also, precautionary procedures are of an urgent nature, with a maximum expected duration of 2 months, and in practice they may last for two years or more. Already not to question if 3 months is not an excessive time, attentive to the possible urgency of the user, as will be the normal case.

That is, the legislator might as well have stayed quiet. The system is so inadequate that it falls within the same system of recourse to traditional judicial remedies.

The only minimally acceptable solution seems to us to be the proposal, de *iure condendo*, by OLIVEIRA ASCENSÃO: to attribute to IGAC, or another administrative entity, the means of withdrawal of the protection measures, the power to authorize access or intended use when the legal assumptions are met, a summary

4.6.Member States must adopt remedies against devices related to rights management information. Artº 7 of InfoSoc Directive is not as the WIPO Treaties in relation to this subject but extends its protection to the *sui generis* manufacturer of databases. Arts. 223º and 224º of CDADC implement artº 7 of the InfoSoc Directive, but once again, we think that there is overprotection, because draconious measures ought to be expressly considered void, giving rise to criminal liability.[74]

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assessment being sufficient. If there is still a conflict between the user and the rightsholder, a procedural solution will be intervened through a Mediation and Arbitration Commission.

However, even this solution does not satisfy us, since there is no guarantee that the beneficiary of the technological measures will deposit anything with the administrative body, whose collection may be zero. The deposit of works /performances free of technological constraints should constitute an obligation, covered as a contravention subject to fines and generating civil liability. In addition, the administrative entity should be networked with administrative entities from other countries, at least in the EU, to create a broad database and be obliged to decide within a very short time, at most 48 hours, silence, or a lack of acquis if the beneficiary was not sanctioned or if the agreement was not reached with administrative entities in other countries functioned as an authorization for the withdrawal of the measures by the user.

If a fast and efficient route is not opened, the whole complicated provision of artº 6 of the Directive and the CDADC is useless. As OLIVEIRA ASCENSÃO points out, "It would be truer to say that in digital there are no restrictions, at least for the sake of small stingrays."

It should be noted that it is not a question of contesting technological devices. It is normal to pay to obtain a good, material or immaterial, but it is no longer normal that the access and use of this good is unreasonably hampered or impeded, which is exactly what happens.

[74] Rights management information systems are provided for and protected by Article 223 CDADC in favor of the holders of copyright and related rights, as well as of the manufacturer of the database, except for computer programs.

They allow to follow the uses that are made of the work, service or protected product, functioning as watermarks. Artº 223º, nº2 defines them as all the information provided by rightsholders identifying the protected work, performance and production, information on the conditions of use of rights, and any numbers or codes representing that information. According to nº 3, protection shall cover all information for the electronic management of rights contained in the original or in the protected copies, or in the context of any communication to the public.

Its withdrawal is sanctioned with civil responsibility, in the general terms, and penal liability. As for the penalty, artº. 224 (a) and (b), also cover preparatory acts and attempts. The withdrawal of measures and preparatory acts shall be punished with an equal penalty of up to one year's imprisonment or a fine of up to 100 days. The attempt is only punishable by fine. Contrary to technological measures, withdrawal and preparatory acts are subject to the same penalty, although the attempt is still not punishable by imprisonment. It is required intention or awareness of the act not authorized (see artº 224º, nº1, which refers intentionally or have reasonable grounds to know).

Although the measures for the illicit information and management of data are not mentioned, which seems regrettable, they should not be protected in the light of the law on the protection of personal data in the field of cybercrime. We regret, however, that no reference has been made in the CDADC to measures of this kind which, when placed, take personal information from the computer or other hardware of the right holder. On the other hand, these measures can be used to prevent interoperability with other products, which will also be illegal and unplanned.

5. The InfoSoc Directive closed list of exceptions and limitations v. The US Fair Use

Contrary to what happens in the EU, in the US a general clause is used. Such clause is called Fair Use. It is an affirmative defence that the user of of a protected work can use when being accused of violation of copyrights. He will have to prove that the use was fair.

Fair use is an expression created by the courts, now codified in Copyright Act of 1976, Section 107, that states: "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any case is a fair use the factors to be considered shall include—

(1)

the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;

(2)

the nature of the copyrighted work;

(3)

the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4)

the effect of the use upon the potential market for or value of the copyrighted work.

Sony's gaming consoles and Lexmark cases for printers are known to try to prevent the use of generic ink cartridges. These are situations which cannot be accepted in the light of the Community rules on competition law. In such situations there should be an expeditious way of withdrawing the device, so as not to fall into the delays and costs of traditional procedural forms.

But if the national legislator still made a failed attempt on technological measures, there is no concern in this area. Measures cannot be withdrawn unless in normal procedural ways, which will be highly detrimental to the user. Moreover, draconian measures such as those which, for example, in the market for computer games for a single player require a constant Internet connection for the player to be able to play and obtain updates, by connecting to the server of the rights holder, to control piracy, harms the interests of consumers in terms of costs, without much interest in companies, which would better prevent piracy by doing business otherwise. For example, selling at a cheaper price and adding value, providing upgrades at zero cost or at low prices. It is not by putting a draconian measure that is practically impeded the piracy, being certain that the true interested in the game always acquire it of licit form and are harmed. Consumers and competition law within the EU are those who are hit hard, without the draconian measure achieving its desired effect.

Besides the balance against users due to Technological Devices and Management an Information Systems, especially in the EU, because InfoSoc goes beyond what the two WIPO Treaties of 1996 pedicted, there are much other facts that lead to an excessive protection.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

Thus, fair use demands from the courts a case by case analysis based on the four factors and others that the court may use. The commercial use is a circumstance that does not favour fair use; the greater creativity of the work or the fact that the work is less known, also does not favour fair use; if a large part of the work is used, this also does not favour fair use; the negative effect on the market and the economic value of the work are also factors to take in consideration.[75]The general clause of fair use seem much more flexible than the option of the InfoSoc Directive. But, on other side a closed list, duly reflected (not the one of InfoSoc Directive) seems much more predictable. Nevertheless, these stereotypes of copyright wars are exaggerated on both sides of its defendants.[76].´

In the EU more and more authors claim for a revision of the InfoSoc Directive, mainly because the system implies a delay of Europe regarding new forms of use in the digital era, as compared to what happens in the USA.

Nevertheless, the InfoSoc disastrous ruling, has not been decisive in this matter. Because, in the end, all depends of the way courts decide, there may be a broader interpretation, though EU does not have the general clause of fair use.

The European Court of Justice, in the Infopac case[77] decided that beyond the three-step rule, the exceptions and limits to copyright must be subject to a restrict interpretation, because the exceptions and limitations have the nature of exceptions to the rule of exclusivity of copyrights, which implies that there may not be analogue application and demands a restrictive interpretation. Nevertheless, in other cases, the Supreme Court of Justice and the national courts have done broad interpretations to the exceptions and limits, taking account its purpose. This leads to large insecurity in the EU.

The European Court of Justice, itself, two years after the Infopaq case, in the Premier League[78] case, made clear that it was very important to attend to the purpose of the exceptions and limitations, even within a strict interpretation, otherwise the exceptions ans limitations wouldn't have a useful purpose. Thus, artº 5, nº1 of InfoSoc Directive had to make possible and grant the development of new technologies and maintain a fair balance between the rights of the users of new technologies, and of the rightsholders. The Court ruled that the reproduction acts done in the memory of a decodifyer of satellite and in one TV screen may be done without permission of the right holders and do not go against artº5, nº1 of InfoSoc Directive. Since this decision, national EU courts, namely in Germany in the case related to Thumbnails, that opposed an artist against Google, because of the Google Image Search. The

[75] With further details see RENDAS, T., 2015, p. 29.

[76] About this "copyright wars" largely studied, see RENDAS, T., 2015., p.30 ff.

[77] InfoPaq, C-5/08,paragraph 56.

[78] Premier League, C-403/08 and C-429/08, paragraph 164.

Court, in a very broad interpretation, considered that the artist had given an implied consent because he uploaded the images to the net without using the possibility of blocking the automatic indexation by the search engine.[79] In France in the SAIF case also v. Google, the same was decided based in a different argument: the reproduction of the images on line has a temporary character and is part essential for the search engine to function[80] The same result was reached with the fair use clause in the USA, namely in the cases Kelly v. Arriba Soft Corporation, The use of protected images was considered fair because of the importance of the search engines[81] and in the Perfect 10, Inc. v. Amazon com Inc,, also based in the public utility of the search engine[82].

Relating Caching, in the USA, in the case Sony Corporation of America v. Universal City Studios, it was decided the recording of TV programs for further visualisation is fair use[83].

The Supreme Court of Justice in the case Public Relations Consultants Association[84] maintaining that the InfoSoc list of exceptions and limitations of art^{0} 5, ^{0}1, must be strict, it also must grant the development of new technologies and a fair equilibrium between the copyright holders and the users, thus the cache copies may be done without permission of the copyright holders.

In a similar case in the USA, the case Field v. Google, with the only difference that the unlike the former case, where the copies were in the cache memory of the computer, and in this case the copies were in the Google web Crawler (Googlebot), Google also won. The Court based its decision in fair use ruling and in Google's good faith, because it removed the caches of the website of Blake Field when Google took notice of the court action. On the contrary, Blake Field was clearly in bad faith because he didn't block the caching to sue Google. The Court also considered that the plaintiff didn't use meta-tags to prevent Googlebot to make the cache copies, which is the equivalent of an implicit license[85].

In Spain, in the case Google v. Megatikin, the court went to far, and concluded that though it was not a case of temporary reproduction, the step rule has not only a negative interpretation value, but also a positive one, being a manifestation of the good faith principle, of the prohibition of abuse of law, and of the constitutional construction of intellectual property as a limited right. The strict interpretation of the limits and exceptions of InfoSoc Directive does

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[79] Bundesgerichtshof , I, ZR 69/08, of 29.04.2010). See RENDAS, T. 2015. pp. 31-32.

[80] Court d'Appel Paris, 26.01.2011, *apud* RENDAS, T., p.32 and footnote 46.

[81] Kelly v. Arriba Soft Corporation , 280 F. 3d 934(9th Cir. 2002), analysed by RENDAS, T. , 2015., p. 32

[82] Perfect 10 Inc, v. Amazon.com Inc.508, Fd 1146 (9th Cir.2007), analysed by RENDAS, T., 2015, p. 32.

[83] Sony Corporation of America v. Universal City Studios, Inc. 464, U.S. 417 (1984).

[84] Case PRCA, C-360/13.

[85] FIELD v. Google Inc., 412 E Supp. 2d 1106 (D. Nev.2006), mentioned and analysed by RENDAS, T., 2015., p. 33.

not exclude these principles, leading to absurd solutions. Thus, the Court considered the uses of the search engine and of the cache service of Google allowed[86].

Regarding downloads, namely by P2P (peer-to-peer) services, in the USA the act was considered illegal. Napster case, of 2001, is well known, but in that case, there was a central server. In 2005 in a peer.to-peer share, in the case BMG Music v. Gonzalez, the download by a private person, without, and not directed to the entity that furnishes the software that allows the access to the net, and without a central server, the same was decided.in other cases[87].

Curiously in EU countries, bounded to InfoSoc Directive, several cases of P2P downloads for private use have been considered lawful. In Portugal the Public Attorney as refused to present charges against 2.000 complaints of ACAPOR (Associação do Comércio Audiovisual de Portugal) , considering lawful the downloads for private use[88]. But the Courts don't decide always in this sense. So, in the end, it all depends of each court in a case to case basis.

The Supreme Court of Justice decided to condemn P2P downloads for private use in the ACI *Adam BV* and others v. *Stichting de Thuiskopie and others* case.[89]It was decided that a national legislation that does not make a distinction between downloads from a licit source or na unlawful one, may not be accepted. The Court decided in the same line as USA Courts.

Very unexpected was the decision of the Supreme Court of Justice in the case Darmastad Tecnhical University v. Eugen Ulmer KG[90]. The Court goes against the strict interpretation of the exceptions and limits of InfoSoc Directive, making na interpretation based on the purpose of the exception or limitation in cause. The University allowed the digitalization of a book of Ulmer for the purpose of being consulted in the terminals of the library and allowing also the students to make copies in paper and download part or the whole book to a pen drive. In case was artº 5, nº3 al.n) of InfoSoc Directive. This allows the use of publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage, by communication or making available, for research or private study, to individual members of the public by dedicated terminals on its premises of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections. The Court decided that the exception was with no interest if there wasn't the possibility of such establishments did not have an instrumental right of digitalizing the works in question. This goes directly against the three-step rule,

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[86] Tribunal Supremo, Sala Primera de lo Civil, Sentencia 172/2012 of 3.04.2012, mentioned and analysed by Rendas, T., 2015., p. 33.

[87] Cf.AGM Records Inc. v. Napster, 239 E3d 1004 (2001); BMG Music v.Gonzalez, 430 E3d (7th Cir. 2005). In detail see RENDAS, T., 2015, pp. 33-34.

[88] Decision nº 6135/11.7TDLSB, of 20.07.2012.

[89] ACI Adam, C-435/12, paragraph 37.

[90] Case ULMER, C-117/13, paragraph 36.

because Ulmer had books to sell. Nevertheless, the digitalization, not of the whole collection of the library, but of specific acts of reproduction ought to be allowed. The answer to this question, submitted to the Supreme Court of Justice by the Bundesgerischtshof, to us, was totally unexpected. But the fact that the Court decided that not the whole collections could be digitalized, prevented the use this decision to open the door to the digitalization of works of the library, namely orphan works[91]. Thus, the Directive 2012/28/EU of the European Parliament and of the Council, of 25.10. 2012, on certain uses allowed of orphan works.

USA Courts have a much larger interpretation. US District Court for the Southern District of New York, in its decision of 14.11.2013, allowed the non-authorized digitalization of millions of works, within the Google Books Project, basing its decision in de fair use doctrine. The Court considered that Google transformed text in a word index, with cultural purposes, notwithstanding the commercial aim of the company. The Court compared Google Books with the bookshops shells, both with the aim of making the works and authors known to the public and to attack buyers. This decision as a straight relation to the orphan works Directive, because EU couldn't stay being the digitalization process. Nevertheless, the European Union could go far beyond, following this decision of the Supreme Court of Justice, and allowing the digitalization of all works that stay years long in a grey zone, namely in the deposits of libraries, and that are very seldom sold. We think that in those cases the exclusive right ought to be replaced by a simple remuneration right: the work could be used, namely digitalized, and an amount of money ought to be paid to the rightsholder. This seems to us a much better solution than the one opened by the Ulmer case[92].

Conclusions

The copyright wars, of authors and courts defending a general clause like the fair use one, in other for Europe not to stay behind de USA, and others defending a strict closed list of exceptions and limitations, will remain, with arguments of both sides. Nevertheless, we consider the InfoSoc Directive a total error, in the way the exceptions and limitations were legislated, as well as protection measures and rights management information. Not only there is no harmonization, but there is also no definite regulation. What happens is that the ultimate decision is of the courts, that don't have the same interpretations of the exceptions and limitations, sometimes the interpretation goes too far, sometimes it is to narrow. One never knows. In USA as in EU courts have the last word. But while in USA there is the precedent principle, that doesn't happen in Continental Copyright and Related Rights. Thus, the problem in EU is that there is a much greater level of uncertainty[93]. And we can observe

[91] RENDAS, T., 2005, p. 35, in a different interpretation, says the Court does not close the door to the digitalization of the whole of the library collections.

[92]

[93] See RENDAS, T. 2015., pp. 38-39 and bibliography mentioned by the author.

that certain court decisions go openly against InfoSoc Directive. We defend a solution closer to the USA fair use.

Because of this lack of security, and because of the way InfoSoc exceptions and limitations were ruled, we think that in the EU there should be a solution closer to the fair use USA solution. Europe could adopt a general clause like the fair use one, solution that we believe is the best, or establish an equilibrate interpretation of the three-step rule, it could also allow analogy when the same interests meet, and the situation is not in a list of limits and exceptions. I tis important to approach the court decisions from the law, which will not happen if this issue is not properly addressed.

BIBLIOGRAPHY

AKESTER, P., "Implementation of the Information Society Directive in Portugal, *Ent. L.R.,* 1 (2005), London, Sweet and Maxwell, p. 7 ff.

ASCENSÃO, J. de OLIVEIRA, Direito Civil, *Direito de Autor e Direitos Conexos,* Reimpressão da edição de 1993, Coimbra Editora, Coimbra, 2012.

ASCENSÃO, J. de OLIVEIRA, "O fair use no direito autoral", *Anais do XXII Seminário Nacional da Propriedade Intelectual: A inserção da Propriedade Intelectual no Mundo Económico,* ABPI, São Paulo, p. 94 ff.

ASCENSÃO, J. de OLIVEIRA, "O fair use no Direito Autoral, *Direito da Sociedade da Informação,* Vol. IV, 89 (2003), p. 91 ff.

ASCENSÃO, J. de OLIVEIRA "A questão do domínio público", *Estudos de Direito de Autor e Interesse Público,* Fundação Boiteux, Florianopolis, 2008, p. 14 ff.

ASCENSÃO, J.de, OLIVEIRA, "Dispositivos tecnológicos de protecção e direito de acesso ao público", *Direito da Sociedade da Informação e Direito de Autor* (APDI/ASCENSÃO, J. de OLIVEIRA coord.), Vol. X, Coimbra Editora, Coimbra, 2012., p. 110 ff.

ELLINS, J., *Copyright Law, Urheberrecht und ihre Harmonisierung in der Europäischen Gemenischaft*, Duncker & Humboldt, Berlin, 1997

EVANGELIO LORCA, R., "La libre consulta de obras mediante terminales especializados en Bibliotecas y otros Establecimientos Culturales, MORENO MARTÍNEZ, J. A., (coord.) *Límites a la propiedad Intelectual y Nuevas Tecnologias, Incidencias por la Ley 23/2006, de 7 de Julio,* Dikinson, Madrid, 2008, p 119 ff.

GARROTE FERNÁNDEZ-DÍEZ, I., BERCOVITZ RODRÍGUEZ-CANO, R. (coord.) *Comentarios a la Ley de Propiedad Intelectual*, 3ª ed. Madrid, tecnos, 2007, art. 160º TRLPI comment, p. 2047 ff.

HUGENHOLZ, P. BERNT, "Why the Copyright Directive is Unimportant, and possibly Invalid, *EIPR* (2000), p. 499 ff.

KOELMAN, J. K./HELBERGER, N., "Protection of techonological measures", *Copyright and Electronic Commerce. Legal aspects of Electronic Copyright Mangement, (*P. B. HUGENHOLTZ, P. B., coord.), Kluwer Law International, The Hague/London/Boston, 2000, p. 165ff.

LEITÃO, L. M. TELES de MENEZES, *Direito de Autor,* Almedina, Coimbra, 2011.

LEITÃO, L.M. TELES de MENEZES, "Dispositivos tecnológicos de protecção e direito de acesso ao público", *Direito da Sociedade da Informação e Direito de Autor* (APDI/ASCENSÃO, J. de OLIVEIRA coord.), Vol. X, Coimbra Editora, Coimbra, 2012, p. 137 ff.

LUCAS., A., LUCAS, H. -J., *Traité de la Propriété Littérarie et Artistique ,* 2ª Ed., Litec, Paris. 2001.

MELLO, A. de SÁ e, *Manual de Direito de Autor e Direitos Conexos,* 2º Ed. Actualizada e Ampliada, Almedina, Coimbra, 2016.

PEREIRA, A. L. DIAS, "Imprensa Universitária, *e-books* e novos modelos de negócio" *RUA-L. Revista da Universidade de Aveiro n.º 3 (II. série)* 2014, p. 31 ff..

PEREIRA, A.L.DIAS, "O novo regime das obras órfãs", *Revista de Direito Intelectual,* 1 (2016), p. 21 ff.

PEREIRA, A. L. DIAS, "Imprensa Universitária, *e-books* e novos modelos de negócio" *RUA-L. Revista da Universidade de Aveiro n.º 3 (II. série)* 2014, pp. 31-42.

REBELLO, L. F.,*Introdução ao Direito de Autor* , Vol. I, SPA/Dom Quixote, Lisboa, 1993.

RENDAS, T., "Fair Use na União Europeia (*ou os estereótipos das* Copyright Wars)", *Propriedades Intelectuais,* nº3, Junho (2015),p. 26 ff.

ROCHA, M. V., " Contributos para a delimitação da "originalidade" como requisito de protecção da obra pelo Direito de Autor", DIAS, J. de FIGUEIREDO, CANOTILHO, J.J. GOMES, COSTA, J. de FARIA (org.) *Estudos em Homenagem ao Prof. Doutor António Castanheira Neves, Universidade de Coimbra-Boletim da Faculdade de Direito,* STVDIA IVRIDICA 91, Vol. II, *Direito Privado,* Coimbra Editora, Coimbra, 2008, pp. 733 ff.

ROCHA, M. V., Dispositivos tecnológicos de Protecção, Informações para gestão electrónica de direitos e utilizações livres no Direito Português: um desequilíbrio em desfavor dos utilizadores", *Actas de Derecho de Industrial y Derecho de Autor*, (*ADI,)* 33 (2012-2013), pp. 429-446.

ROCHA, M. V., *Portugal,* HENDRICKX, F. (ed.) 104-Suppl. of *Intellectual Property, International Encyclopaedia of Laws,* Wolters Kluwer, Netherlands, 2017.

ROCHA, M. V., "Impressão 3D e Direito de Autor", *Cadernos de Direito Privado,* nº57, Janeiro/Março (2017) p. 16 ff.

ROCHA, M. V. , "Brief Thoughts on the Future of Coyright in the Digital Age", *Copyright, what is its future in the digital age? There is no culture without authors,* 2nd ed., SPAutores/ Guerra e Paz, Lisboa, 2017.

VICENTE, D. M., *Direito Internacional Privado: Problemática Internacional da Sociedade da Informação-Relatório,* Coimbra, 2005.

VICENTE, D. MOURA, "Direito de Autor e Medidas Tecnológicas de Protecção", APDI/ASCENSÃO, J. de OLIVEIRA (coord.)*, Direito da Sociedade da Informação*, VII, Coimbra, Coimbra Editora, 2009, p. 500 ff.

SAIZ GARCIA, C., *Objeto y sujeto del derecho de autor,* Valencia, 2000

STROWEL, A. , *Droit d'auteur et Copyright, divergences et convergences, Étude de Droit Comparé,* Bruylandt, Brussels, 1993.

TRITTON, G., (ed.), *Intellectual Property in Europe,* 2ª ed., Sweet & Maxwell, London, 2002.