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**The Ethics of Transformation: Rethinking the Right to Adaptation in
Copyright Law**

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Abstract

This thesis interrogates the ethical, legal, and economic dimensions of the right of adaptation within copyright law, foregrounding the jurisprudential fragmentation and doctrinal indeterminacy that continue to characterise its regulation across jurisdictions. It contends that adaptation, whether manifested through translation, dramatisation, transmedial reconfiguration, or algorithmic recomposition, constitutes a pivotal mechanism of cultural production and circulation, yet remains among the most contested and conceptually elusive prerogatives of intellectual property.

Part I excavates the historical trajectory and international codification of adaptation rights, with particular reference to the Berne Convention, WIPO instruments, and national frameworks in the United States, the United Kingdom, France, and Italy. The analysis exposes hermeneutic ambiguities in defining derivative works, tensions between exclusive authorial control and constitutionally protected freedom of expression, and the unstable doctrinal status of exceptions such as parody, pastiche, and fair use.

Part II examines the economic rationales and disincentives embedded in adaptation regimes, situating them within broader debates in law and economics. It investigates licensing architectures, incentive structures, and the disruptive impact of digital platforms and AI-generated creativity on value chains and cultural markets.

Part III advances normative proposals for a recalibrated architecture of adaptation rights. It argues for clearer definitional thresholds, principled international harmonisation, and the elaboration of best practices to guide legislators, rights holders, and creative industries.

By synthesising comparative legal analysis with economic inquiry and ethical reflection, the thesis maintains that a coherent and future-oriented regulatory regime is indispensable to reconciling the proprietary claims of authors with the societal imperatives of innovation, access, and cultural participation in an increasingly digitised and globalised creative ecosystem.

Methodology

The thesis adopts a doctrinal legal research methodology, complemented by comparative and interdisciplinary approaches, to examine the legal, economic, and philosophical dimensions of the right of adaptation in copyright law. The research is structured in three principal parts: the first focuses on the legal analysis of adaptation rights and their intersection with fundamental rights; the second investigates the economic and policy implications of adaptation in contemporary creative industries; the third and final section proposes solutions to the various dilemmas outlined in the previous parts. Throughout, the thesis draws on legislative texts, judicial decisions, international treaties, economic theory, and scholarly commentary to build a comprehensive and critically informed argument.

The doctrinal component involves a detailed analysis of statutory sources, international treaties, case law, and scholarly commentary to elucidate the normative structure and interpretative challenges associated with adaptation rights. Key legal instruments examined include the Berne Convention, the U.S. Copyright Act of 1976, the UK Copyright, Designs and Patents Act 1988, the French Code de la propriété intellectuelle, and Italian Law No. 633 of 22 April 1941. These sources were selected for their representativeness across both common law and civil law traditions, and for their relevance to the broader project of international copyright harmonisation.

The comparative dimension of the research focuses on how adaptation rights are conceptualised and enforced in four jurisdictions: the United States, the United Kingdom, France, and Italy. Jurisdictional differences are analysed through legislative texts, judicial reasoning, and doctrinal interpretations, with special attention to how each system defines and limits adaptation, regulates exceptions such as fair use and parody, and incorporates the doctrine of moral rights.

To examine the economic implications of adaptation, the thesis incorporates elements of law and economics. This includes analysis of licensing mechanisms, value chains, and market incentives that influence the production and dissemination of adapted works. Selected case studies are used to illustrate the practical impact of adaptation rights on commercial exploitation and to highlight the legal uncertainties encountered in navigating derivative content markets.

Where relevant, interdisciplinary perspectives are also introduced, especially from cultural studies and digital media theory, to situate legal developments within broader societal and technological contexts. In particular, the role of generative artificial intelligence and other emerging digital tools in the transformation of creative works is explored through recent legal controversies, policy initiatives, and evolving jurisprudence.

The sources consulted comprise a combination of primary legal materials, peer-reviewed academic literature, legal monographs, policy documents issued by institutions such as WIPO and the European Commission, and empirical data where available. Special attention is given to developments up to the current year, to ensure the analysis reflects the most current trends and challenges facing the adaptation right.

Overall, the methodology aims to combine legal precision with comparative insight and interdisciplinary breadth, yielding a multidimensional understanding of adaptation rights and their implications for authorship, innovation, and legal policy.

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List of abbreviations

- **AG** – Advocate General
- **AGCOM** – Autorità per le Garanzie nelle Comunicazioni
- **AI** – Artificial Intelligence
- **ALCS** – Authors’ Licensing and Collecting Society
- **BBC** – British Broadcasting Corporation
- **BFI** – British Film Institute
- **CD** – Compact Disc
- **CDPA** – Copyright, Designs and Patents Act 1988 (United Kingdom)
- **CFREU** – Charter of Fundamental Rights of the European Union
- **CJEU** – Court of Justice of the European Union
- **CNC** – Centre National du Cinéma et de l’Image Animée (France)
- **CO** – Company
- **CPDA** – Copyright, Designs and Patents Act (alternative citation style)
- **CPI** – Code de la propriété intellectuelle (France)
- **DRM** – Digital Rights Management
- **DSM** – Digital Single Market
- **DVD** – Digital Versatile Disc
- **EC** – European Commission / European Community
- **ECJ** – European Court of Justice
- **EU** – European Union
- **EUIPO** – European Union Intellectual Property Office
- **EWB** – EWB v Tixdaq (UK case reference)
- **GPO** – Government Publishing Office (United States)
- **GPT** – Generative Pre-trained Transformer
- **ID** – Identification
- **IFPI** – International Federation of the Phonographic Industry
- **IP** – Intellectual Property
- **IPTV** – Internet Protocol Television
- **JRC** – Joint Research Centre (European Commission)

- **KIKO** – KIKO Milano S.p.A. (Italian cosmetics company / case law reference)
- **LLC** – Limited Liability Company
- **MEDIA** – EU Programme for the Audiovisual Industry
- **OECD** – Organisation for Economic Co-operation and Development
- **OFAH** – Only Fools and Horses (UK sitcom; case reference)
- **OFDE** – Only Fools: The Dining Experience (case reference)
- **OJ** – Official Journal of the European Union
- **OSS** – Open Source Software
- **OUP** – Oxford University Press
- **RDR** – Right of Digital Reproduction (legal shorthand, context-specific)
- **SABAM** – Société d’Auteurs Belge - Belgische Auteurs Maatschappij (Belgium)
- **SACD** – Société des Auteurs et Compositeurs Dramatiques (France)
- **SGDL** – Société des Gens de Lettres (France)
- **SIAE** – Società Italiana degli Autori ed Editori (Italy)
- **TRIPS** – Agreement on Trade-Related Aspects of Intellectual Property Rights
- **TV** – Television
- **UGC** – User-Generated Content
- **UK** – United Kingdom
- **UNCTAD** – United Nations Conference on Trade and Development
- **UNESCO** – United Nations Educational, Scientific and Cultural Organization
- **UP** – University Press
- **USC** – United States Code
- **VARA** – Visual Artists Rights Act (United States)
- **VIP** – VIP Products LLC (case law reference)
- **VOD** – Video on Demand
- **WCT** – WIPO Copyright Treaty
- **WGA** – Writers Guild of America
- **WIPO** – World Intellectual Property Organization
- **WPPT** – WIPO Performances and Phonograms Treaty
- **WTO** – World Trade Organization

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INTRODUCTION

The act of transforming existing creative works through translation, dramatisation, reinterpretation, or technological re-composition has long been a defining engine of cultural evolution. From the adaptation of myth into literature, and literature into film, to the algorithmic generation of art by artificial intelligence, the creative process increasingly unfolds through a continuum of reuse and reinterpretation. As Gérard Genette observes, texts always exist in relation to prior works, “all that sets the text in relationship, whether obvious or concealed, with other texts”.¹ Roland Barthes similarly contends that the writer “can only imitate a gesture that is always anterior, never original,” emphasising that creative production inherently draws upon pre-existing forms.² This evolving paradigm extends beyond human authorship: as Martine Mussies argues, aesthetic vocabularies should remain “available for creative reuse and reinterpretation,”³ thereby situating myth, literature, film, and AI-generated imagery on a shared continuum of creative transformation. Likewise, Advait Sarkar reminds us that “all creative work is essentially reuse,”⁴ challenging traditional notions of originality and affirming the generative potential of remix culture in both human and machine-authored expression. At the core of this process lies the legal concept of the right of adaptation, a cornerstone of copyright law that governs how original works may be modified or transformed into derivative forms. While adaptation is vital to artistic progress and innovation, its legal regulation remains one of the most contested and ambiguous domains in intellectual property (IP) law.

The thesis critically examines the ethical, legal, and economic implications of the right of adaptation, with a particular focus on its conceptual coherence, cross-jurisdictional inconsistencies, and regulatory adequacy in light of contemporary creative practices. Although international treaties such as the Berne Convention and institutions like WIPO have attempted to establish a baseline for the protection of adaptation rights, significant divergences persist among national laws, particularly in the interpretation of what constitutes a derivative work, the scope of fair use or fair dealing, and the balance

¹ Gérard Genette, *Palimpsests: Literature in the Second Degree* (University of Nebraska Press 1997) 1.

² Roland Barthes, ‘The Death of the Author’ in *Image, Music, Text* (Fontana Press 1977) 146.

³ Martine Mussies, ‘AI, Fanart and Intellectual Property: An Analysis of Ownership in the Age of Machine Creativity’ (2020).

⁴ Advait Sarkar, ‘Creativity in the Age of Generative AI’ (2023).

between moral rights and transformative uses.⁵⁶ These divergences have generated legal uncertainty for creators, rights holders, and digital platforms alike, inhibiting creative experimentation and raising barriers to transnational collaboration. As Ben Depoorter notes, “legal uncertainty and delay present interrelated complications that inhibit the enforcement of copyright law,” and such ambiguity can result in “excessive compliance [that] induces cultural impoverishment, especially when it causes artists to avoid incorporating copyrighted material even though the use might be considered non-infringing”⁷.

Part I of the thesis explores the doctrinal and normative foundations of the adaptation right. It traces the historical emergence of this right within copyright law, examines its codification in international and domestic instruments, and offers a comparative legal analysis across the United States, the United Kingdom, France, and Italy. Particular attention is devoted to the ways in which different legal systems define, delimit, and enforce adaptation rights, and how they reconcile these rights with constitutional principles such as freedom of expression and the public interest in cultural access. The discussion also engages with pressing issues raised by the rise of user-generated content, remix culture, parody, and AI-generated creativity, which blur the boundaries between original and derivative works and challenge traditional legal categories.

Part II shifts the focus to the economic dimensions of adaptation, investigating how legal uncertainty influences the commercialisation, licensing, and market circulation of derivative works. Through an interdisciplinary approach that integrates elements of copyright economics, contract theory, and cultural policy, this part examines the incentives and disincentives that current adaptation regimes create for creators, intermediaries, and the wider public. Case studies illustrate both the value-generating potential of adaptations and the legal frictions that arise in their development and distribution, particularly in digital environments.

⁵ Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, last revised 28 September 1979).

⁶ WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002).

⁷ Depoorter, Ben, *Technology and Uncertainty: The Shaping Effect on Copyright Law* (June 15, 2009). *University of Pennsylvania Law Review*, Vol. 157, 2009, University of Miami Legal Studies Research Paper No. 2009-21.

Ultimately, in Part III, the thesis argues for a more coherent and harmonised legal framework for the regulation of adaptation rights, one that provides legal clarity, respects the moral and economic interests of authors, and accommodates the transformative nature of modern creativity. By proposing clearer definitional criteria, transnational principles, and best practices, the study seeks to contribute to ongoing scholarly and policy debates about how copyright law can better support the ethical and creative imperatives of transformation in a rapidly evolving cultural ecosystem.

PART I

REFRAMING THE RIGHT OF ADAPTATION: TOWARDS LEGAL CLARITY AND HARMONIZATION IN A FRAGMENTED COPYRIGHT LANDSCAPE

1.1. The Right of Adaptation

The transformation of creative works through translation, dramatisation, adaptation, or reinterpretation has long constituted a fundamental aspect of cultural evolution. From Shakespeare’s reworking of classical narratives to contemporary cinematic reinterpretations of literary classics, the act of adapting existing works is not only central to artistic innovation but also instrumental in facilitating the circulation of knowledge and cultural memory across time, language, and media, as Alexa Huang observes in “Shakespeare and the Ethics of Appropriation”.⁸ In this sense, adaptation enables a continuous layering of cultural meaning, through which artists reimagine inherited stories and forms in new artistic, social, and technological contexts. As Liane Gabora explains, “creative ideas beget other creative ideas and... modifications accumulate,” resulting in a cumulative process of cultural novelty and transmission.⁹

In the digital era, where content is disseminated across platforms and formats with unprecedented speed and scale, the legal and ethical frameworks governing such transformations have become increasingly complex and contested. Henry Jenkins refers to this phenomenon as “transmedia storytelling,” a process in which “integral elements of a fiction get dispersed systematically across multiple delivery channels,” with each medium contributing uniquely to the narrative.¹⁰ This model of creative production not only amplifies the cultural reach of a work but also complicates traditional legal distinctions between original and derivative expression.

⁸ Huang, A., Rivlin, E. (2014). Introduction. In: Huang, A., Rivlin, E. (eds) *Shakespeare and the Ethics of Appropriation*. Reproducing Shakespeare: New Studies in Adaptation and Appropriation. Palgrave Macmillan, New York.

⁹ Gabora, L. (2018). The creative process of cultural evolution. In Leung, A., Kwan, L., & Liou, S. (Eds.) *Handbook of Culture and Creativity: Basic Processes and Applied Innovations* (pp. 33-60). Oxford: Oxford University Press.

¹⁰ Transmedia Storytelling 101, Henry Jenkins.

At the heart of this evolving landscape lies the right of adaptation, a core principle of copyright law that grants authors the exclusive authority to authorise or prohibit derivative uses of their original works. This right is designed to safeguard both the moral and economic interests of creators by allowing them to control how their works are altered, extended, or reinterpreted by others. However, the practical application of this right is fraught with legal ambiguity. Its scope, definition, and doctrinal interpretation vary not only between jurisdictions but also across different cultural and technological contexts.¹¹

The challenges surrounding the right of adaptation are compounded by broader shifts in how creative works are conceived, produced, and consumed. The rise of transmedia storytelling, remix culture, user-generated content, and AI-assisted creativity has blurred the lines between original and derivative expression. In response, courts, legislators, and scholars have struggled to articulate a coherent framework that reconciles the legitimate interests of original authors with the societal benefits of transformative creativity.

Part I seeks to explore the legal foundations of the adaptation right by examining its historical origins, international codification, national implementations, and conceptual boundaries. It begins with an analysis of foundational instruments such as the Berne Convention. It continues with an examination of how the U.S., UK, French, and Italian copyright laws treat adaptations. The subsequent sections will examine how legal systems distinguish between adaptation and transformative use, how moral rights intersect with derivative creation, and how existing frameworks address emerging forms of adaptation in the digital age.

By mapping these legal terrains, this part aims to uncover the core doctrinal tensions that shape the regulation of adaptations and to identify areas where reform may be necessary to support both creative freedom and rights protection.

1.1.1 History, current beliefs and definitions

¹¹ Drahos, P. (1999). The universality of intellectual property rights: origins and development. *Intellectual Property and Human Rights*. Geneva: World Intellectual Property Organization, 13-41.

The right of adaptation within intellectual property (IP) law grants authors the exclusive authority to alter their original works or to authorise others to do so, thereby giving rise to derivative creations. This prerogative forms a core component of copyright protection, enabling creators to retain control over the transformative uses of their works, such as translations, cinematographic reinterpretations, or musical arrangements.¹² In the United States, article 17 U.S.C. § 106(2) explicitly grants copyright holders the exclusive right “to prepare derivative works based upon the copyrighted work.”¹³ The U.S. Copyright Office further elaborates that “only the owner of copyright in a work has the right to prepare, or to authorise someone else to create, an adaptation of that work”.¹⁴ Doctrinal scholars emphasise the strategic importance of this right; as Michael Abramowicz explains, “copyright’s derivative right gives an author the exclusive right to prepare adaptations of copyrighted works, preventing competitors from preparing unauthorised sequels and other transformations”.¹⁵

Internationally, the Berne Convention for the Protection of Literary and Artistic Works affirms the adaptation right under Article 12, which recognises the author’s exclusive authority to authorise arrangements and other alterations of their works.¹⁶ WIPO has further observed that “the scope of the right of adaptation has been the subject of significant discussion ... because of the greatly increased possibilities for adapting and transforming works in digital formats”.¹⁷ The adaptation right, therefore, not only protects the author’s original expression but also governs the evolution of works across media, markets, and jurisdictions.

The development of adaptation rights has paralleled the historical trajectory of copyright law, evolving significantly over several centuries. Copyright law itself can trace back over 300 years, shaped by diverse legal traditions and cultural transformations. Initially, legal protections were primarily concerned with the reproduction and distribution of literary and artistic works, offering limited recognition to derivative or adaptive uses.

¹² Ibid.

¹³ 17 U.S.C. § 106(2).

¹⁴ U.S. Copyright Office, “Circular 14: Copyright in Derivative Works and Compilations”.

¹⁵ Michael Abramowicz, “A Theory of Copyright’s Derivative Right and Related Doctrines”.

¹⁶ Ibid art. 12.

¹⁷ WIPO, “Understanding Copyright and Related Rights” 2016.

Prior to the enactment of the first modern copyright statute, the Stationers' Company dominated the English publishing landscape, a powerful guild of printers and booksellers that maintained a monopoly over the book trade. The Licensing Act of 1662 institutionalised this control, which required all books to be registered with the Company. The regulatory framework privileged publishers over authors, who at the time were largely excluded from formal legal recognition or protection.

This imbalance began to shift with the enactment of the Statute of Anne in 1710, widely regarded as the first modern piece of copyright legislation. Officially titled “An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned”, the Statute marked a decisive departure from the publisher-centric model of regulation. For the first time, authors were legally recognised as the principal beneficiaries of copyright protection, being granted exclusive rights to control the use of their literary works.

The Statute introduced several groundbreaking mechanisms: it granted authors exclusive rights for a limited period, fourteen years from publication, renewable for an additional fourteen years if the author was still alive, and it protected existing works for twenty-one years. Its preamble articulated a normative goal that remains central to copyright discourse today: to promote learning and public access to knowledge through the incentivisation of authorship.¹⁸

As Craig Joyce explains in “L. Ray Patterson: Copyright (and its Master) in Historical Perspective”, the Statute of Anne transformed what had been the publishers' private law copyright into a public law grant and it established a public domain for literature. By instituting a limited term of protection, the Statute laid the groundwork for the modern concept of the public domain, ensuring that creative works would eventually become freely accessible to the public. The Statute of Anne thus sought to reconcile the interests of authors, publishers, and the wider public, a balance that continues to underpin contemporary copyright frameworks. Legal historians have underscored the transformative impact of this Statute, noting that it not only elevated the legal status of authorship but also fundamentally redefined the structure of literary property.¹⁹ The legacy of the Statute of Anne is evident in both national and international frameworks, as

¹⁸ Morris Jr, Thomas B. "The origins of the statute of Anne." *Copyright L. Symp.*. Vol. 12. 1961.

¹⁹ Craig Joyce, *Introduction - L. Ray Patterson: Copyright (and Its Master) in Historical Perspective*, 10 J. Intell. Prop. L. 239 (2003).

it inspired the U.S. Copyright Act of 1790, shaped debates in French revolutionary lawmaking, and informed the architecture of global treaties, such as the Berne Convention.²⁰

Subsequent legal developments reinforced and refined the distinction between original and derivative works. In *Gyles v Wilcox* (1740), the English Court of Chancery recognised that an abridged version of a work could be lawful if it reflected independent skill and judgment, a doctrine that presaged modern notions of fair use and transformative work.²¹ Later cases, such as *Millar v Taylor* (1769), debated the conflict between common-law copyright and statutory limitations, ultimately affirming that copyright is a perpetual natural right, not a limited statutory privilege.²² These doctrinal shifts laid the foundation for later conceptions of derivative rights, including the adaptation right, which emerged as a discrete legal category in the nineteenth and twentieth centuries.

Today, the adaptation right reflects an ongoing tension between protecting the author's original expression and allowing for new, transformative creativity. As noted by contemporary scholars, the right of adaptation plays a dual role: it safeguards the moral and economic interests of the original author while facilitating cultural dialogue through authorised reworkings.²³ Nevertheless, its practical application remains contested, particularly in light of transmedia storytelling, remix culture, user-generated content, and AI-generated adaptations, all of which challenge traditional notions of authorship, originality, and transformation.

In summary, the right of adaptation is rooted in a centuries-old legal and philosophical tradition that has evolved continuously to respond to changing modes of creative production and dissemination. From the Statute of Anne to the Berne Convention and beyond, the legal treatment of adaptations reflects the broader struggle to balance control with access, protection with innovation, and authorship with cultural evolution.

A. Berne Convention (1886)

²⁰ *Ibid.*

²¹ *Gyles v Wilcox* (1740), 26 ER 489.

²² *Millar v Taylor* (1769), 4 Burr. 2303, 98 ER 201.

²³ *Ibid.*

A pivotal moment in the development of international copyright law was the adoption of the Berne Convention for the Protection of Literary and Artistic Works in 1886. Prior to its enactment, although national legislation based on England's Statute of Anne (1710) had gradually emerged, such as the Copyright Act of 1790 in the United States, there was no coordinated international framework for the mutual recognition and enforcement of copyright. This fragmentation posed significant obstacles to authors seeking protection for their works beyond national borders.

The Berne Convention aimed to address this issue by establishing a comprehensive system of reciprocal protection among signatory states. Its objective was twofold: to grant authors exclusive rights over the use of their creative works, including derivative uses, and to standardise levels of protection across jurisdictions. A primary achievement of the Berne Convention was the abolition of formalities: "authors would now receive protection in all signatory countries without having to register their works in each one". This shift allowed authors to benefit from copyright protections the moment they fixed a work in tangible form, without the burden of procedural requirements.

The Convention was initially signed by ten European countries in Berne, Switzerland. Its influence expanded significantly in the 20th century, most notably with the United States' accession in 1989, following decades of resistance due to conflicts between the Berne principles and the U.S. doctrine of formalities. Today, the Convention has over 180 contracting parties, making it the most widely adopted international treaty on copyright protection.

Among its most significant legal innovations was the extension of copyright protection to unpublished works fixed in some tangible medium. Article 5(2) of the Convention provides that "the enjoyment and the exercise of these rights shall not be subject to any formality", firmly establishing automatic protection for works without the need for national registration.²⁴

Of particular importance for the right of adaptation are Articles 12 and 14, which explicitly recognise authors' exclusive rights to control transformations of their works. Article 12 provides that:

²⁴ Ricketson, Sam, and Jane C Ginsburg, 'Origins of the Berne Convention', *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 3rd edn (Oxford, 2022; online edn, Oxford Law Pro, 23 June 2022)

“Authors of literary or artistic works shall enjoy the exclusive right of authorising adaptations, arrangements and other alterations of their works.”

This provision is foundational for the international recognition of the right of adaptation. It establishes that only the author, or their authorised assignee, has the power to determine whether and how their work may be transformed or altered, reinforcing the legal framework that underpins derivative works across member states.²⁵

Article 14 further expands on the adaptation right in the context of cinematographic works. The provision reads:

“(1) Authors of literary or artistic works shall have the exclusive right of authorising:

(i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;

(ii) the public performance and communication to the public by wire of the works thus adapted or reproduced.

(2) The adaptation into any other artistic form of a cinematographic production derived from literary or artistic works shall, without prejudice to the authorisation of the author of the cinematographic production, remain subject to the authorisation of the authors of the original works.”

This article provides two layers of protection: first, to the authors of the underlying literary or artistic work; and second, to the creators of the cinematographic derivative. Importantly, it ensures that any further adaptation of a film, such as converting it into a stage play or graphic novel, still requires permission from the original author of the underlying work.²⁶

Article 14-bis further addresses issues of ownership and the allocation of rights in cinematographic works. It clarifies that:

²⁵ Ibid art. 12.

²⁶ Ibid art. 14.

“(1) Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work.”

The article also permits national legal systems to define how rights are allocated among contributors, such as screenwriters and directors, allowing for co-ownership or presumptive transfers in national law, provided these are set out in contracts or legislation.²⁷

Although not directly related to adaptation, Article 14-ter introduces the “droit de suite”, a resale right for authors of original artworks and manuscripts. It provides that:

“The author, or after his death the persons or institutions authorised by national legislation, shall, concerning original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work after the first transfer by the author of the work.”

While this right is primarily of economic relevance in the visual arts market, it exemplifies the broader policy goals of the Convention: to ensure continuous recognition and remuneration for creators beyond the initial publication or exploitation of their work.²⁸

The Berne Convention remains the bedrock of international copyright regulation. It has shaped regional and national laws, including the EU *acquis*, the TRIPS agreement, and the U.S. accession to the global copyright regime. The Berne Convention’s inclusion of adaptation rights has provided the foundational structure for derivative protection in nearly every national copyright system globally. By codifying the right of adaptation and embedding it within a binding international framework, the Convention ensures that the principles of authorial control, moral rights, and fair remuneration govern derivative uses of creative works.²⁹

²⁷ Ibid art.14-bis.

²⁸ Ibid art. 14-ter.

²⁹ Ibid.

B. U.S. Copyright Act

In the United States, the right of adaptation is codified in Title 17 of the United States Code, specifically within the Copyright Act of 1976. It is divided into 54 titles, each covering a broad subject area, and is maintained by the Office of the Law Revision Counsel of the U.S. House of Representatives. Title 17 has been enacted into positive law, meaning that the text of the title itself serves as legal evidence of the law. In contrast, titles not enacted into positive law serve only as prima facie evidence, with the Statutes at Large taking precedence in cases of discrepancy.

The U.S.C. is republished every six years in its main edition, with annual cumulative supplements issued to reflect legislative changes. It is made publicly accessible through GovInfo, a digital repository maintained by the Government Publishing Office (GPO). Users are advised to verify online results against the official printed version for authoritative and accurate legal research.

This Statute grants authors a bundle of exclusive rights, among which is the right to prepare derivative works based on their original creations. This encompasses a wide range of transformative uses, including translations, dramatisations, and other reinterpretations of existing material. By vesting this right exclusively in the author, U.S. copyright law ensures that creators retain control over how their works are adapted, modified, or built upon by others.³⁰ As stated in Article 1, Section 8, Clause 8 of the Intellectual Property Clause of the U.S. Constitution, “[The Congress shall have Power...] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”.³¹

According to 17 U.S.C. § 101, a “derivative work” is defined as:

“a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatisation, fictionalisation, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.”

³⁰ Reese, R. Anthony. "Innocent infringement in US copyright law: A history." *Colum. JL & Arts* 30 (2006): 133.

³¹ ArtI.S8.C8.1 Overview of Congress's Power Over Intellectual Property.

The provision further explains that derivative works may include editorial revisions, annotations, or other modifications that, when considered as a whole, constitute original works of authorship.³² This statutory language reflects the intent of the U.S. legislature to provide robust protection not only to original creators but also to subsequent creators who add sufficient original expression to existing works.

The enforcement and interpretation of the derivative work right have been extensively shaped by U.S. case law. Courts have clarified that mere mechanical or trivial alterations are insufficient for protection as derivative works unless they meet the originality threshold outlined in *Feist Publications, Inc. v Rural Telephone Service Co.*, which held that copyright only protects works that possess a minimal degree of creativity, as Tracy L. Maede analyses in her “Ex-Post Feist: Application of a Landmark Copyright Decision”.³³

The policy rationale underlying protection for derivative works lies in the need to strike a balance between the creative freedom of creators and the rights of originators. The derivative right therefore embodies a dual function: protecting economic rights and fostering the evolution of culture through lawful transformation.

C. WIPO

Beyond national legislation, the regulation of intellectual property increasingly relies on multilateral frameworks, with the World Intellectual Property Organisation (WIPO) playing a central role in coordinating and developing international legal standards.³⁴

WIPO administers treaties such as the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), which supplement the Berne Convention and address the challenges posed by digital technologies, particularly concerning cross-border enforcement and the right of adaptation.

³² 17 U.S.C. § 101

³³ Tracy L. Maede, *Ex-Post Feist: Application of a Landmark Copyright Decision*, 2 J. INTELL. PROP. L.245 (1994)

³⁴ *Ibid.*

In addition to its copyright-related functions, WIPO has initiated negotiations to protect genetic resources and traditional knowledge associated with those resources. The objective of this initiative is twofold: to enhance the efficacy, transparency, and quality of the international patent system regarding traditional knowledge and genetic materials, and to prevent the erroneous granting of patents where the invention lacks novelty or inventiveness due to the prior existence or public disclosure of such knowledge.³⁵

The adoption of the WIPO Copyright Treaty (WCT) in 1996 was a significant step in adapting international copyright law to the digital age. Created as a “special agreement” under Article 20 of the Berne Convention and designed to complement the TRIPS Agreement, the WCT aimed to harmonise standards and extend copyright protections.

The treaty incorporated well-established provisions such as recognising computer programs as literary works, safeguarding databases based on originality in their selection or arrangement, and expanding rights related to distribution and rental, in alignment with United States practices.

While these provisions facilitated harmonisation, certain contentious issues pertinent to the digital age remained unresolved. For instance, the treatment of temporary digital copies prompted debate: although the WCT's Agreed Statements clarified that digital storage of works constitutes reproduction under Berne, the treaty's wording did not conclusively resolve this matter, creating uncertainty over whether short-term or incidental uses infringe rights.

Furthermore, the treaty introduced an 'exclusive communication to the public' right via wire or wireless means, extending beyond the scope of Berne and raising concerns about intermediary liability, particularly for Internet service providers transmitting infringing content.

Additionally, the prohibition against circumventing technological protection measures (TPMs) enhanced enforcement efforts but also raised worries about hindering innovation or legitimate activities.

Notably, the treaty did not explicitly recognise doctrines such as fair use or fair dealing; instead, it left the determination of restrictions to individual countries, provided they complied with the Berne's three-step test.” This omission prompted concerns that

³⁵ Ethan Schow, Updating the Berne Convention for the Internet Age: Un-Blurring the Line Between United States and Foreign Copyrighted Works, 37 *BYU J. Pub. L.* 385 (2023).

practices such as educational use, ephemeral copying, or reverse engineering could be threatened by restrictive interpretations. Legislative proposals by the United States to implement the treaty reflected divergent priorities: H. R. 2281 (Coble Bill) prioritised robust anti-circumvention measures, whereas S. 1146 (Ashcroft Bill) and H. R. 3048 (Boucher Bill), supported by dissemination-oriented groups, aimed to safeguard fair use and limit service provider liabilities.³⁶

1.1.2 Mapping legal boundaries: National legislations on the right of adaptation

1.1.2.1 Italy

In Italy, adaptations of copyrighted works such as translations, modifications, additions, and transformations are protected under national copyright law. These adaptations are classified as “*elaborazioni creative*” (creative elaborations) and are afforded the same legal protection as original works. According to the Italian Copyright Law, Law No. 633 of 22 April 1941, an adaptation must demonstrate originality and reflect the personal imprint of the author to qualify for protection. Consequently, modifying a protected work without the necessary authorisation may constitute copyright infringement.

Article 46 explicitly addresses rights related to cinematographic works, stating that, unless otherwise agreed, the producer is prohibited from making or exhibiting adaptations, transformations, or translations of a cinematographic work without the consent of the authors. This reinforces the centrality of authorial control over derivative uses.³⁷

Italy’s copyright framework is rooted in the civil law tradition and emphasises authors’ rights. It offers limited exceptions compared to standard law systems. Notably, it does not provide equivalents to the “fair use” or “fair dealing” doctrines. Exceptions for educational purposes remain narrow, often necessitating case-by-case interpretation, and have prompted calls for more explicit legislative guidance.

³⁶ Sheinblatt, Julie S. "The WIPO copyright treaty." *Berkeley Tech. LJ* 13 (1998): 535.

³⁷ *Ibid* art. 46.

In recent years, Italy has adapted its legal framework to reflect developments at the European level, particularly the EU Directive on Copyright in the Digital Single Market (Directive (EU) 2019/790). Italian transposition of this directive introduced new rules governing the use of copyrighted material online, including liability for online content-sharing platforms and the rights of press publishers. In parallel, the Italian Communications Authority (AGCOM) has implemented specific procedures for addressing online copyright infringements, further reinforcing enforcement mechanisms in the digital sphere.³⁸

Additional domestic reforms have sought to increase awareness of copyright compliance, promote respect for intellectual property, and support businesses and authors. One notable area of regulation involves the reproduction of images of cultural goods, a domain where copyright principles intersect with Italy's constitutional commitment to cultural heritage. Although not copyright in a strict sense, these rules prohibit unauthorised commercial exploitation of Italy's publicly owned artworks and landmarks. Moral rights in Italy are powerful and inalienable, meaning they cannot be waived or transferred, even when economic rights are assigned or transferred. These rights enable authors to object to distortions or mutilations of their works that would harm their reputation or artistic integrity.³⁹

Italian case law has played a pivotal role in interpreting the scope of adaptation rights. In the *KIKO S.p.A. v Wycon S.p.A.* case, the Italian Supreme Court held that the distinctive store layout of KIKO, including its design elements and colour schemes, qualified for copyright protection as an original intellectual creation. Adaptations or imitations of such designs without consent were ruled to be infringing.⁴⁰

Article 70 permits limited use of works for quotation and educational use, the legal status of appropriation art remains contested, especially when transformation may or may not qualify as a parody or sufficiently original creation.⁴¹

Italian copyright law provides a robust framework for protecting adaptations, founded on the principles of originality and personal authorship. Although national

³⁸ *Transposition of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.*

³⁹ *Ibid.*

⁴⁰ *KIKO S.p.A. v Wycon S.p.A.* 780/2020.

⁴¹ *Ibid* art. 70.

exceptions remain narrow and the law prioritises the protection of creators over expansive user freedoms, recent harmonisation with EU directives and increased digital enforcement efforts signal a growing responsiveness to the changing technological and cultural landscape. The evolution of case law demonstrates Italy's commitment to striking a balance between protection and interpretive nuance, particularly in complex cases involving parody, appropriation, and design.

1.1.2.2 UK

In the United Kingdom, the right of adaptation forms a central component of copyright law, granting authors the exclusive authority to transform their works into new forms. This includes activities such as translating a novel into another language, converting a book into a stage play or screenplay, or arranging a musical composition for a different set of instruments. The primary legal instrument that governs this right is the Copyright, Designs and Patents Act 1988 (CDPA), which codifies the scope, limitations, and enforcement of adaptation rights within the UK legal framework.⁴²

Under Section 16 of the CDPA, copyright in a work confers upon its owner a series of exclusive rights, including the right to copy the work, issue copies to the public, perform, show or play the work in public, and most crucially, to make adaptations of it.⁴³

The Statute defines what constitutes an adaptation with specificity depending on the category of the original work. According to the Statute literary works adaptations include translations, transformations into dramatic forms (e.g., turning a novel into a play or screenplay), and abridgements or summaries; while for dramatic works adaptations involve conversions into non-dramatic forms (e.g., converting a play into a narrative prose format); additionally for musical works adaptations typically involve arrangements or transcriptions that present the composition in a new form.

It is important to note that the CDPA does not extend the right of adaptation to artistic works, sound recordings, films, or broadcasts. While these forms of work are still protected under UK copyright law, primarily through reproduction rights or rights related to public performance and communication, the specific right to authorise adaptations does

⁴² *Ibid.*

⁴³ *Ibid* art. 16.

not apply. This demarcation reflects a deliberate legislative choice to limit the adaptation right to specific categories of works where transformation is commonly understood as a core form of reuse.⁴⁴

For an adaptation to enjoy copyright protection in the UK, it must satisfy the requirement of originality. Courts have consistently held that the adaptation must reflect the adapter's intellectual creation and exhibit a sufficient degree of skill, judgment, and labour. This is in line with the standard laid down in *University of London Press Ltd v University Tutorial Press Ltd*, where the Court ruled that even examination papers could be original works so long as they were not copied mechanically. Thus, originality in UK law does not require novelty, but rather it must reflect personal intellectual input.⁴⁵

In addition to economic rights, UK law also recognises a set of moral rights, which serve to protect the author's personal and reputational interests in their work. Among these is the right to object to derogatory treatment under Section 80 of the CDPA. This moral right allows authors to prevent distortions, mutilations, or other modifications of their works that are prejudicial to their honour or reputation. Notably, this right remains with the author even after the economic rights have been transferred. The significance of moral rights in the context of adaptation lies in the fact that an author could oppose an adaptation that distorts the essence or tone of the original, even if the adaptation is otherwise lawful.⁴⁶

For creators and businesses involved in adaptation practices in the UK, several practical and legal considerations arise. Regarding permission and licensing, it is essential to obtain permission from the copyright holder before undertaking any adaptation. Even a seemingly minor transformation requires explicit authorisation unless a statutory exception applies, such as adapting a novel into a short film. To be protected in its own right, the adapted work must demonstrate independent intellectual effort. A derivative that merely reproduces the original work without creative input will not qualify.⁴⁷

The CDPA provides certain exceptions for fair dealing. These include uses for criticism or review (Section 30), news reporting (Section 30), research and private study (Section 29), parody and caricature (Section 30A), and educational use (Sections 32–36).

⁴⁴ *Ibid*; Copyright Act 1911.

⁴⁵ *University of London Press Ltd v University Tutorial Press Ltd* 2 Ch. 601.

⁴⁶ *Ibid* art. 80.

⁴⁷ *Ibid*.

Each of these defences is construed narrowly and generally requires proper attribution of the original work. Although even if the adaptation is authorised, it must not infringe the moral rights of the original author. An adaptation perceived as defamatory, satirical, or offensive could give rise to a legal challenge based on moral rights. The UK's carefully limited adaptation right serves to promote balance by offering protection where transformation is meaningful while avoiding overly expansive monopolisation of ideas.⁴⁸

Several landmark UK cases have contributed to defining and refining the boundaries of adaptation rights. In *Lucasfilm Ltd v Ainsworth*, the Supreme Court ruled that replica Stormtrooper helmets from Star Wars were functional props rather than artistic sculptures, and therefore were not entitled to copyright protection under the provisions for artistic works. The decision limited the scope of protection for utilitarian adaptations and demonstrated judicial restraint in extending copyright to functional objects.⁴⁹

Section 30A of the CDPA introduces a statutory exception for parody, caricature, or pastiche. However, courts have generally applied this exception conservatively. As in *Shazam Productions Ltd v Only Fools The Dining Experience Ltd*, which concerned an immersive dining event that recreated the setting and characters from the television show "Only Fools and Horses". The Court held that the use of characters and scripts without permission constituted copyright infringement and rejected the parody defence under Section 30A CDPA. It emphasised the requirement that parodies must involve a transformative use and not simply be unauthorised reproductions for commercial gain.⁵⁰

The UK's copyright framework offers a nuanced and measured approach to adaptation rights. By defining the categories of works eligible for adaptation, establishing a clear originality threshold, and upholding strong moral rights, UK law ensures that authors retain substantial control over how their works are reused and reinterpreted. At the same time, it allows for limited, well-defined exceptions that enable socially beneficial uses such as education, commentary, and parody. This balanced approach underscores the UK's commitment to protecting intellectual property while fostering a dynamic environment for cultural expression and innovation.

⁴⁸ *Ibid.*

⁴⁹ *Lucasfilm Ltd v Ainsworth* UKSC 39.

⁵⁰ *Shazam Productions Ltd v Only Fools The Dining Experience Ltd* EWHC 1379 (IPEC).

1.1.2.3 USA

In the United States, the right to adapt a copyrighted work is enshrined within the broader legal category of “derivative works,” a concept which lies at the core of American copyright protection. This right empowers copyright holders with the exclusive authority to authorise the transformation of their original works into new, recognisably related forms. These transformations can take numerous forms, including but not limited to translations, dramatisations, musical arrangements, fictionalisations, abridgements, and cinematic adaptations. The legal foundation for this right is found in the Copyright Act of 1976, codified in Title 17 of the United States Code, which represents a comprehensive overhaul of earlier copyright statutes.⁵¹

The principal statutory provision governing the right of adaptation is 17 U.S.C. § 106(2), which expressly grants copyright owners the exclusive right “to prepare derivative works based upon the copyrighted work.” This statutory recognition ensures that authors have the legal power to regulate and monetise the evolution of their creative expressions into different forms. Adaptations, as derivative works, require the permission of the original author for lawful creation, unless a statutory exception such as fair use applies.⁵²

Section 101 of the same title offers a legal definition of a derivative work. According to 17 U.S.C. § 101, a derivative work is defined as “a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatisation, fictionalisation, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” This list is illustrative rather than exhaustive, reflecting the legislature’s intent to encompass a broad range of expressive reinterpretations. Whether a work qualifies as a derivative ultimately hinges on its substantial reliance on and transformation of the underlying protected work.⁵³

The requirement for permission to create a derivative work is not limited to formal publication or distribution. Even private, unpublished adaptations may constitute infringement if they are created without authorisation. This highlights the expansive nature of protection conferred under U.S. copyright law.

⁵¹ Ibid.

⁵² 17 U.S.C. § 106(2).

⁵³ 17 U.S.C. § 10.

Although derivative works are based on pre-existing content, they may themselves qualify for separate copyright protection provided they meet the threshold of originality. U.S. courts have consistently held that to be protectable, the derivative work must exhibit sufficient creativity that reflects the author's intellectual effort. The famous *Feist Publications v Rural Telephone Service* case reaffirmed the constitutional requirement of originality, rejecting protection for mere compilations of data that lacked creative selection or arrangement.⁵⁴

The originality standard for derivative works means that simple or mechanical modifications, such as literal translations or straightforward digitisation, may fail to achieve protectability. However, adaptations that reinterpret, reframe, or enrich the source material, such as a novel turned into a film screenplay with newly imagined dialogue and scenes, are likely to be eligible.⁵⁵

Among the most important limitations on the adaptation right in the United States is the doctrine of fair use, codified at 17 U.S.C. § 107. Fair use permits the limited, non-licensed use of copyrighted works under specific circumstances. Courts evaluate whether the use qualifies as fair based on four factors:

1. The purpose and character of the use, including whether it is commercial or is for non-profit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used;
4. The effect of the use upon the potential market for or value of the copyrighted work.⁵⁶

In adaptation cases, the first factor often hinges on whether the use is transformative, that is, whether it adds something new with a different purpose or character, rather than merely superseding the original. Transformative uses are favoured under the fair use doctrine, but the analysis remains context-specific and fact-intensive.

Software occupies a unique space in U.S. copyright law. 17 U.S.C. § 117 provides that the owner of a lawfully acquired copy of a computer program may make adaptations necessary for its use with a machine or for archival purposes, without infringing copyright. This exception was enacted to accommodate the technical realities of software

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ 17 U.S.C. § 107.

functionality and represents a rare statutory carve-out from the exclusive right to prepare derivative works.⁵⁷

The doctrine of derivative works and the fair use exception have been the subject of significant judicial elaboration. Noteworthy cases like the *Andy Warhol Foundation v Goldsmith* case. In this 2023 decision, the Supreme Court ruled that Warhol’s use of a Lynn Goldsmith photograph of Prince in a silkscreen series was not fair use when licensed for commercial publication. The Court emphasised that minimal aesthetic changes, even when artistically notable, may not be transformative if the new work retains the same commercial purpose.⁵⁸

Furthermore, the *Campbell v Acuff-Rose Music, Inc.* case involved a parody by 2 Live Crew of the song “Oh, Pretty Woman”. The Court ruled that parody can be considered a fair use, even if it is commercial, provided it makes a sufficient comment on the original work.⁵⁹

The U.S. right of adaptation, embedded within the derivative works doctrine, constitutes a vital legal mechanism for protecting authors’ intellectual property. Its strength lies in its ability to prevent unauthorised transformations of copyrighted material, thereby preserving the integrity and economic value of original works. However, the doctrine also coexists with significant limitations, especially the fair use defence and statutory exceptions for software, that serve as counterweights to overprotection.

Judicial interpretations have progressively shaped the contours of what qualifies as lawful adaptation, particularly through evolving understandings of “transformative use.” Meanwhile, academic critiques and empirical research continue to inform ongoing debates about how best to balance creative freedom with proprietary control, in an increasingly digital, globalised world. In an AI-driven world, the U.S. framework for adaptation rights remains a dynamic and contested space at the heart of intellectual property law.

1.1.2.4 France

⁵⁷ 17 U.S.C. § 117.

⁵⁸ *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

⁵⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

In France, the “*droit d’adaptation*” (the right of adaptation) is a core aspect of copyright protection, granting authors exclusive control over how their original works are modified, transformed, or translated into new forms. This right, grounded in the principles of “*droit d’auteur*” (copyright/author’s rights), allows authors to authorise or prohibit any adaptation, including translations, dramatisations, audiovisual conversions, and musical arrangements. French copyright law distinguishes itself by the coexistence of economic rights and strong, perpetual moral rights that continue to protect the author’s personal and reputational interests even after the transfer of economic rights.⁶⁰

French copyright law is codified in the Code de la propriété intellectuelle (CPI). For a work to receive copyright protection, it must satisfy two main criteria: the work must be expressed in a form that is perceivable and recordable (e.g. written, digital, audiovisual) and the work must reflect the author’s personal imprint and creative expression.

These conditions align with the broader European framework but remain underpinned by the philosophical tradition of “*droit moral*”, prioritising the individual connection between the author and the work.

Under the CPI, “*droits patrimoniaux*” (economic rights) allow authors to control and monetise the use of their works, including reproduction, communication to the public, and adaptation. The right of adaptation is thus an integral economic right, requiring explicit authorisation for any form of transformation.

However, “*droit d’auteur*” (copyright/author’s rights) goes further by establishing “*droits moraux*” (moral rights), which include:

- “*Droit de divulgation*” (the right to disclosure): the exclusive right to determine the timing and manner of publication;
- “*Droit à la paternité*” (the right to attribution): the right to be recognised as the author;
- “*Droit au respect de l’œuvre*” (the right to integrity): the right to oppose any modification that may distort the work or harm the author’s reputation;
- “*Droit de retrait ou de repentir*” (the right of withdrawal or repentance): the right to withdraw a published work under certain conditions.⁶¹

⁶⁰ Code de la propriété intellectuelle.

⁶¹ Ibid.

These rights are inalienable, perpetual, and imprescriptible under French law, meaning they cannot be waived or assigned, even after the individual's death.

A written, explicit agreement must govern the transfer of adaptation rights. Article L. 131-3 CPI requires that each mode of exploitation, including adaptation for film or television, be specified separately to avoid ambiguity or presumed transfer. Courts interpret these provisions strictly, ensuring authors are fully informed about the scope and implications of any contractual assignment of their rights.⁶²

Although French copyright law is author-centric, certain statutory exceptions exist that permit limited adaptations without prior authorisation. One such exception concerns accessibility for persons with disabilities. Works may be reproduced or adapted by authorised institutions to improve accessibility without infringing the author's rights.

However, unlike some standard law systems, France does not embrace broad fair use or fair dealing doctrines. Exceptions are narrowly tailored and interpreted restrictively.

Unauthorised adaptations are considered infringements under French law and may result in both civil and criminal liability. Remedies include injunctions, damages, publication of judicial decisions, and, in some cases, fines or imprisonment. The robustness of enforcement mechanisms is evident in the publication of sequels to Victor Hugo's *Les Misérables* by François Cérésa. Hugo's descendants alleged violation of moral rights, claiming distortion of the original work. The Court of Cassation upheld that while moral rights are perpetual, the plaintiffs failed to demonstrate sufficient distortion or reputational harm.⁶³

Furthermore, in the *Société Le Chant du Monde v Société Fox Europe et Société Fox Américaine Twentieth Century* case, Russian composers, including Shostakovich, sued over the unauthorised use of their compositions in the film "The Iron Curtain". Although the works were in the public domain in France, the Court ruled in favour of the composers based on moral rights, showing that even public domain works are not immune to claims of misrepresentation or misuse under *droit moral*.⁶⁴

⁶² Ibid art. L. 131-3.

⁶³ CBC Arts, "Court clears the way for sequels to *Les Misérables*".

⁶⁴ *Société Le Chant du Monde c. Société Fox Europa et Société Fox américaine Twentieth Century*, Cour d'appel, Paris, 13 janvier 1953, D.A. 1954, 16, 80.

With the rise of online media, disputes emerged over whether digital publication of newspaper articles constituted a new adaptation. Courts held that collective works require additional authorisation when individual contributions are reused. In January 2024, a legislative proposal sought to modernise French copyright law in response to the rise of generative artificial intelligence. The proposal introduced remuneration mechanisms for authors whose works are used in AI training datasets, relying on collective rights management. However, the bill was met with criticism for its lack of clarity, particularly regarding exceptions such as parody and pastiche, which remain poorly defined in the digital context. This debate reflects the ongoing tension between fostering innovation and ensuring that authors retain meaningful control over the transformation of their works in the age of AI.⁶⁵

With a jurisprudence rich in precedents and evolving digital challenges, the French continues to evolve in response to new technologies, but always with the core objective of safeguarding the dignity and creative autonomy of authors.

1.1.3 Clash with exceptions

In the realm of intellectual property law, the doctrines of fair use, caricature, pastiche, and parody constitute distinct yet interconnected legal mechanisms that permit the limited use of copyrighted material under specific conditions. These exceptions or defences serve as critical tools for reconciling the exclusive rights of authors with broader societal values, such as freedom of expression, critical commentary, and cultural innovation. A nuanced understanding of the distinctions among these concepts is essential for creators, legal practitioners, and scholars navigating the increasingly complex landscape of copyright protection.

Although fair use and fair dealing serve analogous functions in enabling expressive freedom, their doctrinal structures differ considerably. The U.S. approach is notably open-ended and adaptable, allowing a broad range of transformative uses but at the cost of legal predictability, as outcomes hinge on fact-intensive judicial discretion. The UK and EU frameworks, while more prescriptive and transparent, provide less flexibility and rely on narrowly defined statutory categories. Moreover, while caricature,

⁶⁵ Stephenson Harwood, “AI, machine learning and big data laws and regulations 2024”.

pastiche, and parody are expressly codified in the UK and certain EU member states, they are subsumed under the broader fair use doctrine in the U.S.⁶⁶

Contemporary challenges posed by digital technologies and artificial intelligence have further complicated the interpretation of these doctrines. The question of whether training AI systems using copyrighted material constitutes fair use has become a matter of active litigation. Notably, companies such as Meta⁶⁷ and Anthropic⁶⁸ have been subject to lawsuits alleging the unauthorised use of copyrighted content in AI training datasets. These disputes raise fundamental questions regarding the scope and evolution of fair use in a digital age characterised by automated content generation and data scraping.⁶⁹

Ultimately, the intersection of copyright exceptions and derivative creativity lies at the core of modern intellectual property law. An in-depth understanding of fair use, fair dealing, caricature, pastiche, and parody and their treatment across jurisdictions, is essential for ensuring legal compliance while preserving the vitality of artistic expression. As courts continue to address these evolving issues, particularly in light of emerging technologies, the legal frameworks governing these exceptions will remain central to shaping the boundaries of creative freedom in the twenty-first century.

1.1.3.1 The Pelham Case

The Pelham decision, also known as the Metall auf Metall saga, confronted the CJEU with the question of whether a two-second sample taken from Kraftwerk's 1977 track could be lawfully used by producer Moses Pelham in a new hip-hop recording without the rightholder's authorization. At the preliminary stage, Advocate General Szpunar adopted a strict interpretation of Article 2(c) of the InfoSoc Directive, affirming that "no de minimis threshold exists in relation to the reproduction of phonograms" and that "any part, however small, of a sound recording" fell under the exclusive right of the

⁶⁶D'Agostino, Gluseppina. "Healing Fair Dealing-A Comparative Copyright Analysis of Canada's Fair Dealing to UK Fair Dealing and US Fair Use." *McGill LJ* 53 (2008): 309.; Sarah Lee, "EU Fair Use in Copyright Law: Understanding the nuances of fair use in the European Union's copyright law framework".

⁶⁷ *Kadrey v. Meta Platforms, Inc.*, 3:23-cv-03417.

⁶⁸ *Bartz v. Anthropic*, 3:24-cv-05417.

⁶⁹ Flaherty, Ruth. "Fair dealing in a pandemic: how pastiche can be used to clarify the position of user-generated content." *European Journal of Law and Technology* 13.1 (2022).

producer.⁷⁰ In his view, the freedom of artistic expression did not extend to taking phonograms without authorization, analogising samples to the physical tools of creation: “Is it conceivable for a painter to rely on his freedom of creation so as not to pay for his paint and paintbrushes?”⁷¹ This restrictive approach implied that unauthorized sampling, even of the shortest fragments, would almost invariably constitute an infringement, unless clearly covered by one of the closed list of exceptions in Article 5 of the Directive.

The Court, while largely endorsing the AG’s reasoning that phonograms are protected irrespective of originality and even against very small appropriations, reached a more nuanced conclusion. It held that protection is justified by the investment in the production of phonograms, and thus “the financial and organisational investment that gives rise to such legal protection can be reflected in even the smallest part of the phonogram”.⁷² However, the Grand Chamber simultaneously carved out a safeguard for artistic freedom by recognising that sampling does not infringe reproduction rights if “the sample taken from a phonogram is included in a modified form unrecognisable to the ear in the new work”.⁷³ This balancing exercise explicitly drew on Article 13 of the Charter of Fundamental Rights, which guarantees freedom of the arts, alongside Article 17(2) on intellectual property. As the Court explained, a blanket prohibition of unauthorized sampling “would not enable a proper balance to be struck” between competing rights.⁷⁴

Importantly, the CJEU dismissed the argument that Member States could rely on open-ended doctrines, such as Germany’s §24 UrhG “free use” clause, to accommodate practices like sampling. It reiterated that the system of exceptions in Article 5 InfoSoc Directive is exhaustive and that “judges cannot grant additional derogations from copyright and the related rights on the basis of the fundamental rights guaranteed in the Charter”.⁷⁵ At the same time, however, the Court emphasised that optional exceptions such as quotation, parody, or pastiche must be interpreted in light of fundamental rights,

⁷⁰ AG Szpunar, Opinion in *Pelham and Others* (Case C-476/17, 12 December 2018) paras 28–33, in Bernd Justin Jütte and João Pedro Quintais, ‘The Pelham Chronicles: Sampling, Copyright and Fundamental Rights’ (2021) 16(3) *JIPLP* 213, 215.

⁷¹ AG Szpunar, *Pelham* Opinion, para 52, cited *ibid* 215.

⁷² *Pelham* (CJEU, Grand Chamber, 29 July 2019) paras 29–30, discussed in Jütte and Quintais, *Pelham Chronicles* 215.

⁷³ *Pelham* (C-476/17) para 31, in Jütte and Quintais, *Pelham Chronicles* 215.

⁷⁴ *Ibid* para 37.

⁷⁵ *Pelham* (C-476/17) para 79, in *CURIA - Documenti* 72–79.

and that in some circumstances Member States may even be obliged to implement them to preserve the “fair balance” between the rights of producers and artistic freedom.⁷⁶

The ultimate outcome in *Pelham* therefore reflects a compromise between the AG’s rigid conception of phonogram producers’ rights and the constitutional dimension of artistic freedom. While recognizable samples fall within the scope of reproduction rights and require authorization unless a specific exception applies, unrecognizable fragments may circulate freely, thereby permitting a limited space for musical creativity. As commentators have noted, the decision “leaves little room for what in German is often referred to as “*Referenzkultur*” (reference culture),” since users of samples face not only strong copyright protection but also “even stronger related rights protection”.⁷⁷ The Court’s ruling thus underscores both the limits of judicial flexibility under the closed system of the InfoSoc Directive and the growing necessity of recalibrating copyright law in line with the Charter to accommodate evolving cultural practices such as sampling.

1.1.3.2 Fair use & Fair dealing

Fair use in the United States is outlined in Section 107 of the Copyright Act of 1976, which consolidates the body of case law developed up to that point. It states that the fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research does not constitute copyright infringement.

Unlike the UK’s limited list of specific purposes, the US law offers an open-ended list, with courts applying four mandatory factors in every case: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use on the potential market.

The first factor considers whether a use is commercial or transformative, with early cases such as *Sony Corp of America v Universal City Studios Inc*⁷⁸ recognising non-commercial time-shifting as fair, while the Supreme Court in *Campbell v Acuff-Rose*⁷⁹ rejected any presumption against commercial uses and held that parody, like other uses, must be judged on a case-by-case basis. Later cases, including *Rogers v*

⁷⁶ Ibid paras 72–77.

⁷⁷ Jütte and Quintais, *Pelham Chronicles* 217.

⁷⁸ *Sony Corp of America v Universal City Studios Inc*, 464 U.S. 417 (1984).

⁷⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

Koons⁸⁰ and *Basic Books v Kinko's*⁸¹, reinforced that bad faith or profit-driven motives weigh against defendants, whereas socially valuable objectives, such as government-funded research in *Williams & Wilkins*⁸², may favour fair use.

The second factor examines whether a work is factual or creative and whether it is published or unpublished, with *Harper & Row v Nation Enterprises*⁸³ emphasising an author's right of first publication. However, Congress later overturned the presumption against fair use for unpublished works.

The third factor evaluates both the quantity and quality of what has been taken, with courts stressing that copying even a small part may be unfair if it constitutes the "heart" of the work, as in *Harper & Row*, whereas parody, as in *Acuff-Rose*, may justify more extensive borrowing.⁸⁴

The final factor, market effect, often is regarded as the most significant, as shown in *Harper & Row*⁸⁵, where the use undermined the market for the memoir, and in *Basic Books*⁸⁶, where course packs were found to displace sales of textbooks; by contrast, parody generally does not substitute for the original.

Although these four factors are legislatively enshrined, their application has not produced clear-cut rules. As *Acuff-Rose* confirmed, each case requires a careful balancing of interests, with no presumption that all factors must favour the defendant. While some argue that the statutory framework enhances predictability at the expense of flexibility, others suggest that fair use remains unpredictable yet adaptable, especially in response to new technologies.⁸⁷

In contrast, the doctrine of fair dealing in the United Kingdom, which has evolved through case law over nearly two centuries, was first codified in the statutory framework of the Copyright Act 1911 and is presently delineated in the Copyright, Designs and Patents Act 1988 (CDPA).⁸⁸ Chapter III of the CDPA governs "Acts Permitted in Relation to Copyright Works," with Sections 29 and 30 specifying the purposes of fair dealing as

⁸⁰ *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

⁸¹ *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

⁸² *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973).

⁸³ *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985).

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

research or private study, criticism or review, and the reporting of current events. To invoke the defence, a defendant must demonstrate that the dealing falls within one of these categories, that the dealing is fair, and, in the latter two instances, that adequate acknowledgment is provided.

While scholarly debate has raised questions regarding whether the UK doctrine offers coherent principles or contains excessive barriers, courts have generally adopted a liberal interpretive stance.

Research and private study are confined to non-commercial motives, with courts considering factors such as the proportion utilized, the availability of the work, and the impact on the market; however, this provision applies in a limited capacity to non-textual media and excludes broadcasts, sound recordings, and films. Concerning criticism or review, the work must have been made accessible to the public, the dealing must be fair, and acknowledgment must be sufficient, as demonstrated in cases such as *Sillitoe v McGraw-Hill*⁸⁹ and *Associated Newspapers v News Group*⁹⁰, where excessive quotations or improper motives rendered the defence invalid. The category of reporting current events has been interpreted more expansively following *Pro Sieben Media v Carlton UK Television*⁹¹, extending beyond traditional news reporting.

When a dealing aligns with an enumerated purpose, an assessment of fairness is conducted through a fact-specific inquiry, as articulated by Lord Denning in *Hubbard v Vosper*⁹², who highlighted that fairness depends on the extent of quotations, their purpose, proportionality, and overall impression.

Additional considerations include the nature and origin of the work, the quantity utilized, the motives of the user, the economic benefit derived, the impact on the market, and whether the same objective could have been accomplished through alternative means.

A hierarchy of considerations was subsequently established in *Ashdown v Telegraph Group*⁹³, with market substitution deemed critical, followed by whether the work was unpublished or improperly obtained, and then the extent of the material used.

⁸⁹ *Sillitoe v McGraw-Hill Book Company (U.K.) Ltd* [1983] FSR 545.

⁹⁰ *Associated Newspapers Group PLC v. News Group Newspapers Limited*, RPC 515.

⁹¹ *Pro Sieben Media v Carlton Television* [1999] 1 WLR 605.

⁹² *Hubbard v Vosper* 2 Q.B. 84 1972.

⁹³ *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142; [2001] 4 All ER 666; [2001] 3 WLR 1368.

Importantly, although the right to freedom of expression under the Human Rights Act 1998⁹⁴ may necessitate courts to balance competing interests, market impact, especially the protection of authors' remuneration, remains the primary factor in assessing fairness.⁹⁵

1.1.3.3 Caricature

Caricature, as an artistic practice, has always occupied a contested position in copyright law, because of its inherent reliance on exaggeration and distortion of existing subjects to achieve a satirical, comedic, or critical effect. As a form of expression, caricature serves multiple functions: it is a creative outlet, a method of social commentary, a means of political critique, and a popular form of entertainment. This multifaceted role demonstrates why caricature is deeply embedded in the cultural landscape and why its regulation under copyright law raises complex issues. The tension lies in its very nature: while caricature often pays homage to or critiques pre-existing works, it simultaneously risks crossing into the territory of copyright infringement. Historically, courts approached caricature with scepticism, often conflating it with parody or categorising it as an infringing derivative work. Over time, however, the evolution of legal doctrines, particularly the development of the fair use principle in the United States, has provided a more structured framework for evaluating caricature.

The legal challenge is to balance two competing interests: on the one hand, the protection of authors' exclusive rights, and on the other, the safeguarding of creative freedom and cultural dialogue. This balance is critical because it ensures that original creators are not unfairly deprived of the economic and moral benefits of their works, while also fostering an environment where new works of commentary and critique can thrive. Under Section 107 of the U.S. Copyright Act⁹⁶, this determination is guided by four fair use factors. The first factor, the purpose and character of the use, asks whether the caricature is transformative, whether it adds new meaning, value, or insight, or whether it merely substitutes the original. The second factor, the nature of the copyrighted work, recognizes that highly creative or unpublished works are afforded stronger

⁹⁴ Human Rights Act 1998 (c. 42).

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

protection than factual or published works. The third factor, the amount and substantiality of the portion used, evaluates whether the caricature has borrowed more than is necessary to achieve its purpose. Finally, the fourth factor, the effect of the use on the market, assesses whether the caricature diminishes the commercial value of the original work. Taken together, these factors underscore the fact-specific and nuanced nature of legal evaluations of caricature.

The importance of transformation has been repeatedly affirmed in landmark cases. In *Campbell v. Acuff-Rose Music* (1994)⁹⁷, the Supreme Court found that 2 Live Crew's parody of "Oh, Pretty Woman" constituted fair use, emphasizing that the parody was not intended to act as a substitute for the original but offered new expression and meaning. In *Blanch v. Koons* (2006)⁹⁸, Jeff Koons' use of Andrea Blanch's photograph was deemed transformative because it contributed to a broader commentary on contemporary culture. Similarly, in *Cariou v. Prince* (2013)⁹⁹, the appellate court recognized that Richard Prince's appropriation of Patrick Cariou's photographs was transformative in part, distinguishing between works that offered new insights and those that did not. These cases reveal the courts' nuanced approach, weighing the transformative nature of the caricature against potential harm to the original work's market.

This judicial reasoning can even be conceptualized mathematically, framing the probability of fair use as a function of transformation, the nature of the original, and market impact. A simple model might view fair use probability as positively related to transformation and negatively related to both the originality of the underlying work and the degree of market harm. This formulation highlights the structured yet flexible way courts balance competing considerations. Ultimately, the treatment of caricature under copyright law illustrates the complexity of reconciling creative freedom with intellectual property protection. The doctrinal emphasis on transformation and market effect underscores caricature's essential role in sustaining free expression and cultural dialogue, confirming that the law must continue to evolve to protect both the rights of original authors and the public interest in critical, satirical, and comedic reinterpretation.¹⁰⁰

⁹⁷ *Ibid.*

⁹⁸ *Blanch v. Koons*, 467 F.3d 244 (2016).

⁹⁹ *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

¹⁰⁰ Sarah Lee, "Caricature in Copyright Law".

1.1.3.4 Pastiche

In copyright law, pastiche has developed into an important exception that sits alongside parody and caricature, yet it occupies a distinct conceptual space. Unlike parody, which the Court of Justice of the European Union (CJEU) in *Deckmyn*¹⁰¹ required to contain elements of humour or mockery, pastiche is not limited by such a condition. Instead, it permits a broader set of artistic and cultural practices, encompassing imitations, stylistic homages, or recombination of existing works that are not primarily satirical in nature.

The historical understandings of pastiche highlight its multifaceted and sometimes contradictory nature. Across the centuries, it has signified anything from ironic imitation of artistic motifs, to recombinative compositions in painting, music, and theatre, or even the anachronistic recreation of past styles. At times, it has been criticised as a parasitic act of free-riding, while in other contexts it has been embraced as a legitimate tribute or homage. This plurality of meanings has shaped the difficulties in defining pastiche within copyright law, but it also underscores its value as a flexible concept capable of adapting to changing cultural practices.

Within the EU framework, pastiche was included in Article 5(3)(k) of the Information Society Directive¹⁰², and later reaffirmed as a mandatory exception in Article 17(7) of the Copyright in the Digital Single Market Directive¹⁰³. By placing it on equal footing with parody and caricature, the EU legislature acknowledged that pastiche plays a vital role in protecting freedom of expression and the arts, particularly in the digital environment where user-generated content proliferates. The absence of a requirement of humour or mockery makes the scope of pastiche broader, allowing it to cover forms of reuse such as remixes, memes, GIFs, mashups, fan art, fan fiction, and sampling. The German implementation of Section 51a of the Copyright Act illustrates this broad interpretation: following the *Pelham v. Hütter*¹⁰⁴ litigation over musical sampling, German courts began to apply the pastiche exception to allow recognisable uses of original works, provided they engage in some form of intellectual or artistic dialogue with

¹⁰¹ C-201/13 - *Deckmyn e Vrijheidsfonds*.

¹⁰² *Ibid.*

¹⁰³ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

¹⁰⁴ *Pelham v. Hütter* is C-476/17.

the source material. In this sense, pastiche functions as a legal space where cultural reuse can thrive without necessarily undermining the legitimate interests of rightholders, subject always to the balancing framework of the three-step test.

Comparatively, the treatment of pastiche has varied across Member States.

French law introduced an exception for parody, caricature, and pastiche as early as 1957, and continues to apply them under a unified regime. Although distinctions between the three concepts have been attempted in doctrine and jurisprudence, such as defining pastiche as imitation of style, parody as burlesque transformation, and caricature as mockery of the author, these lines have often blurred in practice, leading many French scholars and courts to subsume them under the “parody exception.” Critics argue, however, that this reductionist approach deprives pastiche of its richness, since it need not be humorous or satirical but may serve as a homage to an author’s style.

Italian law, on the other hand, has never codified a specific pastiche exception, relying instead on the quotation exception under Article 70 of the Italian Copyright Act. While parody and satire have been accommodated under this provision, pastiche has rarely been explicitly considered. Nevertheless, Italian courts have encountered cases involving appropriation art that resonate with the idea of pastiche, such as the *Fondazione Giacometti v. Fondazione Prada* decision¹⁰⁵, where a reinterpretation of existing sculptures was deemed lawful due to its creative contribution and original artistic message, even though it was not satirical. This approach reveals the potential breadth of pastiche, as a category that encompasses transformative uses beyond parody’s requirement of mockery, and highlights its capacity to foster new artistic expression built on pre-existing works.

At the EU level, the lack of a uniform definition continues to pose challenges. While parody has been defined as an autonomous concept of EU law in *Deckmyn*, pastiche has not yet received the same detailed judicial treatment.

Nevertheless, the need for harmonisation is pressing, as Member States continue to diverge in their approaches. Some jurisdictions, such as Germany, have embraced a wide and flexible interpretation that favours user-generated content and artistic freedom, while others, such as France and Italy, have historically either merged it with parody or left it undeveloped. The recurring tension is how to reconcile the freedom of artistic

¹⁰⁵ *Tribunale di Milano*, IP Section, 13 July 2011 (*Fondazione Giacometti v. Fondazione Prada*).

creation with the moral and economic rights of authors. Here, the three-step test provides the guiding principle, requiring that any application of the pastiche exception not conflict with the normal exploitation of the work and not unreasonably prejudice the legitimate interests of rightholders. In this way, pastiche reflects the broader challenge of copyright law in the digital age: striking a balance between control and creativity, between the preservation of authors' rights and the recognition that cultural progress depends on reuse, reinterpretation, and stylistic homage.

As such, pastiche stands today as an evolving and autonomous concept in EU copyright law, one that resists a fixed definition but plays a crucial role in maintaining the space for cultural dialogue, artistic freedom, and creative transformation.¹⁰⁶

1.1.3.5 Parody

According to Aristotle, the Greek Hegemon of Thasos may be regarded as the originator of parody, a form of expression whose very name stems from the Greek "*parōidia*", literally "a song sung alongside another." This etymological root has provided the conceptual basis for the recognition of parody both in culture and in law, particularly as an exception or defence to copyright infringement, justified by the need to preserve freedom of expression.¹⁰⁷

In the United Kingdom, this defence is codified in s.30A of the Copyright, Designs and Patents Act 1988 (CPDA)¹⁰⁸, introduced to implement Article 5(3)(k) of the InfoSoc Directive 2001/29/EC.¹⁰⁹ The provision permits uses of works for the purposes of caricature, parody or pastiche, but restricts them through the principle of fair dealing.

It was this statutory mechanism that came under judicial scrutiny in *Shazam Productions Ltd v Only Fools The Dining Experience Ltd*¹¹⁰, where the claimants, holding the rights to the sitcom *Only Fools and Horses (OFAH)*, challenged the defendants' interactive dining show, *Only Fools: The (Cushty) Dining*

¹⁰⁶ Mezei, Péter and Jütte, Bernd Justin and Sganga, Caterina and Pascual, Léo, *Oops, I Sampled Again... The Meaning of 'Pastiche' as an Autonomous Concept under EU Copyright Law* (April 29, 2024). 55(8) IIC - International Review of Intellectual Property and Competition Law, 2024, p. 1225-1256.

¹⁰⁷ Aristotle (Poetics, ii. 5).

¹⁰⁸ Ibid.

¹⁰⁹ Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society.

¹¹⁰ Ibid.

Experience (OFDE). The defendants relied on the parody defence, arguing that their work fell within s.30A, while Shazam contended that the show was an unauthorised adaptation competing with its own authorised productions, such as the 2019 musical adaptation of OFAH.

In deciding the case, the court was tasked with clarifying what constitutes parody for the purposes of copyright law. The judgment drew on the Court of Justice of the European Union's ruling in *Deckmyn v Vandersteen*¹¹¹, which had identified three essential features: parody must recall an existing work, must differ from it noticeably, and must convey humour or mockery. Yet, as Deputy Judge Kimbell emphasised, these elements alone were insufficient. Parody, in his view, must also "target something" and operate as a form of critique or commentary, creating a measure of critical distance from the original. Applying this reasoning, the court found that OFDE did not qualify as parody. By transferring characters, jokes, and backstories wholesale from OFAH into the context of a pub quiz, the dining show did not ridicule or comment upon the sitcom but instead sought to reproduce it faithfully. Audience reactions, describing the event as akin to watching another live episode of OFAH, confirmed that the purpose was to recreate rather than to parody. As such, the work amounted to reproduction by adaptation, not parody.

The claimants' case was further strengthened by the fair dealing requirement and the three-step test in Article 5(5) of the InfoSoc Directive¹¹², which, although not formally transposed into UK law, was applied in line with Arnold J's reasoning in *EWB v Tixdaq*.¹¹³ This test requires that exceptions be confined to limited cases, not interfere with the normal commercial exploitation of the work, and not cause unreasonable harm to the rightsholder's interests. OFDE failed on all counts. The extent of the copying was substantial, both in quantity and quality; the show competed directly with Shazam's authorised musical production, risking the diversion of audiences; and the defendants' work lacked the type of social or cultural commentary that could invoke fundamental rights considerations. The use was therefore neither transformative nor proportionate, but instead commercially damaging to the rightsholder's exploitation of OFAH.

¹¹¹ *Deckmyn v Vandersteen* C-201/13 [2014] Bus L.R. 1368.

¹¹² *Ibid* art. 5(5).

¹¹³ *EWB v Tixdaq* EWHC 575 (Ch).

The outcome of Shazam highlights the boundaries of the parody defence under s.30A CPDA.

To benefit from the exception, a defendant must show that the work does more than replicate familiar elements of the original. It must present a noticeable difference, function as an instrument of humour or criticism, and satisfy the requirements of fair dealing by avoiding market substitution and ensuring that the taking is both reasonable and proportionate. Where these elements are absent, as in the case of OFDE, the courts will treat the new work as an unauthorised adaptation and deny protection under the parody defence.¹¹⁴

1.1.4 Pressing issues regarding the legitimisation of use and the balance with fundamental rights

The legitimisation of copyright use in the European Union represents one of the most pressing contemporary challenges, situated at the intersection of property, culture, and fundamental rights. The difficulty stems from the EU's gradual "privatisation" of copyright law, whereby intellectual property has been elevated to the status of a constitutionally protected right under Article 17(2) of the Charter of Fundamental Rights of the European Union (CFREU). This provision, which cryptically proclaims that "intellectual property shall be protected," is emblematic of what Sganga terms "the systematic chaos generated by the interplay between EU and national legal sources".¹¹⁵ Historically, civil law systems treated property as confined to tangible goods, linking its definition to social function and collective goals. By contrast, the EU's Charter introduced a constitutional guarantee for intellectual property without clarifying its hierarchy *vis-à-vis* other rights, thereby generating "much misunderstanding in its national implementation".¹¹⁶ The effect, Sganga warns, has been a "critical imbalance between exclusive rights and free uses", uses that were traditionally recognised as essential to

¹¹⁴ Venner Shipley, "Parody in Copyright Law.

¹¹⁵ Caterina Sganga, 'EU Copyright Law between Property and Fundamental Rights: A Proposal to Connect the Dots' in R Caso and F Giovanella (eds), *Balancing Copyright in the Digital Age: Comparative Perspectives* (Springer 2015) 1, 2.

¹¹⁶ Sganga (n 1) 4.

ensure citizens' enjoyment of fundamental rights such as freedom of expression and information.¹¹⁷

This imbalance is particularly acute in the digital environment, where copyright holders face widespread unauthorised uses of their works, especially through file sharing. Kisieliute underlines how digitalisation “has fundamentally changed how copyright laws must operate in order to be effective,”¹¹⁸ since digital copies can be reproduced and distributed globally at virtually no cost. As she explains, the legal equation becomes complex when rights of different actors collide: “when applying the implementing laws, the Member States must ensure that a fair balance is struck between the fundamental rights involved”.¹¹⁹ These rights include not only the author's entitlement under Article 17(2) CFREU, but also the user's right to personal data protection (Article 8), the freedom to receive and impart information (Article 11), and the intermediary's freedom to conduct a business (Article 16). This has led commentators to describe balancing as a kind of mathematical problem: “depending on the need to protect the very substance of copyright, the other rights can be restricted accordingly”.¹²⁰ However, Kisieliute notes that such restrictions must never impair the very essence of the competing rights, which places significant limits on enforcement measures. Indeed, preventive mechanisms such as filtering or blocking are consistently rejected as “likely to be disproportionate or technically ineffective,”¹²¹ while taxation schemes or other indirect mechanisms are dismissed as unworkable.

The Court of Justice of the European Union (CJEU) has sought to mediate these tensions by invoking the notion of “fair balance.” Beginning with *Promusicae*, the Court required that Member States, in transposing and applying EU copyright directives, safeguard an “equilibrium between intellectual property rights and other fundamental rights.” Subsequent judgments, such as *Scarlet Extended v SABAM* and *SABAM v Netlog*, confirmed that enforcement tools imposing general monitoring obligations on intermediaries violated proportionality and the fundamental rights of both service

¹¹⁷ Sganga (n 1) 3.

¹¹⁸ Ieva Kisieliute, *A “Fair Balance” between Intellectual Property Rights and Other Fundamental Rights?* (Master's Thesis, Lund University 2012) 6.

¹¹⁹ Kisieliute (n 4) 8, citing Case C-275/06 *Promusicae v Telefónica de España SAU* EU:C:2008:54, para 68.

¹²⁰ Kisieliute (n 4) 1.

¹²¹ Kisieliute (n 4) 1.

providers and users. Nevertheless, the Court has not developed a consistent doctrinal framework for this balancing exercise. As Jongsma observes, the ECJ's "balancing-heavy rhetoric" often masks the absence of genuine balancing; instead, the Court "structurally avoids actual substantive balancing of normative arguments".¹²² Critics have therefore described the reliance on "fair balance" as "vacuous and unhelpful" or even "an empty slogan merely giving fundamental rights gloss to the ECJ case law".¹²³

This critique exposes a profound legitimacy problem. On the one hand, the Court's use of balancing rhetoric reassures stakeholders that no single right enjoys absolute priority; on the other, the absence of transparent reasoning leaves national courts with little guidance. Jongsma points out that this is especially problematic in "composite" cases, where EU directives leave discretion to Member States, since divergent interpretations risk undermining the uniformity of rights protection across the Union. Moreover, the CJEU's tendency to embed market-oriented rationales into its interpretation of copyright norms has raised concerns that integration goals are prioritised at the expense of individual liberties. This echoes Sganga's diagnosis that "no balance can be coherently pursued and no legal certainty can be achieved until the elements composing this multilevel framework are properly conceptualized and understood".¹²⁴

In light of these tensions, the legitimisation of copyright use requires more than rhetorical references to "fair balance." As Kisieliute concludes, the "current state of law protecting intellectual property rights does not serve the needs of the Information Society," and the over-extension of copyright terms has created a context where "most culture cannot be shared freely".¹²⁵ The consequence is that enforcement measures frequently appear as blunt instruments, failing both to protect authors' incentives effectively and to safeguard users' fundamental freedoms. Without a principled framework that clarifies how rights are to be weighed and how far restrictions may extend, the legitimacy of copyright enforcement remains precarious. Thus, the so-called

¹²² Daniël Jongsma, 'Modalities of Fundamental Rights Balancing in EU Copyright Law: Understanding the Use and Abuse of the EU Charter and the Concept of "Fair Balance"' (forthcoming 2024) *European Law Review* (pre-publication draft on SSRN) 4.

¹²³ Jongsma (n 8) 3, citing J Griffiths, 'Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law' (2013) 38 *European Law Review* 65, 74; T Mylly, 'The Constitutionalization of the European Legal Order: Impact of Human Rights on Intellectual Property in the EU' in C Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 130.

¹²⁴ Sganga (n 1) 5.

¹²⁵ Kisieliute (n 4) 1.

“fair balance” risks devolving into what Jongsma aptly labels a “balancing puzzle”, a mechanism that promises reconciliation but too often produces opacity, inconsistency, and normative uncertainty.¹²⁶

1.2 Fragmented Interpretations and the Elusive Nature of Adaptation Rights

The right of adaptation, which grants authors and creators exclusive authority over transforming their original works into derivative forms, represents a fundamental pillar of modern copyright law. This right ensures that creators retain control not only over direct reproductions of their work but also over reinterpretations, translations, dramatisations, film adaptations, musical arrangements, and other modifications that may build upon the original expression. The legal purpose of this right is twofold: to incentivise creativity by offering authors a robust framework of protection and to regulate the secondary use of intellectual creations in a manner that respects their integrity. However, as artistic practices evolve and technological innovation accelerates, the scope and application of the adaptation right have become increasingly contested, revealing significant legal ambiguities and interpretive challenges.¹²⁷

One of the most enduring complexities in this domain concerns the definition and conceptual boundaries of what constitutes a “derivative work.” While copyright regimes uniformly recognise protection for original expressions, they diverge on how to determine whether a given work has undergone sufficient transformation to warrant classification as a new, independently copyrightable creation. The U.S. Supreme Court’s decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*¹²⁸ offers a compelling illustration of this tension. In that case, the Court was asked to determine whether Warhol’s silkscreen portrait series, based on a photograph of the musician Prince taken by Lynn Goldsmith, was “transformative” enough to fall within the doctrine of fair use. The Court’s divided opinion underscored the nuanced and often subjective nature of such determinations, as it had to weigh the artistic intent and visual modification of the original work against the commercial context in which the adaptation was exploited. Ultimately,

¹²⁶ Jongsma (n 8) 4; P Teunissen, ‘The Balance Puzzle: The ECJ’s Method of Proportionality Review in EU Copyright Law’ (2018) 40(9) *EIPR* 579.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

the decision clarified that the existence of artistic transformation alone is insufficient to establish fair use without also considering the use's broader purpose and market implications.

The fair use doctrine, while providing a critical mechanism for limiting the reach of exclusive rights, further complicates the legal landscape. Codified in 17 U.S.C. § 107 in the United States, fair use permits the use of copyrighted material without authorisation for purposes such as criticism, comment, news reporting, teaching, scholarship, and research. However, its application hinges upon a fact-specific four-factor test, which evaluates the purpose and character of the use, the nature of the original work, the amount and substantiality of the portion used, and the effect on the potential market for the original. This inherently flexible and case-dependent framework has led to considerable legal uncertainty. As noted by many scholars and practitioners, the only conclusive determination of whether a use is fair typically arises through litigation, a process that is time-consuming, financially burdensome, and inaccessible to many creators. Consequently, the doctrine operates less as a clear legal shield and more as a contested battlefield, where each case must be argued on its particular facts and merits.

In recent years, the emergence of artificial intelligence (AI) has exacerbated existing legal ambiguities and introduced new ones. AI systems that generate text, music, images, or even entire films by ingesting vast datasets of pre-existing creative works challenge traditional understandings of authorship, originality, and adaptation. When such systems are trained on copyrighted materials without the consent of the rights holders, the question arises as to whether the resulting outputs constitute unlawful adaptations, transformative works, or merely algorithmic extrapolations devoid of legal significance. The absence of a human author in AI-generated outputs further complicates matters, as copyright law historically predicates protection and infringement on human creativity. The debate over whether current legal frameworks are equipped to handle these developments is ongoing, with some advocating for the introduction of *sui generis* rights for AI-generated works. In contrast, others emphasise the need to uphold existing doctrines to safeguard the rights of human creators.¹²⁹

¹²⁹ Ahuja, Virendra, Artificial Intelligence and Copyright: Issues and Challenges (June 11, 2020). ILI Law Review Winter Issue 2020.

The transnational nature of copyright law adds yet another layer of complexity. While international agreements such as the Berne Convention for the Protection of Literary and Artistic Works¹³⁰ establish minimum standards and promote reciprocal recognition of rights, significant divergences remain in how different jurisdictions interpret and enforce adaptation rights. Notably, Article 12 of the Berne Convention¹³¹ obliges member states to provide authors with the exclusive right to authorise adaptations, arrangements, and other alterations. However, the application of this provision varies widely. A striking example is the French case *Société Plon et autres v. Pierre Hugo et autres*¹³², which concerned sequels to Victor Hugo’s *Les Misérables*. The Court had to decide whether such derivative works violated the moral rights of the original author, a concept particularly robust in the French “*droit d’auteur*” tradition. Unlike in standard law systems, where economic rights tend to dominate, French law upholds moral rights as perpetual, inalienable, and enforceable by heirs. The Court ultimately held that the sequels infringed upon Hugo’s moral rights, reaffirming the enduring influence of authorial personality and artistic integrity in French copyright doctrine.

These jurisdictional variations are not limited to civil law countries. In the United Kingdom, for example, the right of adaptation is narrowly defined and closely tied to specific acts enumerated in the Copyright, Designs and Patents Act 1988¹³³. This includes translations, dramatic versions of non-dramatic works, and film adaptations, but the scope does not extend as broadly as it might under U.S. or French law. As a result, what may constitute an infringing adaptation in one jurisdiction could be deemed lawful or even fall outside the scope of copyright protection altogether in another, further complicating cross-border enforcement and the licensing of derivative works.

In summary, the right of adaptation remains one of the most dynamic and legally uncertain areas within the realm of copyright law. Its conceptual boundaries are challenged by evolving artistic practices, shifting judicial interpretations, emerging technologies, and the globalised nature of content creation and dissemination. The interplay between derivative works and doctrines such as fair use or fair dealing introduces significant unpredictability, often leaving creators and users without clear

¹³⁰ Ibid.

¹³¹ Ibid art. 12.

¹³² *Société Plon et autres v. Pierre Hugo et autres*, 04–15.543 Arrêt n° 125 (2007).

¹³³ Ibid.

guidance on the permissibility of their actions. Moreover, the rise of AI and the persistence of divergent national laws raise questions about the adequacy of existing legal structures in addressing the realities of modern creativity.

As such, there is a growing imperative to clarify the contours of the adaptation right through both legislative reform and judicial engagement. Legal systems must strive to strike a balance that protects the legitimate interests of original authors while fostering an environment conducive to innovation, cultural exchange, and critical engagement with past works. In doing so, copyright law can continue to fulfil its dual function: rewarding creative endeavour while enriching the collective cultural commons.

1.2.1 Challenges in defining what constitutes an adaptation

Determining what constitutes an adaptation under copyright law presents a series of conceptual and practical challenges. These difficulties arise from the evolving nature of creative expression, the proliferation of new technologies, and the variability in legal interpretation across jurisdictions. At the centre lies the task of defining the boundary between permissible transformation and unlawful reproduction, an inquiry complicated further by national legal traditions, international treaties, and the adaptive capacity of judicial reasoning.

A central issue is establishing the threshold of originality that separates a lawful adaptation from a trivial modification. Most jurisdictions, including the United States, require that a derivative work incorporate sufficient new expression to qualify for copyright protection. Section 101 of the U.S. Copyright Act defines a derivative work as one “based upon one or more pre-existing works,” listing translations, musical arrangements, dramatizations, and other forms in which a work may be “recast, transformed, or adapted.”¹³⁴ Yet the law also requires “substantial” creative input beyond the original. Minor edits, formatting changes, or superficial alterations remain insufficient and may constitute infringement if undertaken without authorisation. The absence of a precise legal metric for “substantial” contribution creates uncertainty, leaving courts to evaluate creative decisions that are inevitably subjective and context-dependent. As Jane Ginsburg observes, “the very vagueness of the originality threshold makes derivative

¹³⁴ Ibid.

works both a fertile source of litigation and a barometer of courts' cultural sensibilities."¹³⁵

An additional complexity lies in distinguishing adaptations from transformative uses. While both involve reworking pre-existing material, their legal consequences diverge. Adaptations generally require the authorisation of the rightsholder, as they derive economic value from the original. By contrast, transformative uses may be shielded by exceptions such as fair use if they introduce new expression, meaning, or message. This distinction was central in *Campbell v Acuff-Rose Music Inc*, where the U.S. Supreme Court held that parody, by its nature, can qualify as transformative fair use even when it reproduces recognisable elements.¹³⁶ The Court stressed that the inquiry turns on whether the secondary work merely supplants the original or instead adds something new, enriching public discourse. Nevertheless, the overlap between “transformative use” and “adaptation” remains unsettled: a work may simultaneously qualify as transformative for fair use purposes and as a derivative requiring authorisation, depending on jurisdictional interpretation.

The rapid emergence of artificial intelligence (AI) exacerbates these definitional challenges. AI systems now generate sophisticated texts, images, and music closely resembling copyrighted works, often trained on large datasets containing protected material without authorisation. This raises questions about whether outputs constitute independent works, unlawful adaptations, or unprotectable artefacts lacking human authorship. Technologies such as deepfakes and voice replication illustrate these tensions vividly: they reproduce the style or persona of an existing artist without consent, blurring the line between homage and infringement.¹³⁷ At present, few jurisdictions have squarely addressed these issues, leading scholars and policymakers to call for reform. As Pamela Samuelson argues, “the law must either extend copyright concepts to machine creativity or recognise *a sui generis* right, lest the system collapse under doctrinal strain.”¹³⁸

At the international level, variation in implementation further complicates matters. The Berne Convention obliges member states to grant authors the exclusive right

¹³⁵ Jane C Ginsburg, ‘Derivative Works in U.S. Copyright Law’ (2005) 29 *Columbia Journal of Law & the Arts* 109.

¹³⁶ *Ibid.*

¹³⁷ Niva Elkin-Koren, ‘Algorithmic Authors and the Law’ (2017) 13 *JIPITEC* 17

¹³⁸ Pamela Samuelson, ‘Allocating Ownership Rights in Computer-Generated Works’ (1986) 47 *U Pitt L Rev* 1185.

to authorise adaptations and arrangements (Art. 12), but leaves their scope undefined.¹³⁹ National legal traditions fill this gap divergently. In France, for example, the doctrine of “*droit moral enables*” authors to object to modifications they believe distort their work’s integrity, regardless of economic rights. This principle was affirmed in *Société Plon et autres v Pierre Hugo et autres*, where Victor Hugo’s descendants successfully blocked sequels to *Les Misérables* on moral rights grounds.¹⁴⁰ This contrasts with the United States, where moral rights are narrowly circumscribed and rarely invoked in adaptation disputes, reflecting a more economically oriented copyright model.

Judicial interpretation remains indispensable in shaping adaptation rights. Courts frequently extend copyright principles to new media and technologies. In *Kalem Co v Harper Bros.*, the U.S. Supreme Court held that producing a motion picture based on a novel without authorisation constituted infringement, affirming that adaptations may take new technological forms while still requiring consent.¹⁴¹ Such rulings demonstrate the elasticity of the adaptation concept but also expose the judiciary’s reactive, case-by-case approach, often leaving unresolved gaps in rapidly changing cultural contexts. Lionel Bently and Brad Sherman underline that “copyright law’s treatment of derivative works has been forged through judicial pragmatism rather than legislative foresight.”¹⁴²

Beyond the doctrinal and technological challenges, defining the scope of adaptation also implicates economic incentives. Overly expansive interpretations of the adaptation right may stifle creative reuse, parody, fan fiction, or remix culture, forms of engagement that enrich the public domain. Conversely, an unduly narrow conception may erode the economic incentives underpinning copyright by discouraging investment in derivative creativity. Bernt Hugenholtz has argued that “derivative works are not merely legal constructs, but essential nodes in the copyright value chain, ensuring that creativity remains a renewable rather than exhaustible resource.”¹⁴³ The adaptation right thus operates as both a market mechanism, allocating value among authors, rights holders, and adapters, and a cultural filter, determining which forms of reuse are permitted without permission.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ *Kalem Co v Harper Bros* 222 US 55 (1911).

¹⁴² Lionel Bently and Brad Sherman, *Intellectual Property Law* (5th edn, OUP 2022) 193.

¹⁴³ P Bernt Hugenholtz, ‘Adapting the Right of Adaptation to the Digital Age’ (2012) 44 IIC 930.

In conclusion, the scope of adaptation remains contested and multifaceted. It requires navigating originality thresholds, distinguishing between adaptation and transformation, accounting for technological disruptions, reconciling divergent international frameworks, and ensuring the proper balance between private rights and public interests. Without legislative clarity, sustained judicial reasoning, and international coordination, adaptation risks becoming a source of uncertainty and friction rather than a driver of cultural innovation.

1.2.2 Inconsistent judicial interpretations and case law analysis

The right of adaptation, granting authors the exclusive authority to control the creation of derivative works, occupies a foundational place within copyright law. Yet its scope has been interpreted inconsistently across jurisdictions. Divergences arise from competing definitions of what constitutes an adaptation, the uneven application of fair use and transformative use doctrines, the varying weight attributed to moral rights, and the disruptive influence of technological innovation. These tensions reveal both the conceptual fluidity of adaptation rights and the broader difficulty of reconciling protection of authors with the demands of cultural progress.

A central challenge concerns the delineation of derivative works. Courts must often determine whether borrowing from an existing work amounts to lawful transformation or impermissible appropriation. In *Klinger v Conan Doyle Estate Ltd* the U.S. Court of Appeals for the Seventh Circuit considered whether elements of the character Sherlock Holmes could be used in new works after most of Conan Doyle's stories had entered the public domain.¹⁴⁴ While earlier stories were free to use, the court held that features introduced in later, still-protected works, such as Holmes's emotional complexity, remained subject to copyright. The decision illustrates the granular analysis required to distinguish between public domain and protected material, particularly where a fictional universe evolves across multiple works. It also underscores that classification of a derivative work depends not merely on formal transformation, but on the qualitative originality present in protected elements.

¹⁴⁴ *Ibid.*

The doctrine of transformative use, embedded within U.S. fair use analysis, has further contributed to doctrinal fragmentation. Transformative use permits limited reliance on copyrighted material when new meaning, purpose, or character is added, especially in commentary, parody, or criticism. However, courts have diverged on the threshold of transformation. In *Andy Warhol Foundation for the Visual Arts, Inc v Goldsmith* the U.S. Supreme Court rejected the claim that Warhol’s silkscreen portraits of Prince were transformative, holding that altering visual style for commercial licensing did not suffice.¹⁴⁵ The decision clarified that transformation requires a distinct artistic or critical purpose, not mere aesthetic modification. It also highlights the increasing judicial emphasis on commercial motives, reinforcing the need for fact-sensitive assessment of fair use claims.

Civil law jurisdictions add further complexity through the role of moral rights. Unlike economic rights, which may lapse or be assigned, the right of integrity allows authors to resist distortions of their work. In *Société Plon et autres v Pierre Hugo et autres* the French Court of Cassation considered whether sequels to *Les Misérables* violated Victor Hugo’s moral rights.¹⁴⁶ Hugo’s descendants opposed the sequels, but the court found no violation, given the passage of time and the work’s entry into the public domain. This ruling demonstrates how French courts balance the enduring dignity of the author with public domain freedoms, in contrast with Anglo-American systems where moral rights are weaker or less enforceable.

Technological change further unsettles the jurisprudence. New media formats, artificial intelligence, and digital platforms disrupt established notions of authorship and transformation, while legislative frameworks lag behind. Courts increasingly face disputes involving AI-generated adaptations, such as synthetic voices, algorithmically produced images, and remix culture, that test the limits of originality and authorship. In the absence of legislative clarity, judicial responses remain fragmented and unpredictable, creating uncertainty for creators, rights holders, and users alike.

In sum, the judicial interpretation of adaptation rights is marked by inconsistency and doctrinal fluidity. The uncertain boundary between derivative and transformative works, divergent treatment of moral rights, and the challenges of technological disruption

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

all underscore the need for a more coherent and harmonised approach. A forward-looking copyright system must protect original authors while also enabling the transformative practices that sustain cultural dialogue, innovation, and democratic expression.

1.2.3 *Subjectivity in assessing transformative use*

The doctrine of transformative use has become central to U.S. fair use jurisprudence, yet its very dominance underscores the subjective and inconsistent ways in which courts apply it. As Liu’s empirical study demonstrates, although “transformative use has harmonised fair use rhetoric, it falls short of streamlining fair use practice or increasing its predictability”.¹⁴⁷ Courts diverge not only on what constitutes “transformativeness” but also on how to evaluate it: some rely on evidence of “physical transformation,” others on “purposive transformation,” and still others uphold transformative use without finding either.¹⁴⁸ This lack of uniformity reveals what Liu calls “a high degree of uncertainty and incoherency,”¹⁴⁹ rooted in the doctrine’s “dubious policy foundation”.

At the heart of this subjectivity is the difficulty of identifying whether a work’s new purpose is genuinely distinct from the original. Courts often attempt to “discover the subjective purposes that the two parties respectively had at the time of creation,” but such efforts are “susceptible to self-serving testimony” and invite judges to assess not legal criteria but “artistic intent”.¹⁵⁰ This reliance on inferred intention has led to starkly divergent outcomes. For example, in *Campbell v. Acuff-Rose Music*, Justice Souter famously reframed the analysis by asking whether the new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message”.¹⁵¹ While the Court endorsed the parody as transformative, it remanded the case for further findings on market harm, signaling a nuanced and restrained application. Yet subsequent courts have treated *Campbell* as a near-automatic shortcut:

¹⁴⁷ Jiarui Liu, ‘An Empirical Study of Transformative Use in Copyright Law’ (2019) 22 *Stan Tech L Rev* 163, 172.

¹⁴⁸ *Ibid* (n 1) 170.

¹⁴⁹ *Ibid* (n 1) 173.

¹⁵⁰ *Ibid* (n 1) 170.

¹⁵¹ *Campbell v Acuff-Rose Music, Inc* 510 US 569, 579 (1994); discussed in Liu (n 1) 166–8; Mary WS Wong, “‘Transformative’ User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?” (2009) 11 *Vand J Ent & Tech L* 1075, 1106–07.

Liu notes that “of all the dispositive decisions that upheld transformative use, 94% eventually led to a finding of fair use”,¹⁵² thereby converting what was meant as an inquiry into a de facto determinant.

The case of *Cariou v. Prince* further illustrates this subjectivity. In evaluating whether Richard Prince’s appropriation art transformed Patrick Cariou’s photographs, the Second Circuit emphasized the new “aesthetic” and the fact that Prince’s works appealed to a celebrity clientele, even listing patrons like Angelina Jolie and Brad Pitt as evidence of transformation.¹⁵³ This reasoning, far from being an objective measure, highlights how judicial impressions of artistic or cultural value can shape the outcome. As Liu observes, such reasoning risks turning transformative use into “a slippery slope,” stretched “bit by bit toward fact patterns increasingly remote from the original context”.¹⁵⁴

The problem is compounded in the digital environment of user-generated content, where Wong shows that the overlap between transformative fair use and derivative works creates profound uncertainty. She argues that “the line between the type and level of transformation required for a copyrightable derivative work and that required to constitute fair use has not been drawn clearly”.¹⁵⁵ This ambiguity results in what she terms a “double appearance” of “transformativeness”, at once the primary factor for fair use and the threshold test for infringement of the adaptation right.¹⁵⁶ Courts’ subjective assessments in this context can therefore determine not only whether a use is excused but whether it qualifies as authorship at all. Wong warns that “the scope of “transformativeness” is subject to much indeterminacy and uncertainty,” and that its overemphasis “could prejudice not just the fair use prospects of socially valuable [user-generated content], but also complicate its status as copyrightable work”.¹⁵⁷

This subjectivity becomes especially acute when courts confront Web 2.0 remix practices. In cases involving mass digitization projects, such as *Authors Guild v. Google*, Judge Leval acknowledged the transformative purpose of creating a searchable database,¹⁵⁸ yet cautioned that the word “transformative” must be seen as “a suggestive

¹⁵² *Ibid* (n 1) 167.

¹⁵³ *Cariou v Prince* 714 F3d 694, 709 (2d Cir 2013); discussed in Liu (n 1) 169.

¹⁵⁴ *Ibid* (n 1) 171.

¹⁵⁵ *Ibid* (n 5) 1077.

¹⁵⁶ *Ibid* (n 5) 1135.

¹⁵⁷ *Ibid* (n 5) 1137.

¹⁵⁸ *Authors Guild, Inc v Google Inc* 804 F3d 202, 214 (2d Cir 2015); discussed in Liu (n 1) 173.

symbol for a complex thought” rather than “a sufficient key” to fair use. His warning underscores that the doctrine cannot be taken too literally. Nonetheless, other courts have expanded it liberally to cover full-text copying (HathiTrust), thumbnail reproductions (Perfect 10 v. Amazon), or even verbatim duplication where judges perceived a new function. In each case, judicial subjectivity dictated whether identical acts of copying were deemed transformative innovation or unlawful appropriation.¹⁵⁹

As Liu emphasizes, this flexibility allows courts to “implement intuitive judgments yet maintain the impression of stare decisis”.¹⁶⁰ By invoking transformative use, judges can align outcomes with policy preferences, such as promoting access to knowledge, encouraging parody, or legitimizing technological innovation, without explicitly departing from precedent. Yet this comes at the cost of coherence: courts substitute “a mechanical exercise of physical or purposive transformation for an in-depth policy analysis”, masking substantive disagreements behind the veneer of a shared label.¹⁶¹ Wong’s comparative analysis reinforces this concern: other common law jurisdictions, such as the UK and Canada, adopt narrower approaches that avoid the American tendency to let “transformativeness” dominate every aspect of the inquiry.¹⁶²

In sum, the subjectivity embedded in transformative use doctrine is both a source of its resilience and its greatest weakness. While it enables courts to adapt to new forms of cultural production, it also renders outcomes unpredictable and unstable. As both Liu and Wong show, the concept has become so malleable that it often conceals rather than resolves judicial subjectivity, leaving the line between permissible transformation and infringing adaptation blurred. For creators and users, this means that fair use determinations remain contingent not on clear standards but on how a particular court interprets the elusive notion of “adding something new.”¹⁶³

1.2.4 Evolving nature of creative industries and digital media

¹⁵⁹ *Authors Guild, Inc v HathiTrust* 755 F3d 87, 98 (2d Cir 2014); *Perfect 10, Inc v Amazon.com, Inc* 508 F3d 1146 (9th Cir 2007); discussed in Liu (n 1) 168, 174.

¹⁶⁰ *Ibid* (n 1) 172.

¹⁶¹ *Ibid* (n 1) 173.

¹⁶² *Ibid* (n 5) 1118, 1131.

¹⁶³ *Ibid* (n 1) 173; *Ibid* (n 5) 1137.

The creative industries today are defined by their continual negotiation between cultural value, technological change, and legal frameworks. As the European Commission’s Joint Research Centre (JRC) argues, the very nature of creative content, “symbolic, highly digitisable” goods, makes the sector especially prone to disruption by digital technologies, which alter the ways cultural products are “produced, distributed and consumed”.¹⁶⁴ Unlike material goods, creative works are information goods with high fixed and low marginal costs: once the “master copy” has been produced, replication is “relatively inexpensive,” and digitisation reduces reproduction and distribution costs to “almost zero”.¹⁶⁵ This has undermined traditional industry structures, where large publishers and distributors could justify their centrality through financial capacity and control of distribution channels, and has opened new opportunities for small and medium-sized enterprises as well as individual creators.

At the same time, these technological shifts create challenges as well as opportunities. The JRC notes that the low cost of digital reproduction generates an acute risk of piracy, which “threatens the survival of some sub-sectors”.¹⁶⁶ To address this, industries have increasingly relied on Digital Rights Management (DRM) technologies, though these have often been controversial in terms of consumer rights and interoperability.¹⁶⁷ The net effect has been a destabilisation of the traditional value chain. Whereas previously the sector operated on a sequence of content creation, publication, distribution, and retail, digital convergence has blurred these lines, enabling new actors such as Apple, Google, and Amazon to insert themselves as powerful intermediaries. As the report stresses, the dominance of Apple in digital music distribution arose precisely from its ability to leverage market power in one stage of the chain, MP3 players, into dominance over others, through proprietary DRM formats that “excluded competitors from access”.¹⁶⁸

The impacts of digital transformation, however, vary significantly by subsector. Music and audiovisual industries have been most radically reshaped, as online

¹⁶⁴ European Commission Joint Research Centre, *The Future Evolution of the Creative Content Industries: Three Discussion Papers* (Office for Official Publications of the European Communities 2008) 10.

¹⁶⁵ *Ibid* 17–18.

¹⁶⁶ *Ibid* 18.

¹⁶⁷ *Ibid* 18–19.

¹⁶⁸ *Ibid* 21.

distribution models, from peer-to-peer technologies to IPTV, have fundamentally altered how content is monetised.¹⁶⁹ By contrast, books and cultural spaces initially experienced “smaller scale” change, confined largely to e-commerce and internal knowledge management, though the report warns that these sectors may eventually follow similar paths of transformation.¹⁷⁰ Video games present yet another model: the sector, described as “relatively young,” has innovated rapidly by moving from “shrink-wrapped products into online services” and fostering communities of users who actively participate in promotion and production.¹⁷¹ These users create and share content in close collaboration with firms, illustrating a broader trend of user-driven innovation that spills into other creative sectors.

Against this background of technological and structural change, debates over copyright have become increasingly central. Terry Flew observes that “copyright was central to the early definitions of the creative industries as developed in the United Kingdom,” where policy makers emphasised the potential for wealth and job creation “through the generation and exploitation of intellectual property”.¹⁷² This conception positioned copyright as the cornerstone of the creative economy, linking individual creativity to national economic competitiveness. John Howkins famously declared that “patents and copyright are the currency of the information age,” underscoring their role as the basis of wealth in the digital economy.¹⁷³ Yet, as Flew points out, digital media convergence has “flipped the traditional relationship between content creators, content distributors, and copyrighted works, by radically reducing the costs of reproducing, repurposing and redistributing creative works in digital form”.¹⁷⁴

This transformation has sharpened tensions between copyright’s dual functions: providing incentives for creators by granting exclusive rights, and ensuring that works can circulate in the public domain for broader social benefit. As Flew explains, copyright embeds “two competing normative visions of intellectual property”: one that views it as

¹⁶⁹ Ibid 7.

¹⁷⁰ Ibid 7.

¹⁷¹ Ibid 7.

¹⁷² Terry Flew, ‘Copyright and Creativity: An Ongoing Debate in the Creative Industries’ (2015) 2(3) *International Journal of Cultural and Creative Industries* 6, citing DCMS, *Creative Industries Mapping Document* (1998) 1.

¹⁷³ *ibid* 7, citing John Howkins, *The Creative Economy: How People Make Money from Ideas* (Penguin 2001) 19.

¹⁷⁴ *ibid* 7, citing Howkins (n 10) 58–64.

privately owned and remunerative, and another that recognises it as a form of knowledge and expression whose free circulation underpins “freedom of speech, equitable access to public information, and economic efficiency”.¹⁷⁵ The challenge, therefore, is to balance these claims in a context where digital technologies have made global dissemination frictionless. As Benkler observed, the networked information economy has removed the “physical constraints on effective information production,” making “human creativity and the economics of information ... core structuring facts in the new networked information economy”.¹⁷⁶

The policy response to these changes has often been inadequate. Flew criticises UK policymakers for adopting a “defensive stance” that privileged incumbent interests and resisted flexibility in copyright regimes, such as in debates over term extensions, despite “hard economic evidence” against such measures.¹⁷⁷ This tendency towards regulatory capture left policymakers aligned with legacy distributors rather than adapting to the realities of digital disruption. The consequences have been far-reaching: newspapers and magazines entered crisis, music stores and video rental outlets collapsed, and book publishers faced structural challenges from Amazon’s distribution dominance.¹⁷⁸ Even Hollywood, which weathered many storms, suffered from the collapse of the DVD market and the failure of its own digital platform, UltraViolet, which was eclipsed by consumer reliance on iTunes and Netflix.¹⁷⁹

For the JRC, these developments point to a future where small and medium-sized enterprises (SMEs), which dominate the European creative sector, must adopt new strategies. The report argues that online distribution and closer ties with consumer communities constitute “potential strategies that these small and medium-sized actors ... can adopt in order to access (or create) markets and audiences from which, until now, they have been mostly excluded”.¹⁸⁰ This signals a shift from reliance on traditional intermediaries to more participatory, networked models of value creation. Yet, as Flew highlights, the emergence of global platforms such as Google, Amazon, Apple, and

¹⁷⁵ Ibid 5.

¹⁷⁶ Ibid 6, citing Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press 2006) 4.

¹⁷⁷ Ibid 8, citing Hasan Bakhshi, Ian Hargreaves and Juan Mateos-Garcia, *A Manifesto for the Creative Economy* (Nesta 2013) 14–15, 25.

¹⁷⁸ Flew (n 9) 8.

¹⁷⁹ Ibid 8, citing Steirer (2015).

¹⁸⁰ European Commission JRC (n 1) 7.

Facebook complicates this vision, since these entities now control key infrastructures of discovery, distribution, and monetisation.¹⁸¹ In effect, while digital technologies open possibilities for disintermediation, they also foster new forms of concentration, as cultural production becomes increasingly dependent on a handful of powerful global players.

Taken together, these perspectives underscore the evolving and contested nature of the creative industries in the digital era. The JRC emphasises the structural upheaval caused by ICTs, highlighting sector-specific trajectories of transformation, while Flew foregrounds the institutional debates around copyright and intellectual property that frame these changes. Both converge on the recognition that digital media has reconfigured the balance of power in cultural industries, creating opportunities for innovation but also exacerbating tensions between cultural value, economic imperatives, and regulatory frameworks. As Flew concludes, the challenge for policymakers lies in recognising that the health of the creative economy cannot be equated simply with the protection of incumbent copyright industries, but must adapt to the realities of a “networked global creative economy”.¹⁸²

¹⁸¹ Flew (n 9) 8–9.

¹⁸² *Ibid* 4.

PART 2

FROM PAGE TO PROFIT: THE ECONOMIC DYNAMICS OF ADAPTATIONS IN INTELLECTUAL PROPERTY LAW

2.1 Framing Adaptation in the economic landscape

The role of adaptation in copyright cannot be assessed in isolation from the broader economic transformations of the digital age. As Peukert and Windisch observe, “digital technologies, perhaps starting with the introduction of the microchip and personal computers and much accelerated by the internet, have immensely challenged the copyright system”.¹⁸³ These challenges extend directly to the ways in which derivative works and adaptations circulate in the market. On the one hand, digitization substantially lowered the costs of production and distribution, resulting in “market entry at an unprecedented scale”¹⁸⁴, including by creators who rely on the re-use of existing works. Such forms of adaptation, ranging from sampling in music to appropriation in visual art, frequently constitute “supply-side copyright infringement”¹⁸⁵ when not authorized, yet they also demonstrate how economic incentives can encourage creative recombination and innovation.

The empirical literature highlights that licensing frictions often determine whether adaptation fosters or hinders welfare. For instance, studies of the appropriation art market show that “higher perceived litigation risks decrease sales volume in art auctions and lead art dealers to relocate to jurisdictions with less legal uncertainty”.¹⁸⁶ Similarly, copyright restrictions have been shown to “drastically reduce citations to copyrighted works on Wikipedia, which results in lower-quality articles”.¹⁸⁷ These findings underscore how restrictive copyright regimes may suppress valuable adaptive uses that generate informational and cultural spillovers. Conversely, once works fall into the public domain,

¹⁸³ Christian Peukert and Margaritha Windisch, *The Economics of Copyright in the Digital Age* (CESifo Working Paper No 10687, October 2023) 1.

¹⁸⁴ *Ibid* 2.

¹⁸⁵ *Ibid* 2.

¹⁸⁶ *Ibid* 4.

¹⁸⁷ *Ibid* 4.

evidence demonstrates that they are “more often performed”¹⁸⁸ and that “lower prices of accessing copyrighted works encourage follow-on innovation”.¹⁸⁹ Adaptation, therefore, lies at the heart of the economic balance between incentivizing creation and enabling access.

At the same time, digital platforms have reframed adaptation into new economic logics. Automated licensing and enforcement tools, most notably YouTube’s “Content ID,” represent a paradigmatic shift: rightsholders can now decide “whether the content should be taken down or whether they want to receive monetary compensation”, with over 90% choosing monetization, leading to billions in revenue for copyright owners.¹⁹⁰ In this model, adaptation is not simply tolerated but actively transformed into a revenue stream, illustrating how economic structures can reconfigure the meaning of derivative use. Likewise, in the sphere of software, the open-source movement illustrates alternative economic incentives, where re-use is facilitated by permissive licensing and collaboration rather than exclusivity. Yet, as Peukert and Windisch stress, “the degree of IP enforcement can substantially affect developer activity in OSS projects”, revealing that even in ostensibly open systems, adaptation remains tethered to economic considerations.¹⁹¹

Finally, emerging technologies suggest that adaptation will continue to reshape the economic landscape. Blockchain and NFTs promise “a substantially reduced power of intermediaries” by enabling transparent, decentralized licensing markets that could directly link original creators with adapters.¹⁹² These tools not only create new channels for derivative works to circulate but also revive long-standing questions about how adaptation can maximize welfare while ensuring fair returns to creators. Framing adaptation within this economic context reveals it as a pivotal site where copyright law, technological innovation, and market design intersect, simultaneously a source of conflict and an engine of cultural and economic dynamism.

2.2 Economic Incentives Behind Copyright and Adaptation Rights

¹⁸⁸ Ibid 4.

¹⁸⁹ Ibid 4.

¹⁹⁰ Ibid 14.

¹⁹¹ Ibid 15.

¹⁹² Ibid 18.

Copyright law has historically been justified as a means to balance the costs of creative production with the rewards needed to sustain it. By granting exclusive rights to authors, the system aims to ensure that creators can recover the significant investments involved in producing new works, including time, editorial processes, marketing, and publication. As Peukert and Windisch explain, “[c]opyright is primarily justified as a means to provide monetary incentives for creating new works and the possibility to recoup the investments made by the creator in the creation process”. This rationale is most strongly reflected in the utilitarian theory, which is particularly influential in the United States and frames copyright as a tool to promote social welfare by addressing the underproduction of creative goods that are otherwise non-rival and non-exclusive. Conversely, European traditions highlight the labour theory of John Locke, emphasising that creators are entitled to the fruits of their intellectual effort, and the personality theory of Hegel and Kant, which regard artistic work as an extension of the creator’s personality and identity. These philosophical traditions underpin a stronger emphasis on moral rights within continental systems, granting authors inalienable rights of attribution and integrity beyond mere economic exploitation.¹⁹³

Empirical research provides evidence for these incentive effects, although not without qualification. Giorcelli and Moser (2020) show that when certain regions of Italy adopted copyright protections imported through Napoleon’s export of French law, the number and quality of newly composed operas increased significantly,¹⁹⁴ suggesting a positive link between exclusive rights and creative output. Similarly, Li et al. (2021a) find that stronger rights enforcement in online publishing environments leads authors to increase their output,¹⁹⁵ demonstrating that copyright can stimulate creation even in digital contexts. At the same time, historical and contemporary evidence complicates this narrative: Albinsson (2021) highlights that copyright in operatic production created highly concentrated market structures where only a limited set of composers benefitted¹⁹⁶ from sustained performance opportunities, while studies on copyright term extensions, such as the U.K. Copyright Act of 1814 and the U.S. Copyright Term Extension Act of

¹⁹³ Ibid 6–7.

¹⁹⁴ Petra Moser and Nicola Giorcelli, ‘Copyright and Creativity: Evidence from Italian Opera in Napoleonic Italy’ (2020) <https://ssrn.com/abstract=3491010> (cited in Peukert and Windisch, 7).

¹⁹⁵ Peukert and Windisch (n 1) 7.

¹⁹⁶ Staffan Albinsson, ‘Copyright and Concentration in the Market for Operas’ (2021) (cited in Peukert and Windisch, 7).

1998, show that longer terms reduced availability of works, increased prices, and ultimately lowered welfare because consumer surplus decreased more than rightsholders' profits increased (Heald et al., 2015; Reimers, 2019).¹⁹⁷ These findings suggest that while copyright can incentivize creation at the extensive margin, excessive protection risks undermining access and welfare.

Beyond stimulating original production, copyright crucially shapes the economic incentives for adaptations and re-use, which are central to cultural progress in the digital age. As the authors observe, “creative activities often build upon existing works, either as a mere inspiration or by integrating parts into the new creation”.¹⁹⁸ Music is an emblematic example: recordings are routinely re-used in practices such as sampling, remixing, and mash-ups. In visual media, user-generated content platforms such as YouTube or TikTok have institutionalized re-use through technical features, TikTok’s “sounds” and “duets” functions, for instance, enable users to incorporate existing material directly into new works.¹⁹⁹ These practices underscore how adaptation is woven into the fabric of modern creativity, and how copyright law structures the conditions under which such derivative creativity flourishes.

Digital licensing systems illustrate how adaptation can be transformed from a threat of infringement into a source of economic value. YouTube’s Content ID system, introduced alongside its affiliate program, notifies rightsholders of potentially infringing uploads and allows them to decide whether to block the content or monetize it through advertising revenues. The data are telling: over 90% of rightsholders opt for monetization rather than removal, and since 2016, Content ID has generated \$7.5 billion in advertising revenue for rightsholders.²⁰⁰ This example shows that when licensing frictions are reduced and scalable monetization is made possible, adaptation becomes not only permissible but economically advantageous, effectively turning derivative works into additional revenue streams. Such systems also lower the transaction costs traditionally associated with licensing, which have long hindered follow-on creation.

¹⁹⁷ Paul J Heald, Kris Erickson and Martin Kretschmer, ‘The Cost of Copyright Term Extensions: Evidence from the UK and US’ (2015) <https://ssrn.com/abstract=2546406>; Luis Aguiar and Joel Waldfogel, ‘Revenue, New Products, and the Evolution of Music Quality since Napster’ (2018) (cited in Peukert and Windisch, 8–9); Imke Reimers, ‘Copyright and Generic Entry in Book Publishing’ (2019) (cited in Peukert and Windisch, 9).

¹⁹⁸ Peukert and Windisch (n 1) 9.

¹⁹⁹ Ibid 10.

²⁰⁰ Ibid 14.

Empirical studies support the view that adaptations often generate positive spillovers for original works. Research on music markets shows that “re-use in the form of sampling and user-generated music videos can increase demand for original work, especially for less popular artists and novel re-uses of works who have not been widely re-used in the past” (Watson, 2017; Schuster et al., 2019).²⁰¹ Similar dynamics are observable in digital journalism, where Cagé et al. (2020) find that copying of news stories is widespread, but original creators tend to receive more views, mitigating potential disincentives from weak de facto protection.²⁰² These findings suggest that adaptation can act as a mechanism of discovery and amplification, extending the reach of original works to new audiences.

Nevertheless, the incentives around adaptation are not uniformly positive. When copyright imposes barriers to re-use, adaptation may be stifled with adverse consequences for welfare and innovation. Studies show that copyright restrictions drastically reduce citations to works on Wikipedia, resulting in lower quality of articles as measured by page visits (Nagaraj, 2018).²⁰³ Similarly, in the market for Appropriation Art, higher litigation risks have been shown to depress sales volumes and even lead galleries to relocate to jurisdictions with less legal uncertainty (Cuntz and Sahli, 2023).²⁰⁴ Automated enforcement technologies also create frictions: empirical work on parody videos demonstrates that about 20% of such content is taken down on YouTube, even though parody often falls under fair use or equivalent exceptions, showing that algorithmic systems can over-enforce to the detriment of lawful adaptations (Erickson and Kretschmer, 2018; Erickson et al., 2019).²⁰⁵

This duality illustrates a central tension: when licensing and enforcement systems are efficient, adaptations both enrich cultural production and enhance economic value for rightsholders; when transaction costs or algorithmic errors dominate, adaptations are

²⁰¹ Joel Waldfogel, ‘Copyright and Quality of Creative Works: Evidence from Music Sampling’ (2017) (cited in Peukert and Windisch, 14); Matt Schuster, Joel Waldfogel and Ben Watson, ‘Demand for Music Sampling and User-Generated Content’ (2019) (cited in Peukert and Windisch, 14).

²⁰² Julia Cagé, Nicolas Hervé and Marie-Luce Viaud, ‘The Production of Information in the Attention Economy: Evidence from Online News’ (2020) (cited in Peukert and Windisch, 14–15).

²⁰³ Neil Nagaraj, ‘Copyright and Cumulative Innovation: Evidence from Wikipedia’ (2018) (cited in Peukert and Windisch, 4, 14).

²⁰⁴ Michael Cuntz and L Sahli, ‘Appropriation Art and Copyright Litigation Risks’ (2023) (cited in Peukert and Windisch, 4, 14).

²⁰⁵ Kristelia Garcia Erickson and Martin Kretschmer, ‘Empirical Study of Parody on YouTube’ (2018) (cited in Peukert and Windisch, 11, 14); Kristelia Garcia Erickson, Martin Kretschmer and Kris Erickson, ‘Fair Use and Automated Takedowns’ (2019) (cited in Peukert and Windisch, 14).

suppressed, innovation slows, and welfare is reduced. The incentive structure of copyright thus extends far beyond the creation of original works. It determines how and whether subsequent creators can transform, remix, or reinterpret existing content, shaping both the trajectory of cultural development and the distribution of economic value.

Ultimately, as Peukert and Windisch note, digitization has created unprecedented opportunities for adaptation by lowering entry barriers, but it has also shifted enforcement into the hands of private platforms, raising concerns about transparency and welfare.²⁰⁶ The economic incentives behind copyright therefore cannot be understood in isolation from adaptations: copyright's role is not only to reward originality but also to set the conditions under which creative re-use is possible, valuable, and legally sustainable. In this sense, adaptations emerge as a pivotal driver of cultural evolution and economic growth, and the efficiency of the copyright framework in managing them will define the balance between private incentives and social welfare in the digital age.

2.3 The value chain of adapted work

The value chain of adapted works in copyright law reflects the journey through which creative content is transformed into new expressive forms and monetised across cultural industries. At its core lies the author's exclusive right of adaptation, as outlined in Article 12 of the Berne Convention and Section 106(2) of the U.S. Copyright Act, empowering creators to authorise or prohibit derivative uses of their works. This right forms the legal and economic foundation for subsequent transactions: without the ability to license, control, or block adaptations, authors would lose leverage in negotiating downstream exploitation of their works. As Jane C. Ginsburg aptly notes, “the derivative work right preserves to the author the decision whether, when and by whom the work may be recast or transformed into another expressive form.”²⁰⁷

The process begins with the licensing or assignment of adaptation rights, often secured through option agreements in the film and publishing sectors, which grant producers a limited-time exclusive opportunity to develop a derivative project. These rights underpin investment in development, financing, production, and distribution. In

²⁰⁶ Peukert and Windisch (n 1) 14–15.

²⁰⁷ Jane C. Ginsburg, *Derivative Works 2.0* (Columbia Public Law & Legal Theory Working Papers, 2008).

practice, the value chain involves a dynamic interaction among authors, literary agents, publishers, studios, distributors, and consumers. Each step not only adds value but also relies on the enforceability of the author's adaptation right to safeguard against free-riding or unauthorised exploitation.

A clear example of this chain is seen in *Warner Bros. Entertainment Inc. v. RDR Books* (2008), concerning the Harry Potter franchise. The defendant sought to publish a lexicon based on Rowling's fictional universe, claiming that the reference guide was a permissible transformative use. The District Court disagreed, ruling that the lexicon "would cause substantial harm to the market for the original works, by supplanting the need for readers to purchase Rowling's companion volumes."²⁰⁸ Judge Patterson highlighted that while reference works could potentially qualify as fair use, RDR's book "borrowed too freely from Rowling's copyrighted expression," crossing into infringement. This case showcases how the value chain is protected: unauthorised adaptations that could cannibalise markets are restrained, ensuring the author and licensees retain the exclusive ability to commercialise derivative markets such as encyclopaedias, guides, or adaptations into other formats.

The economic impact of this decision is substantial. Feder and Cooper argue that derivative rights "integrate new authorship with existing material, thereby generating fresh creative value within the marketplace."²⁰⁹ Allowing unauthorised uses such as the lexicon would disrupt the value chain by diverting revenue streams away from the author and licensed partners. In this way, *Warner Bros. v. RDR Books* underlines how copyright law structures incentives for investment in adaptations by guaranteeing exclusive downstream rights to authors and authorised intermediaries.

Comparative jurisprudence further clarifies how courts balance cultural transformation with economic control in the adaptation process. In *Suntrust Bank v. Houghton Mifflin* (2001), the Eleventh Circuit dealt with the publication of *The Wind Done Gone*, a retelling of *Gone With the Wind* from the perspective of enslaved characters. Unlike in the Harry Potter lexicon case, the court sided with the defence, recognising that the novel was a parody and qualified as transformative fair use. Judge Birch noted that "copyright law should not be used to stifle commentary, criticism, or

²⁰⁸ *Warner Bros. Entertainment Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

²⁰⁹ Amanda Feder & Jack Cooper, *Derivative Works and Economic Value* (2024, forthcoming).

parody that adds new expression and meaning to the original.”²¹⁰ This case demonstrates that the adaptation value chain is not absolute: while authors hold exclusive rights, safety valves like fair use permit transformative adaptations that enrich cultural discourse without usurping the market for the original.

The contrast between *Warner Bros. v. RDR Books* and *Suntrust Bank v. Houghton Mifflin* highlights the delicate balance copyright law maintains in regulating the adaptation chain. In *Rowling’s* case, the lexicon was deemed non-transformative and market-substituting, reaffirming the importance of licensing. Conversely, in *Suntrust*, the adaptation was recognised as an independent cultural contribution, ensuring that derivative rights do not become tools of censorship. As Pamela Samuelson observed, “copyright law must mediate between the incentive function of exclusive rights and the expressive needs of a democratic society.”²¹¹

Other jurisdictions echo similar concerns. In Poland, the Supreme Court in 2014 clarified that whether a work is derivative is “a question of fact, requiring a contextual analysis of the author’s creative input,” rather than a purely formal legal classification.²¹² This reflects the broader reality that adaptation chains are not merely legal constructs but involve fact-based assessments of creativity, originality, and market impact.

Beyond case law, scholarly debates on fan fiction further highlight the tensions within the adaptation value chain. Fan works in the Harry Potter universe, for example, raise the question of whether non-commercial transformative uses should be tolerated. As Michelle Chatelain argued, “fan works may be seen as homages or transformative expressions, but when they fail to add significant new meaning, they fall within the scope of infringing derivative works.”²¹³ Such disputes underscore that while adaptations can revive and extend the cultural and economic value of original works, they also risk undermining the exclusivity that incentivises copyright.

Ultimately, the value chain of adapted works is both economic and interpretive. Economically, it ensures creators and authorised partners capture revenue streams across multiple markets; interpretively, it determines when adaptations are sufficiently transformative to warrant protection from infringement claims. The combined effect is a

²¹⁰ *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

²¹¹ Pamela Samuelson, *Unbundling Fair Uses* (2009) 77 *Fordham L Rev* 2537.

²¹² Polish Supreme Court, Judgment I CNP 1014/14, 6 November 2014.

²¹³ Michelle Chatelain, *Harry Potter and the Fan Fiction Phenomenon: Fair Use or Infringement?* (2007) *Tulane Journal of Technology & Intellectual Property* 263.

dynamic system in which copyright law structures the flow of value across cultural production, while leaving space for critical or parodic reinterpretations that enrich the public domain of ideas. In this way, adaptation rights both enable and limit the circulation of cultural value, mediating between private incentives and public interests.

2.4 Licensing and revenue stream

Licensing is a key method through which copyright holders gain economic value from their works. Instead of transferring ownership, copyright owners often “exploit their rights by granting licences of some or all of their rights to others” so that licencees can distribute, adapt, or otherwise use the protected work while the rights holder retains ownership of the copyright itself.²¹⁴ These agreements form the foundation of revenue streams in creative industries, enabling access to songs, films, software, and books while ensuring that rights holders maintain residual control. The paper also highlights that licensing markets often experience frictions: “Contacting and negotiating with rights holders can be time-consuming, leading to high transaction costs for licence acquisition,” and in some cases, the copyright owner cannot be identified, resulting in orphan works that hinder re-use.²¹⁵ Such inefficiencies impact not only end-users but also professional creators, reducing the potential for derivative or transformative works.

The empirical evidence compiled in the study further demonstrates how licensing arrangements interact with digital distribution models. In the early 2000s, transaction-based licensing, exemplified by Apple’s iTunes, allowed users to acquire single songs at low cost and “played a role in decreasing online piracy.”²¹⁶ However, with the expansion of broadband technology, subscription-based platforms such as Spotify, Netflix, and YouTube transformed the flow of revenues within the copyright economy. On-demand streaming shifted bargaining power towards rights holders, who had to balance the benefits of inclusion in bundled catalogues against disputes over royalty rates. As the authors mention, “whether rights holders are better off inside or outside the bundle varies substantially across different revenue-sharing agreements.”²¹⁷ Despite some

²¹⁴ Christian Peukert and Margaritha Windisch, *The Economics of Copyright in the Digital Age* (CESifo Working Paper No 10687, October 2023) 4.

²¹⁵ Ibid 4.

²¹⁶ Ibid 12.

²¹⁷ Ibid 13.

controversies, evidence indicates that, on average, streaming “benefits rights holders when compared to the alternatives of transaction-based business models or online piracy.”²¹⁸

A recent significant development has been the rise of algorithmic licensing, which has shifted the focus from enforcement to monetisation. YouTube’s Content ID system exemplifies this change: rights holders can choose either to block allegedly infringing videos or to monetise them by sharing advertising revenues. The platform reports that “over 90% of rights holders choose monetising, which has accumulated to \$7.5bn in advertising revenue paid to rights holders from claims through the system since 2016.”²¹⁹ This model marks a considerable departure from traditional litigation-driven enforcement, creating a large-scale digital licensing market that allows millions of derivative works to be exploited at minimal marginal cost. The authors emphasise that algorithmic licensing ‘has the potential to provide an efficient solution to massive-scale copyright enforcement, but [it does] not come without problems,’ especially regarding the correct identification of lawful re-use such as parody or quotation.²²⁰

Finally, the study points towards software and open-source ecosystems as another vital area of licensing practices. Unlike traditional copyright models based on exclusivity, open-source licences permit broad sharing and modification of code, with economic incentives linked to complementary assets and reputational gains. The choice of licensing structure, whether permissive or restrictive, also influences developer participation and subsequent innovation.²²¹ Collectively, these examples demonstrate that licensing is not merely a contractual tool but the dynamic “engine room” of the copyright economy in the digital age, facilitating revenue generation whilst mediating the tension between protection, access, and innovation.

2.5 Economic tensions in adaptations

The adaptation economy is fundamentally about the redistribution of value between original authors and adapters. Copyright law frames adaptations as derivative

²¹⁸ Ibid 13.

²¹⁹ Ibid 14.

²²⁰ Ibid 10.

²²¹ Ibid 15.

works, defined in the U.S. as “a work based upon one or more preexisting works... in which a work may be recast, transformed, or adapted” (17 U.S.C. § 103(b)). This legal framing gives authors exclusive control over adaptation rights but also creates a secondary market where those rights are licensed, often at undervalued prices when the author lacks bargaining power. As Landes and Posner observe, “copyright protection is justified to the extent that it increases the supply of creative works by raising the private return to authorship”, but it may also “create monopoly rents that exceed the incentives required” when control over derivative markets becomes too extensive.²²²

The case of *Klinger v Conan Doyle Estate* (7th Cir. 2014) illustrates this economic balance. The Conan Doyle estate sought to extend licensing revenue by arguing that the “roundedness” of Sherlock Holmes remained protected in later stories. The court, however, rejected this attempt at rent-extraction, noting that once earlier stories had entered the public domain, they must remain freely usable.²²³ Judge Posner underlined the risk of perpetual monopoly, cautioning that the estate’s claim would result in “135 years of copyright protection.” Economically, the judgment preserved the public domain as a generator of new adaptations and derivative markets, ensuring that no single rightsholder could indefinitely tax subsequent creativity.

Commercial examples highlight how adaptations can dramatically reallocate economic value. Philip K. Dick’s *Do Androids Dream of Electric Sheep?* sold modestly on publication, but Ridley Scott’s 1982 adaptation, *Blade Runner*, evolved into a cultural and commercial landmark. The film generated sequels, merchandising, and academic discourse, eclipsing the novel’s earnings.²²⁴ As Julie Sanders has argued, adaptation functions as “a form of survival” for texts, enabling them to circulate across media and time;²²⁵ but this survival often occurs in a way that privileges downstream producers, investors, and distributors, rather than the originating author. Dick himself admired the final vision of *Blade Runner*, but the bulk of its financial afterlife accrued to studios, not to his estate. This illustrates how economic value in adaptations is disproportionately captured by those with capital, distribution infrastructure, and global reach.

²²² William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press 2003) 212.

²²³ *Klinger v Conan Doyle Estate Ltd* 755 F.3d 496 (7th Cir. 2014).

²²⁴ Vanity Fair, ‘The Battle for *Blade Runner*’ (2017) <https://www.vanityfair.com/hollywood/2017/09/the-battle-for-blade-runner-harrison-ford-ridley-scott>.

²²⁵ Julie Sanders, *Adaptation and Appropriation* (Routledge 2016) 24.

Civil law systems, by embedding moral rights, indirectly shape the economics of adaptation contracts. In France, Article L.121-1 of the Intellectual Property Code recognises the inalienable right of the author to oppose distortions that harm honour or reputation. In *Société Le Chant du Monde v Société Fox Europe* (1953), French courts upheld this claim, even where the underlying music had entered the public domain.²²⁶ Although framed as dignity-based, the rule also increases authors' economic leverage in licensing negotiations: producers cannot simply secure blanket waivers, which raises transaction costs and often results in higher compensation to authors. Italy follows a similar structure: under Articles 20-24 of the 1941 Copyright Act, moral rights are perpetual and enforceable by heirs.²²⁷ These provisions, while not primarily economic, alter the cost-benefit calculus of adaptation agreements, embedding risk for producers who deviate too far from the source.

At the transnational level, adaptation underscores economic asymmetry between the Global North and South. *Slumdog Millionaire* (2008), adapted from Vikas Swarup's novel *Q & A*, grossed over \$378 million worldwide and won eight Academy Awards.²²⁸ Yet the contractual structure left Swarup with limited recognition and modest returns, as rights were licensed early and cheaply. The case demonstrates how adaptation rights, once transferred, can become instruments of global capital accumulation, with disproportionate rewards accruing to Western studios.

Thus, the economics of adaptation law oscillate between incentive and inequity. On one hand, the recognition of derivative rights ensures that authors can monetise licensing, forming the cornerstone of creative industries. On the other, the actual allocation of revenues often leaves authors marginalised once adaptations succeed. Future reforms may therefore require statutory revenue-sharing regimes (akin to those in collective management of neighbouring rights), residual payments tied to adaptation success, and recognition of adapters as co-authors where their contributions generate substantial new markets. These mechanisms would better align the law with both economic efficiency and fairness.

²²⁶ *Société Le Chant du Monde v Société Fox Europe et Société Fox Américaine Twentieth Century* (Cass. civ., 1953).

²²⁷ Legge 22 aprile 1941, n 633, Articles 20–24 (Italy).

²²⁸ Atlantis Press, *ICASSEE Proceedings 2019* (2019) on *Slumdog Millionaire*.

PART 3

LEGAL ARCHITECTURE FOR CREATIVE TRANSFORMATION: CLARIFYING THE RIGHT OF ADAPTATION

3.1 Proposed solutions and guidelines to clarify legal frameworks

The rapid development of creative industries and the spread of digital media technologies have significantly heightened the need for clearer and more consistent legal frameworks to regulate the right of adaptation. In a more interconnected and participatory cultural landscape, creators frequently engage in transforming and recontextualising existing works across various platforms, including film, literature, gaming, social media, and immersive digital environments. However, current legal structures often lack sufficient clarity or predictability, especially in distinguishing between lawful adaptations and infringing uses. These uncertainties not only hinder artistic innovation by creating a climate of legal caution and ambiguity, but also put creators at risk of unintentional infringement along with the financial and reputational consequences that follow. Furthermore, the lack of a uniform legal interpretation across different jurisdictions leads to fragmented outcomes and hampers the harmonisation of rights protection in the global digital marketplace. Addressing these issues calls for the development of comprehensive, forward-thinking legal strategies that balance the legitimate interests of original rights holders with the societal and economic benefits of transformative creation. Such reforms should include clearer statutory definitions, more consistent judicial standards, and regulatory mechanisms that recognise the collaborative, iterative, and technologically driven nature of modern cultural production. In this way, copyright law can be recalibrated to meet the needs of a vibrant creative ecosystem while preserving its core aim: to incentivise original authorship without unnecessarily restricting cultural dialogue, adaptation, and innovation.

3.1.1 Recommendations for clearer definitions and criteria for derivative works

The need for clearer definitions and criteria for derivative works cannot be overstated. As Kok observes in the South African context, “the complexities of copyright law and its application in the context of the various forms of adaptation... remain largely undefined, leaving those attempting to create a work of adaptation or resolve a dispute over one in a state of considerable uncertainty.”²²⁹ This observation captures a broader international problem: when statutory definitions of adaptation are vague, the result is not flexibility but arbitrariness. Creators cannot anticipate whether their works will be regarded as lawful or infringing, while courts are forced to engage in ad hoc reasoning. In practice, this legal vacuum benefits copyright owners, who are able to weaponise uncertainty by discouraging uses through the mere threat of litigation. The law thus produces a chilling effect, particularly acute in the digital sphere, where the line between homage, inspiration, and adaptation is especially blurred.

Gervais makes a similar point from a U.S. perspective, noting that the statutory formulation of derivative works as creations “based upon” pre-existing works has created “indeterminacy about the scope of the derivative right, which may have chilling effects on nonprofessional Internet users who may not have the time, desire, or resources to consider or negotiate copyright rights.”²³⁰ In his view, the derivative right is “situated at the essential border between infringement and inspiration” and thus demands a clearer conceptual delineation.²³¹ Without such clarity, copyright effectively grants rightsholders “an unbounded veto” over downstream creativity. This problem is not merely semantic but profoundly normative: if the definition of derivative works remains nebulous, copyright risks collapsing the very distinction between ideas, which should remain free, and expressions, which deserve protection.

Historical perspectives confirm that the current indeterminacy is the product of legal drift rather than necessity. Archana’s study of the assimilation of the adaptation right into copyright law shows how the expansion of copyright from the Statute of Anne to modern frameworks gradually “forgot the value and necessity of collaboration or

²²⁹ Lucinda Kok, ‘Navigating the Complexities of the Adaptation Right in Copyright Law: Addressing Ambiguities, Gaps and the Need for Reforms in South Africa’ (2023) 11 *South African Intellectual Property Law Journal* 42, 43.

²³⁰ Daniel Gervais, ‘The Derivative Right, or Why Copyright Law Protects Foxes Better than Hedgehogs’ (2013) 15(4) *Vanderbilt J of Entertainment & Technology Law* 785, 787.

²³¹ *Ibid* 789.

elaboration of ideas by a series of creative workers.”²³² She notes that while in the eighteenth century “you could publish a translation, you could adapt [a work] into a novel or play, or you could use it to create another commodity,” today most such uses are “considered an infringement of the author’s copyright.”²³³ This historical contrast demonstrates that the current broad scope of derivative rights is not inevitable but the product of a shift toward over-protection, often at the expense of creativity.

European scholarship similarly points to the shortcomings of vague criteria. Van Eechoud stresses that in the EU context, the question of when law should treat a text as an adaptation rather than a copy has become increasingly pressing in the digital environment, “with its possibilities of borrowing, sampling, reworking, appropriation at unprecedented scale.”²³⁴ If originality is understood merely as “not directly copied,” as some CJEU judgments suggest, then the scope of adaptation becomes almost limitless, capturing trivial transformations that ought not to trigger exclusive rights. Such a low threshold risks turning copyright into a tool of enclosure rather than incentive. In my view, the originality test should operate not only as a gatekeeper for protection but also as a limiting principle for defining when a derivative work has truly appropriated protectable expression.

The dangers of vague definitions are also evident in non-Western contexts. Dwisvimiar and Ghanny describe how Indonesian authors of popular novels saw their works adapted into e-novels and distributed online without permission, but because the law lacked clear recognition and enforcement mechanisms for adaptation rights, “the creator who made the e-novel does not get benefit from the adaptation rights of the novel, namely royalties that are distributed based on an agreement with the website.”²³⁵ The authors conclude that, as a result, protection of adaptation rights “has not been realized,” leaving creators without either effective control or economic return.²³⁶ This case underscores the dual risk of unclear criteria: where definitions are vague, infringers exploit loopholes while legitimate creators remain uncompensated.

²³² P Archana, ‘Tracing the History of Assimilation of Adaptation Right into Copyright’ (2023) 6(3) *International Journal of Law Management & Humanities* 3591, 3593.

²³³ *Ibid* 3594.

²³⁴ Mireille van Eechoud, *The Work of Authorship* (Amsterdam University Press 2014) 145.

²³⁵ Inge Dwisvimiar and Andhima Abdul Ghanny, ‘The Protection of Adaptation Rights to E-Novels Infringed by the Website in Perspective of Copyright Law’ (2021) 6(2) *Lambung Mangkurat Law Journal* 213, 218.

²³⁶ *Ibid* 219.

From these perspectives, it is evident that reform must move in the direction of sharper and more balanced criteria. In my view, three recommendations stand out. First, statutes should explicitly define derivative works in terms of recognisable appropriation of protectable elements, rather than the vague standard of “based upon.” This would align with the Berne Convention’s recognition of translations, adaptations, and arrangements as distinct categories, while leaving inspiration outside the scope of exclusive rights. Second, the law should distinguish trivial modifications from genuine adaptations by requiring that derivative works demonstrate originality in their own right. As Gervais argues, there must be “a hard line that divides fundamental changes that are non-infringing... and those that are non-infringing as transformative fair uses.”²³⁷ Third, a proportionality assessment should be integrated into the definition: where a new work neither substitutes for the original in the market nor appropriates its core expressive features, it should not fall within the adaptation right.

These reforms would not diminish the legitimate interests of authors; rather, they would reinforce copyright’s normative legitimacy by ensuring that derivative rights are limited to their proper domain. To paraphrase Kok, copyright must be seen not as “giving an author complete control over how others use their work” but as “a tool to advance knowledge and innovation.”²³⁸ By codifying clearer definitions and workable criteria, legislatures can reduce doctrinal confusion, restore predictability, and foster the kind of transformative creativity that copyright is meant to encourage rather than suppress.

3.1.2 Suggestions for harmonising principles internationally and legislative frameworks

The project of harmonising copyright law internationally has reached a decisive moment, one that demands a reassessment of the guiding principles and legislative tools used to regulate creative production in an increasingly digital and borderless world. While international treaties such as the Berne Convention and TRIPS have succeeded in establishing a basic level of minimum protection, they have left many substantive and procedural questions unresolved. As Barbosa stresses, the principle of territoriality

²³⁷ Gervais (n 2) 805.

²³⁸ Kok (n 1) 44.

remains at the very core of international copyright: “there is no such thing as an international copyright”.²³⁹ This fragmented model inevitably leads to inconsistencies in protection and enforcement, particularly as the internet blurs traditional territorial borders. Camarce highlights that the internet, by allowing instantaneous cross-border communication, has made it “almost independent of physical location”,²⁴⁰ and yet the current system continues to rely on territorially bound laws. The result is a persistent gap between the global nature of infringement and the localised reach of enforcement.

Within the European Union, the harmonisation agenda illustrates both the possibilities and the failures of legislative approximation. Over the past two decades, the EU has built a considerable *acquis* through directives on copyright and related rights, creating common standards of originality and scope of protection. The Court of Justice has gone further by extending the “author’s own intellectual creation” test to virtually all categories of works,²⁴¹ thereby shaping a uniform European threshold of originality. Yet these developments also reveal the structural weaknesses of harmonisation by directive. Hugenholtz argues that the EU’s harmonisation has come “at considerable cost” to Member States, with national legislatures locked into an almost “non-stop process of amending national laws”.²⁴² Moreover, the process has produced what he terms “upwards harmonisation,” whereby each directive ratchets protection to higher levels than before, extending terms of protection and strengthening exclusive rights well beyond the Berne minima.²⁴³ This has created a one-way street: protection levels can only increase, never recalibrate downward, even when empirical evidence questions whether heightened protection yields tangible benefits to creativity or the internal market.

The costs of this maximalist trajectory are considerable. As Hugenholtz observes, despite decades of harmonisation, “the territorial nature of copyright law remains the single most important obstacle to the creation of an Internal Market in content-based services,” leaving EU copyright markets “vulnerable to compartmentalisation along national borderlines”.²⁴⁴ In other words, harmonisation has addressed the scope of rights

²³⁹ Roberto Garza Barbosa, *Revisiting International Copyright Law* (2007) 8 *Barry Law Review* 43, 44.

²⁴⁰ Christian A Camarce, *Harmonization of International Copyright Protection in the Internet Age* (2006) 19 *Pac McGeorge Global Bus & Dev L J* 435, 436.

²⁴¹ P Bernt Hugenholtz, ‘Harmonisation or Unification of European Union Copyright Law’ (2012) 38(1) *Monash UL Rev* 5, 6.

²⁴² *Ibid* 7.

²⁴³ *Ibid* 6-7.

²⁴⁴ *Ibid* 5.

but not the structural problem of territoriality, which continues to divide the European content market into national silos. This persistent compartmentalisation undermines both legal certainty and consumer access, while fostering inefficiencies in licensing. It suggests that harmonisation of substantive norms, without confronting the territorial structure itself, risks being both incomplete and ineffective.

Globally, a similar imbalance can be seen in the TRIPS Agreement. By embedding intellectual property in trade law and attaching compliance to the possibility of sanctions, TRIPS gave international copyright harmonisation “teeth” that Berne and earlier treaties lacked.²⁴⁵ Yet this enforcement power was channelled primarily toward strengthening the position of right holders, particularly those in developed economies with strong entertainment industries.²⁴⁶ Carter describes this as the “digital copyright agenda,” whereby large media corporations successfully lobbied for provisions that reinforced their control, extended terms, and curtailed exceptions.²⁴⁷ The public interest, including education, research, and free expression, was confined to narrow exceptions that must pass the restrictive Berne three-step test. As a result, harmonisation at the WTO level reflects not a balance of interests but a privileging of commercial imperatives over democratic and cultural values.

In my view, future harmonisation efforts should shift focus from upward convergence of rights to a principled equilibrium that recognises both the incentive function of copyright and the fundamental societal interests in access and free expression. Reforming the Berne three-step test could be a starting point. As Carter argues, reshaping the test to resemble the U.S. fair use doctrine would provide much-needed flexibility, allowing courts to consider context, transformative use, and the broader public interest.²⁴⁸ Such reform would ensure that harmonisation does not come at the expense of democratic freedoms, embedding fundamental rights directly into the structure of copyright law rather than relegating them to afterthoughts. Similarly, Camarce’s suggestion of a Draft International Copyright Code or Agreement, which would create uniform rules on jurisdiction, choice of law, and enforcement, represents a pragmatic solution to the

²⁴⁵ Edward L Carter, ‘Harmonization of Copyright Law in Response to Technological Change: Lessons from Europe about Fair Use and Free Expression’ (2009) 30(2) *U La Verne L Rev* 313, 315.

²⁴⁶ *Ibid* 314–15.

²⁴⁷ *Ibid* 315–16.

²⁴⁸ *Ibid* 334–38.

procedural chaos currently afflicting international disputes.²⁴⁹ A specialised tribunal or body of uniform rules would reduce the unpredictability caused by territorial conflicts and make enforcement more consistent across borders.

Ultimately, harmonisation must be reconceptualised not as a race toward maximal protection but as the construction of a sustainable international framework. Barbosa notes that the historical movement of copyright law, from bilateral treaties to multilateral conventions and then to trade agreements, was driven as much by politics as by principle.²⁵⁰ The next stage must be different: it must be guided by normative choices that explicitly integrate the public interest into legislative design. Harmonisation that prioritises rightholders alone, as the EU and TRIPS examples show, fosters legal uncertainty, inefficiency, and public cynicism.²⁵¹ By contrast, a balanced international framework would ensure adequate remuneration and incentives for creators while guaranteeing robust exceptions for access, education, research, parody, and transformative uses. This equilibrium is not merely desirable but essential for the legitimacy of international copyright law in a digital and interconnected society. Such an approach would also enhance the credibility of international institutions. If WIPO, the WTO, and the EU are to remain relevant in the eyes of both creators and the public, their harmonisation efforts must avoid being perceived as vehicles for industry lobbying. Embedding public-interest protections into the very principles of harmonisation would counteract this perception and restore legitimacy. Only by reconciling incentive and access, protection and freedom, can harmonisation achieve its stated aim: a copyright system that supports innovation, fosters cultural participation, and facilitates the global circulation of knowledge.

3.1.3 Reforming adaptation rights for economic growth

The economic rationale for reforming adaptation rights rests on the need to overcome the structural inefficiencies produced by the current system of exclusivity. As Geiger observes, the requirement of prior authorization for derivative works often results in refusals or prohibitive pricing, which can effectively amount to a form of “private

²⁴⁹ Camarce (n 2) 440–44.

²⁵⁰ Barbosa (n 1) 45–47.

²⁵¹ Hugenholtz (n 3) 7; Carter (n 7) 316.

copyright” that stifles new creative outputs and impedes cultural circulation.²⁵² This dynamic contradicts the very purpose of copyright, which is not merely to reward past labour but to stimulate further innovation for the benefit of society. By introducing statutory licensing schemes or limitation-based remuneration rights, legislators could ensure that adaptations are no longer contingent on the discretionary power of original rights holders, while simultaneously guaranteeing creators an equitable share of the economic value generated by reuse.²⁵³ Such mechanisms have already proven successful in other contexts, such as private copying or educational uses, and there is no principled reason why derivative works should be excluded from this evolution of copyright’s toolkit.²⁵⁴

From an economic perspective, the integration of remuneration-based adaptation rights would also align copyright law more closely with the broader findings on intellectual property and growth. Gould and Gruben’s cross-country study demonstrates that stronger intellectual property protection can be a determinant of economic growth, particularly in open trade regimes where innovation is subject to competitive pressures.²⁵⁵ However, they equally caution that protection can lose its innovative force when it fosters monopolistic behaviour or blocks access to new knowledge.²⁵⁶ The current model of adaptation rights is emblematic of this tension: while designed to secure incentives for authors, in practice it often suppresses follow-on innovation and entrenches market power in the hands of a few. By shifting to a system that prioritises fair remuneration over absolute exclusivity, the law could mitigate the risks of monopolisation while preserving the incentive structure necessary for sustained creative investment.²⁵⁷

This reform would not only address inefficiencies at the cultural level but also strengthen the economic functions of copyright. Adaptations are a crucial driver of value creation in the cultural industries, often revitalising dormant works and extending their economic life cycle. Allowing these processes to occur under a clear statutory framework would enhance predictability for investors, facilitate licensing markets, and encourage

²⁵² Christophe Geiger, ‘Statutory Licences as Enabler of Creative Uses’ in Kung-Chung Liu and Reto M Hilty (eds), *Remuneration of Copyright Owners* (Springer 2017) 312.

²⁵³ *Ibid* 314–15.

²⁵⁴ *Ibid* 307–08.

²⁵⁵ David M Gould and William C Gruben, ‘The Role of Intellectual Property Rights in Economic Growth’ (1996) 48 *Journal of Development Economics* 323, 324–25.

²⁵⁶ *Ibid* 326.

²⁵⁷ Geiger (n 1) 318; Gould and Gruben (n 4) 327–28.

cross-border exploitation in line with global trade liberalisation.²⁵⁸ Indeed, as Gould and Gruben note, intellectual property protection delivers the greatest growth benefits in open, competitive economies; conversely, in closed or overly rigid regimes, stronger protection often fails to yield higher rates of innovation.²⁵⁹ Adaptation rights reform thus represents not only a cultural imperative but also a strategic economic adjustment: it would ensure that copyright law supports the circulation of knowledge and creativity rather than obstructing it.

In my view, maintaining the current unqualified exclusivity over adaptations risks perpetuating inefficiencies that harm both creators and society. Original authors may gain short-term control, but the wider innovation system suffers from diminished opportunities for transformative reuse, reduced cultural dynamism, and lost economic potential. By contrast, embedding statutory licenses and remuneration rights into the structure of adaptation law would foster a virtuous cycle: original creators receive guaranteed compensation, secondary creators are free to innovate within defined parameters, and society as a whole benefits from a more vibrant cultural market that actively contributes to long-term economic growth.²⁶⁰ Far from weakening copyright, such reform would restore its legitimacy as a tool designed to “promote the progress of science and useful arts,” aligning its doctrinal foundations with contemporary economic realities.²⁶¹

²⁵⁸ Geiger (n 1) 321.

²⁵⁹ Gould and Gruben (n 4) 333–34.

²⁶⁰ Geiger (n 1) 322.

²⁶¹ US Constitution, art I s 8 cl 8; cited in Geiger (n 1) 307.

CONCLUSION

The analysis undertaken in this thesis renders one conclusion inescapable: the right of adaptation, though historically conceived as a protective bulwark for authorship, has become increasingly misaligned with the realities of cultural production and dissemination. As Gérard Genette and Roland Barthes have long observed, creation is never *ex nihilo* but always situated within an intertextual continuum, a dialogue with prior forms and narratives.²⁶² Yet copyright law continues to operate under the fiction of strict originality, drawing artificial demarcations between “original” and “derivative” works that neither reflect nor serve the dynamics of contemporary creativity.

This anachronistic insistence on exclusivity, crystallised in cases such as *Warhol v Goldsmith*,²⁶³ where aesthetic innovation was deemed insufficient without a concomitant shift in market function, risks not only doctrinal incoherence but also cultural impoverishment. Similarly, the *Pelham* decision²⁶⁴ illustrates the precarious balance struck by courts: while the CJEU acknowledged the constitutional dimension of artistic freedom, it simultaneously entrenched a framework that leaves little room for the referential and iterative practices upon which much of today’s artistic expression depends. By limiting sampling to a narrow constellation of exceptions, the Court reinforced a legal architecture ill-suited to an era defined by remix, quotation, and transmediality.

The comparative perspective confirms that fragmentation across jurisdictions perpetuates uncertainty and deters creative risk-taking. French law, with its entrenched *droit moral*,²⁶⁵ elevates the protection of authorial dignity even beyond the expiry of economic rights; the United States, by contrast, privileges the open-ended but inconsistent doctrine of transformative use,²⁶⁶ rendering outcomes contingent upon judicial subjectivity; while the United Kingdom maintains a restrictive statutory model that leaves adapters dependent on narrowly circumscribed fair dealing provisions. As Ben Depoorter has persuasively argued, such unpredictability induces “excessive compliance”

²⁶² Gérard Genette, *Palimpsests: Literature in the Second Degree* (University of Nebraska Press 1997); Roland Barthes, *The Death of the Author* (Fontana Press 1977).

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

²⁶⁵ *Code de la propriété intellectuelle* (France), arts L. 121–1, L. 121–9.

²⁶⁶ *Ibid.*

and, in turn, “cultural impoverishment,”²⁶⁷ as creators refrain from legitimate appropriation out of fear of infringement.

From an economic perspective, the findings are equally decisive: adaptations are generative, not parasitic. They prolong and expand the cultural and commercial lifecycles of works, catalyse new markets, and create a “halo effect” that reverberates across publishing, film, streaming, and gaming industries. To persist in treating adapters as intruders trespassing upon the author’s domain, rather than as legitimate participants in cultural and economic ecosystems, is both normatively misguided and economically irrational.

Accordingly, this thesis contends that reform is not merely desirable but imperative. Copyright must evolve from a defensive edifice of monopolistic control into a forward-looking architecture that actively accommodates adaptation as a driver of cultural progress. Such an evolution requires the articulation of clearer definitional thresholds, the adoption of harmonised international standards,²⁶⁸ and the institutionalisation of remuneration and licensing mechanisms that ensure fair compensation for authors while facilitating transformative re-use. Far from weakening copyright, such reforms would restore its normative legitimacy by re-aligning it with its foundational purpose: to balance the proprietary claims of creators with the public interest in access, innovation, and cultural participation.

The choice, therefore, is stark. Copyright can remain wedded to an outdated paradigm of exclusivity, perpetuating uncertainty, litigation, and stagnation. Or it can embrace the reality, articulated by Advait Sarkar, that “all creative work is essentially reuse,”²⁶⁹ and reconceive adaptation not as a legal anomaly but as the very engine of cultural and economic renewal. This thesis asserts unequivocally that the latter path is the only viable one. Only by acknowledging adaptation as an indispensable and inevitable modality of creativity can copyright law fulfil its ethical, cultural, and economic promise in the digital age.

²⁶⁷ Ben Depoorter, ‘Technology and Uncertainty: The Shaping Effect on Copyright Law’ (2012) 157 U Pa L Rev 1831.

²⁶⁸ Berne Convention for the Protection of Literary and Artistic Works (1886, as revised 1971), arts 12, 14; Directive (EU) 2019/790 on Copyright in the Digital Single Market, art 17.

²⁶⁹ *Ibid.*

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