Towards the protection of author's moral and material interests through copyright laws
A comparative study

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Abstract

This thesis argues that the interaction between copyright and human rights must be understood in the pitch of protecting an author's moral and material interests. The implications of such an understanding has been analysed in three interrelated areas. One is the justification of copyright through different theories and how this can be connected to the principles of a modern conception of natural law. This has demonstrated that copyright responds to principles based on democracy, freedom of expression and equal rights of participation in the life of society. By protecting the author, society finds a mechanism that guarantees the diversity and dissemination of thoughts. Here is suggested that a concept of author should respond to the human potentiality of creativity as mean for free participation in the life of society. The second area of analysis of author's rights is the comparative study of legislation, case law and doctrine in the mechanisms that Mexico, Argentina, Colombia, the US, the UK and Spain produce to the protection of the author. This has implied also the study of how some of those countries that have developed a constitutional structure protecting author's interests within the understanding of the role that such a protection plays in the construction of a knowledge-based society. The study led to finding that those mechanisms related to the regulation of the contractual relationship between authors and producers are the most important for protecting author's interests. There, the problem is to what extent the law can limit freedom of contract towards the protection of author's interests. The international dimension of this problem shows that the narrative of protecting the author has been present in the discussion towards the construction of a universal copyright system. Such an aim of universalisation is coherent with the introduction of author's rights in the structure of human rights, as for example in the ICESCR. The problem of regulating freedom of contract has been part of the discussions of international instruments recently in the texts of the US-Chile FTA and the TPP. It has been also considered in the recent proposal of EU Directive for Copyright in the Digital Market. However, the challenge is if a principle of protecting author's autonomy, dignity and freedom of creation which would limit freedom of contract in copyright could be reflected in an international instrument. The conclusion is that protecting the author requires attention and legal action, and that there are mechanisms at hand for such a purpose, which would add coherence to the interaction between copyright and human rights.

Acknowledgments

When I finished school, my dad asked me what my plans were. My answer was the nightmare of any parent. ‘I want to be a writer’, I said. The family then met and respectfully suggested that I should choose a more profitable career. Studying law was my other option. Someone told me later, ‘why don’t you do both?’ As I couldn’t find a reason, I did it.

That decision opened a different perspective to my studies. I shared undergraduate time with law students and with literature students, and their future seemed very different. Just before the end of my studies tending to the Law degree, I attended the course on copyright and I found the linking element for my two interests. Soon after graduation, I found myself working at the Colombian copyright office. That was 16 years ago. Since then, I have not changed my vocation. Idealistic perhaps, but very real in the skin of my fellow students of literature, I want to work for making the profession of writing something that would allow people to make a living. There is no other reason for me to embark in this journey.

My thanks then should start in order. To my dad, looking at me from the ether, and to my mum, waking up every single day of her life at 4 AM to study, thank you for setting the example, the life lesson, and tenacity. Thanks to Florelia, who has been my partner in life and academia for more than ten years now, and who has always shown that her sincerity is coherent in mind and heart. Yours, my love, is the strength of my writing.

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Contents

List of abbreviations

ADRDM: American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948)

BIRPI: United International Bureaux for the Protection of Intellectual Property

CESCR: Committee on Economic Social and Cultural Rights

CJEU: Court of Justice of the European Union

ECHR: Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)

ECJ: European Court of Justice

ECOSOC: United Nations Economic and Social Council

ECtHR: European Court of Human Rights

EU-CAN FTA: Trade Agreement between the European Union and its member states, of the one part, and Colombia and Peru, of the other part (Members of the European Union-Colombia-Peru-Ecuador) (adopted 26 June 2012)

EU Charter: Charter of Fundamental Rights of the European Union

FTA: Free Trade Agreement

FTAA: Free Trade Area of the Americas

IACS: Inter-American Copyright System

IACtHR: Inter-American Court of Human rights

ICESCR: International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

NAFTA: North American Free Trade Agreement (Canada-US-Mexico) (1 January 1989)

Pact of San Jose: American Convention on Human Rights "Pact of San Jose, Costa Rica" (entered into force 18 July 1978) OAS Treaty Series No 36

Protocol of San Salvador: Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (entered into force 16 November 1999) OAS Treaty Series No 69

TEU: Treaty on European Union, Consolidated Version

TPP: Trans-Pacific Partnership

TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) LT/UR/A-1C/IP/1 <https://docs.wto.org>

UCC-52: Universal Copyright Convention (adopted 6 September 1952, entered into force 16 September 1955) 216 UNTS 132

UCC-71: Universal Copyright Convention, as revised at Paris on 24 July 1971 (adopted 24 July 1971, entered into force 10 July 1974) 943 UNTS 178

UDHR: Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)

US-Colombia TPA: United States-Colombia Trade Promotion Agreement (entered into force 15 May 2012)

US-Chile FTA: United States–Chile Free Trade Agreement (entered into force 1 January 2004)

WCT: WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002) 2186 UNTS

WMH: Refers to the 'work made for hire' doctrine according to wich, '[t]he employer or other person for whom the work is prepared is considered the author for purposes of the copyright law of the country, and, subject to written agreement to the contrary, owns all of the rights comprised in copyright.' (Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (World Intellectual Property Organization 2003). P. 316)

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Chapter 1 Introduction

'*Authorship is copyright's ghost in the machine*'[1]

I. Context and importance

Copyright is often defined as 'the rights that creators have over their literary and artistic works'.[2] The author (as the creator) has been situated at the core of copyright, for the author would be, finally, the main beneficiary of those rights that the law recognises as a result of an original creation. However, the physical person who creates the work seems blurred within the notion of 'author' that recently appears to include other persons considered successors in title of the copyright. When copyright interacts with human rights, this complex notion creates concerns regarding the effect that protecting author's human rights have on how copyright law is interpreted.

For example, Article 27th of the Universal Declaration of Human Rights (UDHR) indicates:

> *(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*
> *(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

Is the 'author', as mentioned in most copyright laws, the same person indicated in the human rights instruments? According to Article 31 of the Vienna Convention on the Law of Treaties, the terms used in those instruments should be given the ordinary meaning 'in their context and in the light of its object and purpose'. Apparently, while the context of the international laws related to copyright has changed by expanding

[1] Oren Bracha, 'The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright' (2008) 118 The Yale Law Journal 186, 188.

[2] 'World Intellectual Property Organization' <http://www.wipo.int/copyright/en/>.

the concept of 'author' to other right holders,[3] in the context of the human rights instruments, such a concept seems to have narrowed to only natural persons, considered either individually or collectively.[4]

Rahmatian summarises the problem as follows '…the fact that 'author' can be a human being as well as a legal entity-being' has as a consequence that 'copyright needs human authors, not to reward them for their creativity, but to calculate the duration of the resulting property right which may be granted to someone other than the author.'[5] This could paradigmatically create a contradiction with the human rights of the author.

Nevertheless, the context in which this problem evolves seems to pay more attention to other concerns related to the interface between intellectual property (IP) and human rights. Such interface relates to several issues that have caught the attention of scholars. For instance, according to Helfer & Austin, the human rights system did not pay too much attention to the IP rights after the debates about the International Covenant on Economic, Social and Cultural Rights (ICESCR) took place in the 1960's. It was not until the first decade of the twenty-first century that the UN's Economic and Social Council (ECOSOC) turned its attention to this matter. Concerning intellectual property (IP), Helfer & Austin indicate that neither the lawyers nor the international agenda have paid enough attention to the human rights component to which IP, and particularly, copyright, might respond. This has recently changed. The issues triggering the attention back to human rights from IP did not have to do with the author (or the creator) but with other matters such as those related to traditional knowledge; or those matters derived from the interaction between the TRIPS agreement and human rights, especially the transfer of technology regarding developing countries, the relationship between the right of food and genetic engineering, bio-piracy, and

[3] See for example, the definition of the concept offered in Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (World Intellectual Property Organization 2003) 268.

[4] Committee on Economic Social and Cultural Rights, 'General Comment No. 17 (2005) (Article 15, Paragraph 1 (C), of the Covenant) E/C.12/GC/17' (Committee on Economic, Social and Cultural Rights 2006) para 7.

[5] Andreas Rahmatian, *Copyright and Creativity. The Making of Property Rights in Creative Works* (Edward Elgar Publishing 2011) 172-173.

restrictions to pharmaceuticals because of patents and its implication on health. Other issues, such as the impact of copyright or trade marks on freedom of expression, are also considered.[6]

For instance, the Committee on Economic Social and Cultural Rights (CESCR), at its twenty-seventh session held in Geneva in 2001, highlighted the distance that could exists between the IP laws and the interpretation of the human rights instruments, primarily the ICESCR:

> *Whereas human rights are dedicated to assuring satisfactory standards of human welfare and well-being, intellectual property regimes, although they traditionally provide protection to individual authors and creators, are increasingly focused on protecting business and corporate interests and investments. Moreover, the scope of protection of the moral and material interests of the author provided for under article 15 of the Covenant does not necessarily coincide with what is termed intellectual property rights under national legislation or international agreements.*[7]

In respect to the interface between copyright and human rights, the attention has been dominated by the interaction between two interests. On one side is the private, proprietary interests of the copyright owners (which would include the author and successors in title). For instance, although Helfer & Austin analyse the problem of creator's rights in relation to copyright, their analysis is focused on the rights rather than on the person.[8] On the other side is the public interest of society members who benefit from the cultural expressions that authors provide through their creativity. In the literature regarding this matter, there are several examples regarding the

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[6] See Lawrence R Helfer and Graeme W Austin, *Human Rights and Intellectual Property. Mapping the Global Interface* (Cambridge University Press 2011) 34.

[7] Committee on Economic Social and Cultural Rights, 'Human Rights and Intellectual Property, Statement by the Committee on Economic Social and Cultural Rights.' (2001) http://www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.15HRIntel-property.pdf para 6.

[8] Lawrence R Helfer and Graeme W Austin, *Human Rights and Intellectual Property. Mapping the Global Interface* (Cambridge University Press 2011) 171.

protection of different interests connected with copyright. Freedom of expression is one, the right to education is another. The impact that online uses and copyright transformation might create on both interests has been also studied. The impact that copyright might have on freedom of expression in the case of derivative works has been also motive of analysis, including the exercise of a right to parody. Other areas of study have been the exercise of the right to access to culture and copyright and the rights of persons with disabilities in connection with copyright.[9] All of these issues are important and require attention, but those are not the interest of this thesis.

Despite the attention given to the interface between copyright and human rights among the different perspectives described above, less attention has been paid to the interests of the author considered independently of the private interests of the successor in title of the copyright.

The role of the author should possess its own weight in the legal systems in order to conciliate both copyright and human rights towards the protection of the originator of the work. The General Comment 17th from the CESCR asserts that, at the level of human rights, only the entitlement granted by IP systems to the authors of scientific, literary, or artistic productions as natural persons is protected. Therefore, other copyright entitlements should be considered below that level.[10]

The interaction between human rights and copyright based on a common background has to be tied to the interest of protecting the author. Such a common background

[9] Recent publications compiled a good portion of the literature available on the interface. See, for example, Paul Torremans, *Copyright and Human Rights* (Paul Torremans ed, Kluwer Law International 2004); Lawrence R Helfer, *Intellectual Property and Human Rights* (Lawrence R Helfer ed, Edward Elgar Publishing 2013); Mpasi Sinjela, *Human Rights and Intellectual Property Rights* (Mpazi Sinjela ed, Martinus Nijhoff 2007); Paul Torremans, *Intellectual Property Law and Human Rights* (Paul Torremans ed, 3rd edn, Kluwer Law International 2015); Christophe Geiger, *Research Handbook on Human Rights and Intellectual Property* (Christophe Geiger ed, Edward Elgar Publishing 2015) <http://www.elgaronline.com/view/9781783472413.xml>.

[10] Committee on Economic Social and Cultural Rights, 'General Comment No. 17 (2005) (Article 15, Paragraph 1 (C), of the Covenant) E/C.12/GC/17' (Committee on Economic, Social and Cultural Rights 2006) para 7; See also Audrey R Chapman, 'Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (I) (c)' (2001) XXXV Copyright Bulletin 4, 14.

relates for instance to the interest in democracy and the participation of the individual in the cultural life of society. As a notion, the author might be the result of a historical construction, and as such, that notion could be reinterpreted to answer new conditions in the contemporary cultural environment. This functionality could relocate the author at the centre of copyright public policy debates.

Such a relocation of the author in public debates would be historically consequent with the development of the international protection of copyright and the repercussion of the recognition of moral and material interests of authors as human rights. This, by no means, pretends to reduce the protection of these human rights interests into a copyright size. It intends, instead, to articulate both interests and recognise that the first is superior to the latter. Copyright law should and, actually, can respond harmonically to its commercial and cultural functions.

The concerns regarding the protection of author's rights have been highlighted in different frameworks. For instance, in 1997, UNESCO developed a study towards the improvement of the status of the artist. The study included a questionnaire sent to the country members to identify national policies regarding artists' status.[11] Questions related to copyright were included, which were answered positively in terms of recognising the existence of national laws protecting copyright. However, the group of answers raised concerns with respect to the levels of implementation of copyright rules related to the comparison between the minimum wage that each State recognised and the remuneration paid to authors. Only five countries considered that the remuneration that authors received was average regarding the minimum wage, 15 countries mentioned that artists' income was low in comparison with the minimum wage, and only 3 countries considered that such an income was very low. This could be an indicator of how an author's income obtained from copyright royalties or other related sources were not enough to obtain a good enough income for their standard of living.

More recently, the Author's Guild Foundation, in 2015, released the results of a wide survey among their members. Those results came from the book publishing industry

[11] UNESCO, 'Analysis of the Member States' Replies to the Questionnaires on Cultural Policies in Favour of Artists and the Arts and on Copyright and Neighbouring Rights. CLT/CONF/206/7' (1997).

and showed a 30% decrease in income for full-time writers in comparison with a previous survey in 2009. The study also showed that only the 39% of their members could survive supported exclusively with the income they received for their writings.[12] As a consequence of such findings, the guild began an initiative aimed at improving the contractual relationships of their members. The initiative is called the 'Fair Contract Initiative' and it proposes clauses to incorporate into the book publishing contracts that would improve the author's bargaining position. Examples of fair terms proposed by the Authors Guild are: creating time limits to the use of the work by the publisher (use it or lose it), retaining copyright in the hands of the author by changing the assignment of rights for licenses, the presentation of royalty statements in a clear and timely manner, and the obligation for the publisher to publish the book if the criteria previously agreed upon is met. Those examples reflect the urgency in the need to protect authors' interests in their interaction with producers or other persons related to the publication or dissemination of their works.[13]

A final example on this matter can be seen in the impact assessment for the author's fair remuneration initiative within the proposed EU Directive on Copyright in the Digital Single Market. Based on various sources, the Impact Assessment document recognises that within the EU, authors experience disparities in their contractual relationships. The main drivers that the impact assessment document identifies for such an initiative, notes problems of transparency in the contractual relationships, the weak bargaining position of the author, and unfairness in the remuneration that some authors receive for the use of their works. The document also highlights that some of the Member States of the Union protect authors in those relationships in a better way (Germany, France, and Spain) than other countries, creating unfair disadvantages that allow producers to shop for locations where conditions are more relaxed (jurisdiction shopping).[14]

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[12] The Authors Guild, 'The Wages of Writing. Key Findings from the Authors Guild 2015 Member Survey' (2015) <https://www.authorsguild.org/industry-advocacy/the-wages-of-writing/>.

[13] The Authors Guild, 'Fair Contract Initiative' (*The Authors Guild*, 2015) <https://www.authorsguild.org/where-we-stand/fair-contracts/> accessed 24 October 2017.

[14] European Commission, 'Impact Assessment on the Modernisation of EU Copyright Rules. SWD(2016) 301 Final. Part 1/3' (2016) http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=17211 177. One of the sources the Impact

The examples mentioned above signal a growing concern regarding the connection between authors and other persons interested in the dissemination of their work. The role of an author's human rights should be considered in these connections, as it would produce an important impact on how copyright laws can be interpreted.

II. Brief review of the literature on the topic

Scholars as Austin & Zavidow have suggested the importance of considering author's human rights in the interface with copyright,[15] although their analysis does not reach the interaction between authors and other owners of the copyright. They suggest that understanding author's interests under human rights might have a direct impact in the interpretation of copyright laws, both in national and international areas. Christophe Geiger has studied the interaction of copyright and human rights. His work has stated the importance of protecting authors' rights in the framework of such interaction. For instance, Geiger proposes that, given the lack of precision related to the scope of rights derived from the ICESCR (Article 15), there is enough room for legislators to regulate this matter.[16] The proposal in this sense is that such manoeuvres could steer the range of freedom of contract in the relationships between authors and successors in title.

Kretschmer, in his article about contract law and copyright, highlights the role that an author's bargaining position plays in the way contracts are negotiated. He refers to the music industry, revealing that the contractual conditions for authors at the beginning of their careers is different than the contracts signed once the author has a well-known name. His conclusion is that those relationships operate on a structure of winners-

Assessment mentions is Lucie Guibault, Olivia Salamanca and Steph van Gompel, 'Remuneration of Authors and Performers for the Use of Their Works and the Fixations of Their Performances' (2015).

[15] Graeme W Austin and Amy G Zavidow, 'Copyright Law Reform through a Human Rights Lens' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (Kluwer Law International 2015) 310.

[16] Christophe Geiger, 'Copyright as an Access Right, Securing Cultural Participation through the Protection of Creators' Interests' in Rebecca Giblin and Kimberlee G Weatherall (eds), *What if we could reimagine copyright?* (ANU Press 2017) http://www.jstor.org/stable/j.ctt1q1crjg 108.

take-all market,[17] though he does not refer to the role of human rights in such interplay. He highlights an important element of analysis to consider the problem: an author's bargaining position is important concerning how copyright contracts are negotiated. As it will be shown in this thesis, an author's weaker bargaining position has been the motive of policies aimed at balancing such disparities. A further study developed by Kretschmer and others in a report about the relationship between copyright and contract law offers a useful level of categorisation regarding contractual relationships in copyright. While contracts between right holders and users are denominated user contracts, contracts between the author and others for the production and dissemination of the works are denominated creator contracts.[18] The solution proposed here is related to the effect that the protection of an author's human rights would have to the law of those creator contracts.

III. Objective and research question

This thesis' aims to study the possible effects of the application of human rights to the interpretation of copyright contract laws. This because it is believed that a reading from the human rights ideals may transform the way copyright contract laws are interpreted. The scope of this study is limited to the creator's contracts. In this regard, the law about contracts such as the assignment of rights, the works created by employees, and commissioned works are analysed. These contract laws were selected due to that they are the most commonly used for the transfer of copyrights.

Accordingly, the research question is whether an author can claim the protection of her human rights against a copyright holder, and to determine if there are any mechanisms in the national or international arenas for the protection of author's interests.

[17] Martin Kretschmer, 'Copyright and Contracts: A Brief Introduction' (2006) 3 Review of Economic Research on Copyright Issues 75, 80-81.

[18] Martin Kretschmer and others, 'The Relationship Between Copyright and Contract Law' (2010) www.sabip.org.uk 2-3.

IV. Considerations about the sources and the methodology

As explained above, this research proposes that an interpretation of copyright contract laws through the human right lenses could have a transformative effect on how authors benefit of both human rights and copyright.

This thesis' methodology is a doctrinal and comparative one, supported on Habermas' communicative theory and his modern understanding of natural rights. Because of this, the second chapter is dedicated to explain Habermas' theory and to link it to the role of author in society actively participating in the construction of the justification of the law.

The comparative approach faces the problem of comparing in two dimensions, the national jurisprudence and the dimension of international laws. For the national law dimension, the comparative analysis will be mainly horizontal and refer to the applicable law, case law, and constitutional context related to the problem within the countries under study. For the international dimension, two systems will be explored: international copyright law and international human rights. This second dimension can be considered both horizontally and vertically.

The horizontal side of the international dimension will compare the development of the two systems towards the protection of the author. In addition, it will consider the available case law that the jurisdictions of regional systems, such as the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR), can offer in relation to the problem. Nevertheless, the international dimension can also be considered vertically insofar as some national jurisdictions have directly relied on the international laws and, also, some countries have had influence on the outcomes of international policies regarding the problem of study.

The vertical side of the international dimension offer some difficulties, though. The case law which directly applies international laws is limited in the case of copyright and the protection of author's moral and material interests, and, additionally, the impact of those cases is mainly national. It is difficult to document the impact that a decision from a national court can have on the definition of an international policy.

However, it is possible to identify how the delegations of certain countries had participated in the debates about the adoption of some instruments in connection with the development of their own national interests and law. This will be the main focus in the study proposed for the international dimension of the comparative study in its vertical side.

Exploring such dimensions requires anchors that help in keeping the lines of study linked to concepts and principles. It requires finding, in both national and international levels, references to the spheres of copyright and human rights, sets of principles, beliefs, and reasonings. Doing so allows the systems to be compared. Following Ewald's proposal regarding comparative studies, the aim is to understand 'conscious ideas at work in the foreign legal system'.[19] This is why the second chapter, using secondary sources related to doctrinal approaches and the theory of law and philosophy, explores and identifies conceptual and theoretical elements that would be common in a comparative analysis. Those elements are, in the case of this thesis, the construction of the concept of 'author' and the justification of the author's rights in both systems. This is possible by accepting that both human rights and copyright international law systems may behave as legal cultures subject to comparison.

The comparative study proposed here encompasses the US, the UK, Spain, Mexico, Colombia, and Argentina. The selection of these countries, as explained in the introduction to the third chapter, responds to the interest in comparing different legal traditions, their evolution, and their connections. Some of these countries are members of regional organisations, for example, the European Union and the Andean Community of Nations. This implies that the law and case law of such organisations will be considered. In the international level, the framework will include the instruments and soft law related to copyright and the instruments of human rights applicable to those same countries. Those sources will be described in the fourth chapter of this work.

[19] William Ewald, 'The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"' (1998) 46 The American Journal of Comparative Law 701, 705.

V. Outline of the chapters

A prevalence of the author in the interpretation of copyright contract laws would create repercussions on how the author is recognised as a copyright owner. Because of this, the research question will be addressed by answering three sub questions which in turn correspond to the three main chapters of this thesis. The first and fifth chapters are the Introduction and Conclusions, respectively.

The first question consisting in how the author can be situated within constitutional democracies will be answered in the second chapter. If copyright responds to principles underpinning the protection of the author as an individual who participates actively in the cultural life of society, is this role of the author important for such a society? The elements found on this first stage support the development of the research questions that will follow, fundamentally, by a modern understanding of natural law based on the communicative reasonability as explained by Habermas. The use of the communicative reasonability will create a connection which will situate the author as an individual in the legal system, who actively participates in the cultural life of society. This supposes an understanding of an author's expressions as vehicles of culture and knowledge capable of pushing transformations in democratic decisions for society. It will be concluded that those elements will give relevance to the author in the exchange of ideas and contributions towards the justification of the law, in which case she should benefit from an enhanced protection in her rights.

The third chapter answers the question about how the concept of ‘author’ has been constructed in a way in which it protects the author’s fundamental interests in copyright contractual relationships. This thesis is aimed to copyright contract laws as these are the main mechanisms by which the author transfer her rights, which as it has been stated in chapter 2.II.B. it might constitute a risk in concentration of social power. The study of the concept author will examine the national laws of the countries as explained in the methodology in order to demonstrate that the protection of an author’s moral and material interests have been part of the legal policies in those countries even before such protection was considered part of human rights. This chapter comprises three sections. The first explores the concept of authorship through a comparative analysis regarding the concept of communicative power stated in the introduction to

the second chapter. It questions the principles underpinning national laws as to the quality of the ‘author’. The second section is aimed at the protection of authors as fundamental rights considering the constitutional development that some of the countries under study have created for that purpose. It will also explore how the concept of authorship, as studied in the first section and especially its connection with the requirement of originality, which connects directly the personality of the author with the creation, can be linked with such a protection of fundamental rights for authors. The last section identifies some mechanisms towards the protection of author’s moral and material interests in national laws, looking for a balance between eventual conflicting interests among authors and right holders of the copyright. Such mechanisms would be defined through the interest in protecting an author's dignity and autonomy as these serve to guarantee author’s freedom and independency in her creative process. It will be concluded that, although the concept of author has been mainly constructed regarding the relationship between the author, the right holders or proprietary interests, and users; considerations have been made about the author as a natural person, and some principles improving the authors’ position in contractual relationships have been developed.

The fourth chapter deals with the question about the possible points of contact between the international instruments of human rights and copyright and recent developments favouring authors interests. Particularly, it will be explored if at the international sphere the consideration of the author as a natural person, her special status and corporate ownership have been addressed. The first part of this chapter will investigate the protection of the author in the international framework of copyright regarding the relationship between authorship and originality, and the role that authors and right holders play in the framework of protecting the author’s interests. This section will also explore the possible mechanisms at the international level for the protection of the author in their contractual relationships. The second part of this chapter will study the concept of ‘author’ and her protection in the instruments related to human rights. It will be concluded that the sphere of international copyright law has considered the protection of the author as a natural person, stating in some cases principles that could help in developing national and even international laws towards improving authors’ position in contractual relationships.

Finally, this thesis concludes that authors can claim the protection of their human rights against a copyright holder, and that there are some principles that have been developed at the international arena that could support the protection of the author's interests at the national level.

VI. Limitations

The comparative perspective proposed here has limitations. For instance, it is not possible to trace the applicability of human rights treaties by national judges in a comparative approach.[20] There are not sufficient sources for such analysis, as not all the jurisdictions studied here offer cases with comparable sufficiency. This would require the expansion of the number of countries studied, which would exceed the limits of this thesis. Further research focused on the decisions of different judges in different countries regarding the protection of author's moral and material interests, either through copyright law or through the application of human rights, might produce relevant findings about the issues identified in this study.

In addition, the number of countries to be analysed is reduced as more countries would make the study unfeasible within the space available. Other countries in Latin America have interesting developments on the problem. For instance, Brazil recently explored the protection of authors' contractual position, and Venezuela has reformed its Constitution to give more weight to the public interests in counterbalancing private interests related to IP. One country requires especial mention. While Chile has demonstrated an important role in the international arena, the case law available for research is limited. Therefore, this country was not included in the comparative analysis. By the same token, other jurisdictions could offer new perspectives towards the problem, but again, the size of the study would be excessive.

Another limitation consists in assessing the impact that limiting freedom of contract in favour of author's interests might have in the real practices of stakeholders. If the law constrains the ways that individuals use for buying and selling goods, the transactional

[20] Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 International and Comparative Law Quarterly 57, 73.

costs will increase, and consequently such goods would be less attractive for trade. This is a major limitation regarding the possible impact of the research. However, similar concerns have been expressed in the impact assessment produced for the proposal of a Directive on Copyright in the Digital Single Market referring to regulations for fair remuneration for authors. The impact assessment has highlighted the necessity of such regulations, given the disparities in the protection of authors identified in the copyright marketplace.[21]

Finally, it is important to consider that the use of the communicative theory, as proposed in the second chapter, is limited to the concept of 'author' and does not extend to other participants in the cultural life of societies (such as inventors or performers). The reason for this is that it would introduce other elements into the discussion that would exceed the limits of the research, such as the nature of their contribution in terms of freedom of expression and capacity of pushing communicative power as described above. This is not to suggest that these individuals have no potential of producing communicative power through their creations, but that the space for such an analysis is for another study and would require the development of its own categories.

[21] European Commission, 'Impact Assessment on the Modernisation of EU Copyright Rules. SWD(2016) 301 Final. Part 1/3' (2016) http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=17211 173-174.

Chapter 2 Habermas' communicative theory and his modern understanding of natural rights: situating the author in constitutional democracies

I. Introduction

An increasingly widespread decision-making power in the social and political life of western societies during the age of Enlightenment helped to affirm the basic elements of democracy, among others individual freedom, property and freedom of expression. Those would be then considered basic human rights inserted in most of the modern democracies, the kind known as civil and political rights enshrined to protect individual's freedom. It was also a moment of transition for authors as the right to control the product of their creation was no longer considered a privilege but author's own property.[22] Consequently, some scholars in the canon of cultural history assert that because of the institution of literary property, authors would not depend on patronage longer.[23] Allegedly, then, authors would only depend on the money that their creations would produce and that would strength their freedom of expression. Such a freedom of expression constitutes the minimum base of the author's participation in the cultural life of society, which in turn will procure foundation for the recognition of rights and the creation of laws in a given society.

Thus, knowing how the author can be situated within constitutional democracies i.e. knowing how much important her role in the cultural life of society is, will help us to elucidate that author's expressions are vehicles of culture and knowledge capable of pushing transformations in democratic decisions for society. The purpose of this chapter then, is to defend the idea that the author and the protection of her rights should be in a prevailing position within constitutional democracies that should match her role in the definition of such a society. This should give way to analyse, in chapters

[22] See for example William Cornish, 'Copyright', *The Oxford History of the Laws of England*, vol XIII (Oxford University Press 2010) <DOI: 10.1093/acprof:oso/9780199239757.001.0001> accessed 29 June 2012 881.

[23] See for example Roger Chartier, 'La Propiedad Y El Privilegio' in Alejandro García Schnetzer (ed), *Carta Sobre el Comercio de los Libros* (1st edn, Fondo de Cultura Económica 2000); Arnold Hauser, *Social History of Art*, vol III (Routledge 1999); Peter Burke, *A Social History of Knowledge: From Gutenberg to Diderot*, vol 1 (1st edn, Polity Press 2000).

3 and 4, how author's prevalence in the interpretation of copyright can be based on the implications that her protection has for democracy.

On this regard, this thesis affirms that each individual is potentially an author in her interest of proposing her own contributions and topics towards the assessments of the rights defining his society. Because of that, Habermas' communicative theory and his understanding on natural rights have been chosen to support this idea, because his theories depart from the individual towards the comprehension of the democratic principle. This analysis is intended to connect democracy with the author in the system of copyright and her protection through human rights in as much as the individual, towards her participation in the cultural life of society, creates or uses cultural vehicles protected by copyright.

With this aim, this chapter will first, explain in Section II, Habermas post-traditional approach to natural law, emphasizing the concept of communicative power and social power in the context of the communicative reason and the possible role of copyright in constitutional democracies. It will also show the connection between a modern understanding of natural law based on the communicative theory and the elements that from copyright can be found supporting the exchange of ideas and perceptions of the world through cultural expressions. Second, section III will, by situating authors in the framework of constitutional democracies, assert their prevailing situation in case of collision with other interests, in particular with other right holders.

However, it will be required to briefly present the theoretical construction on which Habermas supports his analysis of natural law. For this reason, Habermas' communicative theory and his understanding on natural rights are explained in the following subsections. Such an explanation ends with a list of concepts used by Habermas in the description of his theories. They have been included here to provide the readers with the means that allow them a better understanding of the exposed theories.

A. Habermas' communicative theory

Habermas have explored the transition from a traditional understanding of the law based on a religious conception of society to a post-traditional justification based on communicative rationality and consensus. According to such a transition, natural law would be no longer considered something absolute and irrefutable, but the result of an agreement culturally constructed by the act of communication among individuals.

In order to understand the weight that communication might have for natural rights, it is important to explain, as plainly as possible, the nature of the communicative theory. For this purpose, it is important to accept, first, that communication is based on the shared understanding of what has been communicated (a kind of an agreement) between entities who participate in the communicative act. For instance, once A and B have agreed on the concept and meaning of 'debt', if A owes something to B both will understand that there is a debt. Besides the legal consequences, language has simplified the understanding between A and B, whether they agree on the debt, or B sues the other to get paid, the whole process is possible through a communicative exchange. Second, that the speakers in their utterance are oriented towards their own success in trying to influence 'one another in order to bring opponents to form or to grasp beliefs and intentions that are in the speakers' own interests'.[24] Individuals can understand themselves both as private subjects with autonomy and as members of a given society at the same time.[25] Such a dual condition of the individual should be based on the intersubjectivity of communication. That is, by understanding the other as part of the process of communication.

In addition, communication is not simply the emission and the reception of a given message, it is also the comprehension of such a message and the consequent interaction that may follow between two entities who are trying not only to communicate but to persuade one another through their utterances. This is possible only because the above mentioned basic agreement exists. Otherwise, the democratic principle in which human rights would be based would not apply. From this point Habermas retraced natural law from practical reason through the idea of

[24] Jürgen Habermas, *The Theory of Communicative Action, Volume One* (Polity Press 1986) 95.

[25] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 1.

communicative reason.[26] Because of that, both intersubjectivity and autonomy are key elements to consider (they will be explained in the following section C, Definitions). Consequently, the law, explained by this post-traditional discourse, would be underpinned by reason, and such reason would be the product of a consensus in which autonomy and freedom interact altogether.[27]

The possible role of copyright in the communicative rationality underpinning the justification of the law can be found by reviewing two basic elements in the communicative rationality as proposed by Habermas. One concept is communicative power and its relationship with culture, the other is its correlated social power.

1. Culture and communicative power

The shift proposed by Habermas related to the communicative nature of the law points out the role that culture plays in supporting rational decisions. In section III of this chapter, copyright will be indicated as a law that supports the very system of democratic creation of laws. If positive laws are rationally created through a given democratic procedure (the legislative process) used to articulate the will of the collective, this signifies a process by which all individuals agree, through communicative rationality, to the expression of collective volition and its following assertion as a law. But the law's legitimacy, its adoption through the process pre-established by the Constitution, cannot be separated from the moral principles or natural law underpinning it. According to Habermas, this is not to say that natural law is hierarchically superior to the law, instead this author proposes a complementary

[26] 'Communicative reason differs from practical reason first and foremost in that it is no longer ascribed to the individual actor or to a macrosubject at the level of the state or the whole society. Rather, what makes communicative reason possible is the linguistic medium through which interactions are woven together and forms of life are structured.' Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 3-4.

[27] As it will be explored further on, at section III.B. of this chapter, the concept of autonomy relates to the rights of the individual in terms of the space a person needs to act freely. Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 84.

relationship accepting the cultural background in which such moral principles are based.[28]

The concept of communicative power has been drawn from Hanna Arendt's concept of power as 'the potential of a common will formed in noncoercive communication'.[29] In this sense, Habermas describes communicative power as a *motivating* force which is capable of '…mobilizing citizens' communicative freedom for the formation of political beliefs that in turn influence the production of legitimate law, illocutionary obligations of this sort build up into a potential that holders of administrative power should not ignore'.[30]

Such a motivating force can be a copyrighted work. The original expression that an individual creates responds to such a characteristic. It comprehends both an idea and the original expression of such an idea. While the idea is not protected in terms of copyright, the expression could be protected as far as it complies with the requirements of originality as it will be examined in chapter 3, section II. The importance of such a protection is that it responds to the intention of fostering individuals into creating other works, stimulating the exchange of ideas in the market of knowledge, improving the diversification of opinions, or in terms of communicative power, producing diverse sources of motivating forces, in the shape of cultural expressions. In this sense, an author's freedom is attached firmly to her position in society with the ability to participate through her creations in the rationality-producing communicative power, that is, by promoting consensus towards some interests.

[28] This author points it this out simply: 'Discourse theory conceives of morality as an authority that crosses the boundaries between private and public spheres. If we construe the universalist claim of the moral principle intersubjectively, then we must relocate …allocating the jurisdictions of morality and law according to private and public spheres of action is counterintuitive in any event, for the simple reason that the will formation of the political legislator has to include the moral aspects of the matter in need of regulation.' Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 106-110.

[29] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 147-148. See also, Hannah Arendt, *The Human Condition*, vol 2 (1958) <http://wes.sagepub.com/content/2/1/71.abstract>.

[30] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 147.

2. Social power

The concept of social power, on the other hand, has been explained by Habermas as a measure of the capability that an actor has of upholding his own interests towards or even against others in a given net of social relationships.

While communicative power is a motivating force that would move individuals towards the recognition of a common interest based on communicative reason, social power refers to the actor and the capability of pushing his own interests towards society. Too concentrated social power could push autonomy away on behalf of the interests of one or a few.[31]

At this point it is important to bear in mind that, towards a constitutional principle of democracy, the concentration of communicative power is not desirable nor acceptable. The more social power is accumulated, the easier it will be for the holder of such power to push his own interests against other individuals without contest.

The best way to avoid such concentration is the combination of some of the aims of copyright. For instance, the promotion of creativity by guaranteeing a reward for the author is adamant in this process, as only through such a reward the author would be able to protect his own freedom. However, this is not the only aim of copyright. By other mechanisms such as the principle of no protection of ideas, the duration of the rights conceded to the author, or the limitations to the exercise of the rights in certain circumstances in benefit of societal interests, copyright should be capable of guaranteeing the availability of diverse expressions into a free market of knowledge leaving enough space for their use as vehicles of communicative power.

B. Habermas' modern understanding of natural rights

Jurgen Habermas proposes that natural law is the result of a consensus based on culturally shared notions.[32] Through a complex understanding of the systems of laws,

[31] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 147.

[32] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996).

for this author positivism and natural laws would no longer be considered as conflicted areas of the law but complementary ones. Habermas proposes a theory connecting the rationalisation of natural rights and its cultural background. Such a connection occurs in the field of intersubjective communication. As a consequence of this, the only option available to explain natural laws is based on the democratic principle: A constant stream of communicative rationality defining the content of natural rights, which can be produced only through the participation of the individuals in the decision-making process.

The most important change at this point is that practical reason no longer stands as the basis of the rationality of law. It has moved towards an illuminative position capable of showing the net of discourses holding the decision-making process under the democratic principle. Such an approach neutralises both the fundamentalist normative claims and the ideological discourses justifying the law. Instead, it gives way to an analytical tool useful for the construction of rights. The question is no longer if there are natural rights, but how natural law helps in the support of the law through an intersubjective comprehension of rationality.[33]

Here is important to understand that the concept of natural rights is not to be assumed as human rights. This, because while a premodern understanding of natural rights would authorise each individual to the use of coercion against any violation of their liberties, a post-traditional understanding of natural rights has to assume the existence of positive law which transfers the use of coercion from the individual to the monopoly

[33] For instance, an individual's world life defines the expectations, interests, and therefore the scope of the agreements that that person is able to accept. For instance, how culturally normal was some years ago that women had no rights and were subjected to male's will. The change had taken place because of struggle, no doubt, but also it had to be accepted culturally as part of what ought to be right for society and yet it was not considered as such. Example of that is all the debates that are still going on in the film industry regarding the female roles as leading parts in films. If a given individual lives in a constitutional democracy, certain freedoms are expected for him, but also certain duties related to other individuals. The basic principle according to which an individual's rights end where another individual's rights start is applied here. Such a golden rule demands from the individual the recognition of other individuals as equals, so their rights must be respected as well.

of the State.[34] However, such a monopoly requires justification, the normative content of original human rights cannot be merely stated in terms of general and abstract statements, those propositions say nothing about their validity.[35] Natural rights then would enter to support the justification of the law in terms of moral rules, that is, what is ought to be good.

C. Definitions

As early stated in this introduction, with the aim to provide more clarity for the readers, the explanation of Habermas' theories is accompanied by the inclusion of some relevant key concepts. These concepts are at the core of Habermans' theories, they are constantly referred throughout this chapter and, therefore, their comprehension is crucial for the understanding of the theories presented here.

Communicative reason

Habermas' theoretical construction of communicative reason asserts that any attempt in reaching understanding over certain validity claims can only be successful through communicative conditions, which imply free processing of contributions and topics by individuals. This is directly related to the moral principle according to which an individual's free action is rightful if it does not collide with another person's freedom.

Intersubjectivity

If laws are the expression of popular sovereignty and they are not valid only because of the process by which they have been created. This is the burden of the democratic principle: the individual must accept that, in terms of popular sovereignty, his '*I'* becomes '*We'* and that would be the effect of the constitutive contract.

Habermas identifies two main conditions for this to happen. First, individuals must understand the implications of the intersubjective nature of the decisions they are

[34] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 28.

[35] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 103-106.

taking. This means that those subjects of private law acting rationally and strategically in their own benefit should recognise the condition of the other, a kind of state of reciprocity; that is, perceiving themselves from the perspective of another person. The second condition consists in the capability of the individual to accept and yet to distance himself from societal decisions and assume the social perspective by which it is the '*We*' who decides.

Without considering the intersubjective implications of the principle of democracy by which the law is the emanation of popular sovereignty, legal positivism is incapable by itself to satisfy the legitimacy of the law. It requires recognising the 'intrinsic moral content of the classical liberties',[36] its intersubjectivity, and its communicative nature.

Autonomy

Individuals are often oriented towards their own goals of happiness and freedom, defending their capacity of deciding freely about their own life. However, autonomy is a principle that naturally requires limitations as it is strongly related to individual's position in society. Thus, such limtiations are only possible through the rationalisation by which any individual should play a role as a citizen within society.

The concept of autonomy supports an inherited individual right based on the inviolability of the person who needs her own space to act freely. Such a space is protected through two basic elements from the law: property rights and contracts. However, positivism, according to Habermas, has severed the bond between freedom of choice and autonomous will. The latter remain, but the former has been merely instrumented by the law through institutionalised procedures resulting in universal normative propositions which have nothing to say about their validity.

The discourse principle

Habermas' general proposition is that the discourse principle helps to understand the system of rights and how autonomy, human rights, and popular sovereignty are

[36] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 89.

correlated.[37] The discourse principle states that within a communicatively structured society, there should be symmetrical relations among individuals. This is possible through intersubjectivity.

The result of such an understanding of each other, is basically the general discourse principle according to which there should be symmetrical relations among individuals inside a communicatively structured society. Such symmetrical relations can relate to the right to actively participate in the cultural life of society. Copyright could and should be a guarantor of such symmetrical relations, in particular on behalf of the author, for the author initiates the communicative process through his original expressions manifesting his own personality and submitting his thoughts to the cross examination of the public. From there, norms can be justified as all the interests involved would be considered. This is the principle of democracy, where there are no restrictions on the justifications to be discussed.

Cultural vehicles of knowledge

These are objects capable to carry ideas and knowledge among individuals. Some of these might be considered copyrighted works, if the conditions the law require for such a qualification are met.

II. Habermas post-traditional approach to natural law and copyright

As indicated in the introduction to this chapter, natural law is considered by Habermas the result of a consensus based on culturally shared notions. For this author, the free processing of contributions and topics by the individuals is a condition for the communicative rationality. In this sense, the post-traditional approach to natural law is important to copyright because such contributions and topics are often expressed in terms of copyrighted works which enrich the available set of tools an individual can use for the purpose of the assessment of the justification of a given right based on

[37] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 84.

culturally shared notions.[38] By fostering the creation and dissemination of such expressions as well as the access to them, copyright actively enhances the volume of available expressions helping the individuals in the understanding of one another towards the justification of the law. Therefore, copyright can be related to such a process of individual's assessments of given propositions of morality towards the justification of the law (assertions of the kind: this is good because…). In this regard, it could be affirmed that copyright favours democracy as long as it fulfils its purpose to foster creativity and promote the dissemination of cultural expressions.

However, a problem might arrive if the previously enounced purpose is not achieved by taking into account the role of the author in the process. This because, if authors do not receive a fair remuneration for their creations they may lose motivation to create more works, which ultimately could affect the volume of available expressions that helps in the shaping of society. This problem is assessed from the concepts of communicative power and social power in connection with copyright, as presented below.

A. Connecting communicative power with copyright

[38] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 108. This author indicates here that the role of such moral claims cannot be assumed hierarchically over positive law, rather, there is a complementarity referred to the same question: 'how interpersonal relationships can be legitimately ordered, and actions coordinated with one another through justified norms, how actions conflicts can be consensually resolved against the background of intersubjectively recognised normative principles and rules.' 106. Regarding the role of culture in the justification of the law, other authors have also suggested that it is through the appropriation of cultural vehicles that individuals conform their own ideas about how the law can be justified. For instance, Margaret MacDonald in her essay '*Natural Rights*' proposes a direct relationship between culture and how the law can be justified through consensus. For this author, natural rights could be considered as the 'fundamental conditions for human social life and government', and thus, in a teleological sense, could be considered as the principles required in characterising human societies. As a consequence of this, natural rights are explained by 'assertions of what ought to be as the result of human choice'. If the justification of the law is shaped through cultural achieved consensus, the role of those people creating and proposing cultural vehicles enriching the cultural life of society should be protected. Margaret MacDonald, 'Natural Rights' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press 1984) 37-40.

Copyright can be considered as an institution created to promote the creation of original expressions which will enrich the cultural life of society, and at the same time it secures the dissemination of such expressions. According to Habermas, '[t]he institutions of the constitutional State are supposed to secure an effective exercise of the political autonomy of socially autonomous citizens.'[39] In particular Habermas has stated two aims for these constitutional institutions: First, they should facilitate the emergence of communicative power, and second, they should allow the circulation of communicative power among citizens.[40] For such purposes, constitutional States should institutionalise the public use of communicative freedom and at the same time regulate how communicative power is transformed.

How the constitutional States can produce such an institutionalization? Habermas structuralist approach recognises that the 'institutionalized opinion- and will-formation is linked with informal opinion building in culturally mobilized public spheres.'[41] This relates directly to the public exercise of communicative freedom in the fluent streams of different positions and beliefs expressed freely and not reduced by the legislative bodies. Nevertheless, the public use of communicative freedom is not the same as the public use of expressions communicated. This means that individuals should be able to freely find channels to express their opinions and interests to generate social power (as explained above) but they are also entitled to control, as authors, how such expressions are communicated if they reach the threshold of originality the law demands for such an entitlement. This should be the main purpose of legal institutions such as copyright.[42]

Promoting the creation of works and allowing their circulation (that is promoting the exercise of communicative power), can be correlated with certain aspects of copryight. One of those aspects is the no protection of ideas. For example, by giving weight to

[39] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 176.

[40] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 147.

[41] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996).

[42] See on this matter Mark Rose, 'The Public Sphere and the Emergence of Copyright: Aeropagitica, the Stationers' Company, and the Statute of Anne' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property. Essays on the History of Copyright* (Open Book Publisher 2010) 139 - 144.

the expression of the work over the idea (and the information), copyright law creates conditions where competition in the market relies on the expressive qualities of the work rather than in the information or ideas it contains. This is what qualifies the market itself, as it has been pointed out by Posner in his analysis of the speech market, that '…an idea is true (more precisely, as close to true as it is possible for us to come) only if it prevails in competition with other ideas in the market place of ideas.'[43] This is why, the fair remuneration of authors is relevant for the promotion of creation. If not, individuals may see their access to the market constrained for the lack of creations and the effect would be that such construction of truth might not be the result of free competition of ideas.

B. Connecting social power with copyright

As explained in the introduction of this chapter, social power is conceived as a measure of the capability that an actor has of upholding his own interests towards or even against others in a given net of social relationships. This concept can be better understood by looking at the role of copyright in constitutional democracies and the advantages posed by strengthening author's rights for democracies. This analysis uses Neil Weinstock Netanel view on the matter to conclude that a concentration of social power (copyright property) would affect democracy. These aspects are explained in more detailed as follows.

1. The role of copyright in constitutional democracies

The relation between copyright and democracy have been defended by Neil Weinstock Netanel, showing three basic elements for the comprehension of copyright's democratic principles. First, the incentive for creativity which is easily rooted in the copyright tradition. Second, the importance that author's independency has for creativity, and furthermore, for democracy. These two elements are connected because creativity cannot be dependent of remuneration. In this sense, independency should be secured by recognising rights to authors for example in the form of property

[43] Posner refers to Justice Holmes' opinion on Abrams v. United States, 250 U.S. 616, 630 (1919). See, Richard A Posner, *Frontiers of Legal Theory* (Harvard University Press 2001) 361.

and in opposition to private or public patronage. The third element is that copyright ensures and enshrines the individual as a principal axis in the constant construction of discourse both in the political and cultural fields. Due to the authority that authorship gives to discourse, a copyright system helps to protect the individual and her role in society, but at the same time imposes some limitations on such protection favouring the collective as a whole. This third element highlights that societies are in constant tension between collective and individualistic interests and that copyright is not away from such a problem.[44]

2. Asserting author's rights on cultural expression could be in benefit of democracy

A higher concentration of social power through the concentration of property over cultural expressions could be a risk in terms of the democratic principle of equal conditions of participation in the life of society. Netanel has noted this by asserting that even if the role of copyright in democracy is sound, 'broad copyright owner prerogatives facilitate private censorship or otherwise impair robust debate and the free flow of information, the right of free expression'.[45]

[44] Neil Weinstock Netanel, 'Asserting Copyright's Democratic Principles in the Global Arena' (1998) 51 Vanderbilt Law Review 217, 226ff.

[45] Neil Weinstock Netanel, 'Asserting Copyright's Democratic Principles in the Global Arena' (1998) 51 Vanderbilt Law Review 217, 297-300. In another publication Netanel precises three kinds of 'copyright burdens' to freedom of expression. One is the censorial speech burden, characterised by copyright owners that seek to impede certain expressions of ideas to be used by certain persons, or in some cases, self-censorship in which a person tends to avoid legal problems and decide not to publish certain works. Another is the possible prohibitive cost of certain works making them inaccessible for most of the audience. Finally, the third burden is distributive and refers to 'highly concentrated copyright industries controlling vast inventories of copyrighted works enjoy the preponderance of copyright's benefits. And copyright's free speech burdens fall most heavily on individuals and independent speakers.' See Neil Weinstock Netanel, 'Copyright's Free Speech Burdens' in Neil Weinstock Netanel (ed), *Copyright's Paradox* (Oxford University Press 2008) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780195137620.001.0001/acprof-9780195137620-chapter-6>.

While the presence of those 'burdens', as noted by Netanel might be true, it is also arguable that if the ownership of copyright materials is spread in different hands, in terms of competition on the market of knowledge, this could have a positive impact to such a concern for democracy. For instance, the basic idea of a widespread market of knowledge would imply that the more expressions on a certain topic are present in the market, the better off the individual would be, as she could obtain more contrastable information regarding such a topic. However, if the ownership on such expressions is concentrated on few publishers, there is the risk highlighted above of reducing the accessibility to such expressions, as the owner might impose high prices to them or could decide not to publish them. Thus, if the ownership over the expressions is distributed in a more widespread manner, for instance in the hands of the author rather than publishers, the market would ease effectively the access to such expressions.

This is the reason why this thesis proposes that, giving prevalence to the author in the interpretation of copyright contract law in support to the role that this particular individual plays for democracy, is coherent with the protection of author's rights as human rights. Nevertheless, such a prevalence must depart from the idea that the author has to be separated from other right holders of the copyright because it is the author, as an individual or as collective group of persons, who proposes original expressions of ideas and contributions to enrich the cultural society.

III. The role of the author in a modern (post-traditional) understanding of natural law

As it was indicated in the introduction to this chapter, natural law is the result of a consensus based on culturally shared notions. This theory is based on Habermas' proposal of a modern conception of natural law in which reason and communication towards the formation of political beliefs give justification to the law.[46] According to such a conception, natural rights are supported in a rational consensus achieved by society through democracy. Thus, such a consensus is intersubjective, meaning that it is only possible by the individual's acceptance of the interests of other individuals.

[46] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 145-150.

If the author has something to do with a post-traditional understanding of natural law within constitutional democracies, is through her role in the intersubjective construction of consensus. Here its suggested that such a role in the intersubjective construction of consensus is important to constitutional democracies, because, as an individual, the author proposes contributions and ideas to society by creating works, enriching the cultural base that serves to the construction of consensus among individuals.

This section is aimed at examining the role of the author in the modern understanding of natural rights with the purpose to assert that such role triggers a shift in the point of view used to understand both copyright law and human rights law. Such a shift will focus on the author as the center of the protection in both systems and would imply that, through the conceptualization of natural rights based on communicative rationality, both systems may coexist symbiotically.

However, it should be noted that this section does not pretend to defend nor deny that copyright is a natural law. Rather, it searches for coincidences between the basic modern theory about natural rights and the elements used to support copyright in relation to the author.

For instance, if according to the General Comment No. 17 of the CESCR[47] the protection of the moral and material interests over the author's work can be only referred to the physical person or group of persons who have created the work, then, should those interests prevail over the property rights that another right holder might have on the same work? By ticking the presence of a normativity that recognize the protection of copyright and another that recognize the protection of author's moral and material interests as stated in the ICESCR, article 15, cannot provide enough support to find solutions to possible collision of interests between authors and other copyright owners regarding the rights over the same work. Author's prevalence has to be supported.

[47] Committee on Economic Social and Cultural Rights, 'General Comment No. 17 (2005) (Article 15, Paragraph 1 (C), of the Covenant) E/C.12/GC/17' (Committee on Economic, Social and Cultural Rights 2006) para 7.

Copyright should play a role in this problem because it regulates the possibility of dissemination of cultural expressions created by individuals (authors) towards society.[48] However, it is also important to consider the role of intersubjectivity in asserting the role of the author in the construction of culturally based consensus about natural law. This would give support to the proposal of separating the author from other right holders of the copyright in the interpretation of copyright contract law, particularly from the point of view of the human rights of the author.

A.The author and the individual

If the author is a person who creates literary or artistic works that would be considered cultural vehicles of knowledge, it is important to understand that such an author, in the narrative of human rights, could be anyone. In fact, article 27 of the UDHR indicates that the beneficiary of its protection is anyone who achieves the quality of author. The author is a person who proposes a creation, validated in terms of originality, for which that person receives certain rights. Copyright relates creation, the creator, and the communication (dissemination) of the work as elements that are integrally considered in the first section of article 27 when referring to the rights of everyone to participate in the cultural life of the community and to enjoy the benefits that creativity brings to society.

Often, those interests referred to as the participation in the cultural life of a community, and to the benefit from creativity in relation to copyright, have been analysed from the point of view of the users, consumers, or the public. This reveals a partial vision of the communicative nature of culture. From the point of view of the author, those elements

[48] As seen above with Netanel, the idea of copyright role in democracy is not new. Neil Weinstock Netanel, 'Asserting Copyright's Democratic Principles in the Global Arena' (1998) 51 Vanderbilt Law Review 217, 225. On the field of natural law, MacDonald also defends the idea of a natural law bases on a culturally constructed consensus. See Margaret MacDonald, 'Natural Rights' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press 1984) 37-40. Regarding the role of culture in the assertion of human rights, see: Nick Stevenson, 'Human(e) Rights and the Cosmopolitan Imagination: Questions of Human Dignity and Cultural Identity.' (2014) 8 Cultural Sociology 180 http://eprints.nottingham.ac.uk/34482/3/human%2520rights%2520%2520art%5B1%5D.pdf 3.

have not been considered. This subsection intends to propose that, given the communicative potential of copyrighted works, any individual who actively participates in society by proposing cultural expressions could be an author if such a cultural expression fulfils the conditions of originality that copyright establishes. Nevertheless, to become an author, such an individual is probably also a consumer, a user of previous works upon which the author feeds to produce another original expression. Such a circular process would coincide with the communicative rationality proposed by Habermas.

Habermas' theoretical construction of communicative reason asserts that any attempt in reaching understanding over certain validity claims can only be successful through communicative conditions which imply free processing of contributions and topics by individuals. This is directly related to the moral principle according to which an individual's free action is rightful if it does not collide with another person's freedom.

The role of the individual in the process of will formation towards the expression of popular sovereignty can be linked with the prevalence that the author has had in most of the justifications of copyright. The author has been identified as the originator of the creation proposing to her audience ideas expressed through original works.

For instance, Rose highlights that with the Statute of Anne, the emancipation of the author has also created the emancipation of the market. If freedom of thought and opinion should be allowed, monopolies on book trade should therefore be abolished. Thus, the next question was '…[h]ow to protect printer's and booksellers' property claims without establishing monopolies?'.[49] The Statute of Anne solved this problem by changing the previous paradigm of licensing (which was part of the censorship) to an open and new *telos*: to encourage learning and promote the proliferation of discourse.[50] Rose's approach supports the latter assertion in the creation of the public sphere by vesting the author as first owner of his work. 'A work of literature belonged

[49] Mark Rose, *Authors and Owners. The Invention of Copyright* (Harvard University Press 1993) 34.

[50] Mark Rose, 'The Public Sphere and the Emergence of Copyright: Aeropagitica, the Stationers' Company, and the Statute of Anne' in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property. Essays on the History of Copyright* (Open Book Publisher 2010) 242.

to an individual because it was finally, an embodiment of that individual. And the product of this imprinting of the author's personality on the common stock of the world was a 'work of original authorship''.[51]

In other approaches it has been also recognised that the participation of the individual in the market of ideas increases the construction of truth.[52] In the approach supporting author's rights as the result of personality, Kant's explanation of such a property is illustrative of what is attempted to support here. For Kant, the book exists as an object to be possessed only when it is addressed to the public. Before publication, the book was produced, but there was nothing but discourse. In addition, Kant also indicates the separation between *opus mechanicum*, the book already published, and the possibility of a book to be published, of which only its author is entitled. The author has the right to authorise such a publication through a mandate conferred upon the publisher. Such an authorisation comes from a personal right and not from a right on the thing.[53]

These examples show that the role of the author in proposing ideas to the public that would be used by other individuals for their own purposes. Kant's approach give attention to the role of author's will in publishing such expressions and the recognition of the other as part of such a process.[54] In the examples of justification of copyright

[51] Mark Rose, *Authors and Owners. The Invention of Copyright* (Harvard University Press 1993) 114.

[52] For instance, Landes and Posner in his analysis of the speech market has pointed out that '…an idea is true (more precisely, as close to true as it is possible for us to come) only if it prevails in competition with other ideas in the market place of ideas.' Of course, this is not a problem of truth, but a problem of the construction of truth through the communication of ideas. Posner refers to Justice Holmes' opinion on Abrams v. United States, 250 U.S. 616, 630 (1919). William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18 Journal of Legal Studies 325, 347ff.

[53] Immanuel Kant, *The Science Of Right* (W Hastie tr, ProQuest ebrary Web 2001) 42.

[54] Anne Barron's article *Kant, Copyright and Communicative Freedom* proposes that the traditional approach which places the core of author's moral rights on the distinction between authorised and unauthorised publications of a work (based on Kant's *Science of Right*), is limited. Barron's deeper approach shows a 'principled freedom' which is person's freedom to participate actively in society, for instance, by expressing ideas through works. This freedom has the correlated freedom of recognising the addressee, a freedom to communicate, which implies someone else's freedom of receiving the communication or not. For this purpose, she distinguishes between the sense of moral autonomy on

mentioned above, the place given to the author is correlated to the fact that publishing the work is finally the result of author's will, communicated towards society.

That copyright opens the possibility for the author to participate in the cultural life of society is because there are other individuals in society willing to benefit from the author's work. Otherwise, there would be no point in proposing contributions and topics if there is no one that will receive it, assess it and use it for his own interests. That is precisely the function of the exercise of communicative power as indicated above. To assert and propose ideas with the intention to mobilize individuals towards the collectivity's common interest require another individual in equal conditions at the end of the line, someone who freely will perceive and assess such assertion and decide over them by proposing his own. That would conform both the communicative rationality towards the understanding of natural law and the exchange of copyrighted works.

Bearing such an aim in mind, the duality of interests to which copyright often responds could be considered the effect of a higher interest, the interest in support the existence of cultural expressions that would help individuals for their understanding and participation in the construction of natural law. Therefore, it would be understandable that copyright seeks to satisfy the paradigm of rewarding the creators for their contribution to society and incentive them into the creation of more expressions. However, copyright cannot give only attention to such interests and has to guarantee the common interest in protecting the right to participate in the cultural life of society.

B. Intersubjectivity

In the transition from the individual will towards the will of we, Habermas identifies two main conditions. First, individuals must understand the implications of the

Kant's and his Universal Principle of Right which 'requires that my actions be able to 'coexist with everyone's freedom [of action] in accordance with a universal law''. The moral autonomy is internal freedom, where the Categorical Imperative 'imposes a duty on me to universalize my subjective reasons for acting – to render what I will compatible with anyone else could rationally will -'. Anne Barron, 'Kant, Copyright and Communicative Freedom' (2011) 31 Law and Philosophy 1 <http://link.springer.com/10.1007/s10982-011-9114-1> accessed 8 November 2014 14.

intersubjective nature of the decisions they are taking. This means that those subjects of private law acting rationally and strategically in their own benefit should recognise the condition of one another, a kind of state of reciprocity; that is, perceiving themselves from the perspective of the other person. The second condition consists in the capability of the individual to accept, and yet, to distance himself from societal decisions and assume the social perspective by which it is the '*We*' who decides over his own interests.

Without considering the intersubjective implications of the principle of democracy by which the law is the emanation of popular sovereignty, legal positivism is incapable by itself to satisfy the legitimacy of the law. It requires recognising the 'intrinsic moral content of the classical liberties',[55] that is, recognizing that the law is finally the result of a long process of intersubjectivity, and it is communicative in nature. It is the result of a net of discourses holding the decision-making process under the democratic principle.

Copyright offers a complex rational construction that includes fostering creativity and guaranteeing the dissemination of culture to promote the exchange of knowledge. This dual role has a direct connection with the role of culture in the adoption of decisions that would conform to this modern conception of natural law. Because the law is the result of a long process of intersubjectivity and it is communicative in nature, it is possible to assert that one of the spaces where such process occurs is within the market of knowledge and ideas. Therefore, in the middle of this is space should be the author, an individual who has proposed his contributions and topic in an original manner towards society. An explanation of such a connection will be attempted below, with the support of Habermas' communicative theory.

As indicated above in the previous section of this chapter, some authors suggest that the satisfaction of both interests occurs in what it has been called the market of knowledge or the market of ideas. Within such a market, individuals participate either as authors or as consumers or both, creating, accessing and assessing each other's contributions towards consensus. The original expressions protected by copyright

[55] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 89.

compete in such a market for the benefit of the public. The public therefore would benefit of such a market as it creates a setting of exchange from which all would benefit.

The author, however would need some special protections in such a market, bearing in mind the interest in promoting the existence of a rich and diverse amount contributions and ideas available within the market, which is only possible if authors see incentives and equal conditions for their participation in such a market. Some interventions might be required for such a purpose, limiting the scope of the property, imposing contractual mechanisms for the transfer or assignment of the property and protecting the weak contractual positions of authors, might help to avoid the possibility of too much concentrated social power among copyright owners affecting the free exchange of contribution and ideas among individual (as it has been suggested in section II, B.2).

C. Autonomy and the author

The interest of copyright to promote the access and participation of individuals in the cultural life of society correlates with its aim to provide a reward for those individuals who create expressions that enrich society. In connection to the latter, copyright has a direct relation to freedom of expression, as it promotes the creation of a diversity of opinions available through a free market of knowledge in society, and it also protects access to such expressions through some mechanisms guaranteeing that enough 'raw material' for other authors to work with is available, facilitating a constant creation of expressions.[56]

[56] Locke's theory as explained on Waldron is clear in denying the creation ex nihilo in the hands of men. As such, the importance of this premise is that the rights on creations are the result of the labour onto some raw material: knowledge, ideas. Therefore, whoever would be entitled to those rights, should deserve them. Jeremy Waldron, *The Right to Private Property* (Oxford University Press 1988) 200-202. Following the line of efficiency, authors need to be fed from the elements of their cultural environment. Despite the limitations that the copyright system may impose, it is also important that ideas remain out of the equation of the market. Some authors suggested an eloquent analogy: unlimited amounts of raw material should be guaranteed from which authors find elements for their own creativity. As Diderot stated when defending property theories, such a raw material is the commonality of knowledge. The

Who is the subject protected by this right of freedom of speech? As it will be argued in the next chapter, the author could be anyone who qualifies as such under the prescriptions of the law. If the analytical instruments that Habermas proposed are used, the use of communicative power is potential in every human being. This potential is relevant in the historical transition from the privileges of the publishers to rights of the authors as it created the possibility for the author to gain independency through the recognition of proprietary rights she would be able to exercise freely.

It has been argued above that the concentration of property over copyrighted expression might put in risk the democratic principle. It has also been argued that if less concentrated, copyright kept in the hands of many authors and not in the hands of few publishers or producers, perhaps would ease the market in favour of the democratic principle.

In this respect, the discourse of autonomy can also be found beneath the discourse used to support copyright. This, because, the will of the author is in the middle between communication or no communication of the expression. Such a volition reveals author's autonomy in creation and publishing, and therefore is undoubtedly one of the principal means for gaining communicative power.[57]

Is such autonomy protected by copyright? The immediate answer is yes, the rights that copyright procure for the author start with the very right to decide whether to

idea–expression dichotomy is a fundamental principle for this purpose, but copyright goes further than other mechanisms, such as the duration of the rights or the imposition of certain limitations to property and mandatory licenses. See also Mark Rose, *Authors and Owners. The Invention of Copyright* (Harvard University Press 1993) 12-13. James Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (Harvard University Press 1996) 139.

[57] This can be linked with Locke's theory where the individual mixes his effort with the common and creates property. The property is his, but it is also the result of author's personality, and this last part is fundamental in the analysis. Mark Rose highlights it by quoting Justice Aston in *Millar v Taylor*: 'A work of literature belonged to an individual because it was finally, an embodiment of that individual. And the product of this imprinting of the author's personality on the common stock of the world was a 'work of original authorship'' Mark Rose, *Authors and Owners. The Invention of Copyright* (Harvard University Press 1993) 114.

publish or not a work, and from there the rights that follow are aimed to control the way the work is communicated and used (economic rights) and to protect the relation between the author and the work (moral rights). Although is not possible to assert that copyright is the only mechanism regulating the exchange of ideas and knowledge, copyright can be seen as an instrument of regulation of the two actions required from the State: the institutionalisation of communicative freedom and the circulation of communicative power.

D. From the individual to the author through originality

As it has been suggested throughout this Section, it is possible to assert that the basic elements supporting copyright, the author, the creation of a work, the exclusive rights over that work and the dissemination of the work, are consequent with intersubjective communication, and therefore, with democracy. One of the most important implications of this is that the authorial characteristic of copyright can be related to the exercise of communicative power through intersubjectivity. It is proposed here that one of the ways an individual can use to mobilise the opinion of others is by creating expressions of ideas to the public and that such expressions might be protected as copyrighted works. But even if it is not the intention of the individual to mobilise others towards certain interests, the creation of a work carries the possibility of exercise communicative power. Once the work has been communicated the author loses control on how others make use of the ideas and the information the work carries. The only control the author has is the control that copyright grants her, a control over how the work can be used and disseminated, and control over the relation between the author and the work, for instance by means of the rights of paternity and integrity.

The author contributes in the construction of intersubjectivity through the creation and dissemination of original works which would enrich the cultural landscape of individuals towards their participation in the decisions that affect their community. From there, the matter of identity between the author, in the sense of copyright, and the individual in the sense of the person protected by human rights could be achieved through communicative rationality. An author would be anyone whose expressions towards society obtain a quality of originality within copyright law, which in

consequence will provide that individual with certain rights and duties regarding such an original expression.

The origin of the work is an author's original creation. For instance, for the justifications of copyright based on Locke's labour theory, it is the author's effort what transform the raw material into a work.[58] In the personhood approach as expressed in the Kantian theory of personal rights, it is the author's will what connects the work with the public as only through the author's decision is possible to publish the work.[59] What the author does is to exercise as individual his communicative power, that motivating force capable of '…mobilizing citizens' communicative freedom for the formation of political beliefs, by expressing her own personality which would result eventually in a copyrightable work. A literary or an artistic work has such a characteristic, and even if it was not the author's intention to produce or promote certain political belief, the work can have such capability itself. The author is the agent of that creation, but each individual in the audience is the agent of the change of political beliefs.

Copyright would guarantee the discourse principle by protecting equally all expressions that would surpass the originality threshold.[60] Individual persuasion, the exercise of communicative power, would be based on the personal contribution that an individual adds to the sum of cultural expressions existent in relation to one or any

[58] For instance, according to Sakata a new paradigm of property in which the author is the centre of the protection of copyright comes from Locke's assertions about the individual who uses his efforts to create something that becomes his property. The proposition is author-centred because what makes possible the work of art is author's freedom of choice in creating it. Hitoshi Sakata, 'The Making of the Concept of Authorship in UK Copyright Law' (2013) 236 RIDA 3, 15.

[59] Immanuel Kant, *The Science Of Right* (W Hastie tr, ProQuest ebrary Web 2001) 42. Anne Barron add to the interpretation of Kant's theory an important issue related to this matter. Author's willingness is beyond the mere creation of assets for economic interests, the reward that copyright produces is consequent with the act of volition, but it is the surface of a deeper relation immerse in societies, the very interest in participating actively into the communicative rationality. Anne Barron, 'Kant, Copyright and Communicative Freedom' (2011) 31 Law and Philosophy 1 <http://link.springer.com/10.1007/s10982-011-9114-1> accessed 8 November 2014 38-39.

[60] This principle states that there should be symmetrical relations among individuals inside a communicatively structured society. Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 108-109.

position in which that individual would be interested in. That is, for instance, the role that copyright would propose for the author in the market of knowledge. Each individual who actively participates in the social and cultural life of society by proposing ideas through copyrightable expressions has the right to be recognised in his authorship and property in equal conditions than any other. All those expressions will then compete in the market towards other individuals who will acquire the knowledge for their own purposes.[61]

The more an individual can access different propositions uttered by other members of society, the more capable this individual would be of participating actively in the life of the society. Lynn Hunt's analysis of the invention of human rights is an example of this. In her work she suggests that human rights are the result of a human invention created through the exchange of cultural beliefs. In her study, she has shown that the persuasion produced by cultural devices, particularly novels, was determinant for the acceptance of ideas of freedom and equality during the 18th century. For instance, in Hunt's study, the romantic writers from the 18th and 19th centuries published novels (for example Rousseau's *La Nouvelle Heloise*, but also many others) whose common element was that the principal character had to struggle for his own freedom from different kinds of social restraints. Examples of such restraints were limitations based on race, class, religion, gender, or of another kind. In the plot, the romantic character usually suffers because of such limitations, and she or he would rather die than accept that freedom is not possible. Lynn Hunt argues that such stories might have created a persuaded group of readers whom then will defend the ideal construction of liberty and other values during the XVIII century in Europe and the US. The important issue here

[61] Anne Barron, in her article about Kant, summarises this point clearly: 'On this standard liberal view, culture is envisioned on the model of a 'marketplace of ideas', underpinned by an actual market in authors' works, which in turn is underpinned in various ways by law. In so far as copyright law helps to produce the conditions in which competitive markets in authors' works can flourish, it is said to be consistent with freedom of expression.' Anne Barron, 'Kant, Copyright and Communicative Freedom' (2011) 31 Law and Philosophy 1 <http://link.springer.com/10.1007/s10982-011-9114-1> accessed 8 November 2014 4.

is that such consensus or acceptance is often gained through the intervention of cultural expressions.[62]

Towards the creation of consensus in a constitutional democracy, each individual participates without reservations in the communicative act. Such a participation is often defined by the cultural context that individual has. The consensus occurs through the communicative reason by which each individuals accept one each other based on the sharing perspectives their cultural context can provide. Consequently each person is willing to accept the obligations resulting from the consensus, as it has been adopted rationally and supported culturally. Those obligations are necessarily relevant as they provide a basis for further communication.

Communicative reason might be oriented to validity, but the propositions of the individual are not valid themselves. As explained above, validity occurs in terms of the communication,[63] which is possible by the cross examination from other individuals to assess to what point a claim could be acceptable for them. This is possible, in terms of copyright, by guaranteeing access to existing cultural expressions, fostering the creation of other expressions by protecting them, and accepting that such protection is not absolute for the purpose of promoting a constant provision of 'raw material' which will allow the creation of further expressions. Validity would be achieved then, through the capability of individuals to contrast different expressions, their own reality, and their cultural context, to produce their own decisions.

In conclusion, the transit from the individual to the concept of author is determined by the expression of ideas and contributions towards society by the individual. Such an

[62] This idea of cultural vehicles influencing societal decisions has been pointed out by other authors. Regarding the influence of the book market in the US, see Beth Luey, 'The Organization of the Book Publishing Industry' in David Paul Nord, Joan Shelley Rubin and Michael Schudson (eds), *A History of the Book in America. Volume 5: The Enduring Book: Print Culture in Postwar America* (The University of North Carolina Press 2009). In the narrative of human rights, see Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2nd edn, Hart Publishing 2016) 631. In addition, Article 8 of the Universal Declaration on Cultural Diversity states that cultural goods are considered vectors of identity, values and meaning.

[63] Jürgen Habermas, *The Theory of Communicative Action, Volume One* (Polity Press 1986) 99.

expression, once it reaches the threshold of originality will qualify the individual as an author granting for her the rights copyright promises. Such a concept must be differentiated from other rights holders who might have acquired the copyright but have not expressed the work. Therefore, while copyright could play a role in the communicative rationality in view of the democratic principle, the protection of author's rights has to be considered fundamental in the context of a constitutional democracy. This, because through the protection of individual's expressions guaranteeing equal conditions of participation in the social and cultural life of society, the construction of the justification of the law through mechanisms based on culturally achieved consensus is favoured. This is the mechanism adopted by most of societies for the communications of ideas through a market of knowledge regulated by copyright within constitutional democracies.

IV. Conclusions

This chapter has defended the idea that the author and the protection of her rights should be in a prevailing position within constitutional democracies. This was done using the Habermas' communicative theory and his understanding on natural rights, that is a result of a consensus based on culturally shared notions.

This argumentation starts by affirming that everyone is potentially an author in her interest of proposing her own contributions and topics towards the assessments of the rights defining her society. Based on this and using Habermas' theories, the chapter studied the role of the author in constitutional democracies in the formation of the law.

From such an analysis the following ideas can be highlighted:

- The role of copyright in the communicative rationality is that it can be considered as an institution created to promote the creation of original expressions and to secure the dissemination of such expressions.
- This role can be clearly seen in two basic elements in the communicative rationality as proposed by Habermas: (i) communicative power and its relationship with culture; and, (ii) social power.

- Communicative power is a motivating force capable of form the political beliefs that influence the production of laws. The role of copyright here is that promoting the creation of works and allowing their circulation promotes the exercise of communicative power.

- Social power is the capability that an actor has of upholding his own interests towards or even against others in a given net of social relationships. Social power can be exercised through the use of communicative power. Too concentrated social power could push autonomy away on behalf of the interests of one or a few. The best way to avoid such concentration, in terms of cultural based decision about society, is the combination of some of the aims of copyright. For instance, the promotion of creativity by guaranteeing a reward for the author is adamant in this process, as only through such a reward the author would be able to protect his own freedom. The role of copyright is to secure author's independence by recognizing property rights and protecting her interests and also to satisfy the common interest in author's ideas which can only benefit society through communication.

- Copyright can be found in the basis of a rationally communicative process. Individuals require not only access to cultural expressions to participate equally in the democratic process, but also, every citizen should be able to find guarantees for his own participation. As it has been stated above, copyright can fulfil this purpose by guaranteeing that an individual has the possibility of communicating and trying to persuade other individuals of his own particular interests within a framework of equal conditions within the market of knowledge.

- In Habermas approach, natural rights are supported in a rational consensus achieved by society through democracy. Thus, such a consensus is intersubjective, meaning that it is only possible by the individual's acceptance of the interests of other individuals. In a post-traditional understanding of natural law within constitutional democracies, the author is considered as a creator of cultural vehicles of knowledge, and her role in the intersubjective construction

of consensus is proposing ideas to society through her works within the market of knowledge. Such ideas will contribute to the formation of the construction of truth and the will of society over which laws are constructed. The consequence is that copyright is fundamental for the success of such a consensus, as it helps in protecting equal access and participation for individuals in the cultural life of society.

- The communicative rationality supported in part by copyright would serve in backing the primacy of the author. Because the democratic principle is basically intersubjective, individual mutual recognition is often made possible through cultural expressions which, if original, would qualify the individual as an author granting her moral and material rights.

The main conclusion for this chapter is that, under a modern understanding of natural rights as proposed by Habermas, the author should have a prevailing position within constitutional democracies given his active role in the proposition of vehicles of knowledge that enrich the cultural context in which society is based. This, because of the interaction of three main factors derived from copyright:

One is that the right to access and participate in the cultural life of society has one foot in principles related to constitutional democracy, and another in the idea of a market of knowledge in which copyright plays.

Two, that the right to be protected as author in relation with her creations relates to the role of the individual in the construction of consensus towards society, based on culturally constructed reasons.

Three, that the right to obtain moral and material rights for her creations is a mechanism to protect author´s freedom but also to enhance the diversity of cultural expression inserted in a given society. Those rights are directly related to the elements explained in the previous section concerning the construction of a communicative rationality and the participation of individuals in that process.

Understanding copyright through a modern natural law conception of the law, cannot be limited to the idea of a natural property, which would be an incomplete conceptualization. Instead, copyright and especially, the protection of the author, should be inscribed in the system of constitutional rights with a crucial role in democracy, implying rights but also duties.

Chapter 3 Authors' free participation in society and their equal liberties. Protecting author's fundamental interests in copyright contractual relationships

I. Introduction

The previous chapter proposed that the protection of authors can be supported beyond a mere positivist instrumentalism by arguing theoretically that copyright rationales are related to a modern understanding of natural law, in which the justification of the law is culturally constructed . It is time now to find if such theoretical approach reaches the sphere of the law. For this purpose, a comparative analysis comprehending different legal traditions will be proposed. This is not a global comparative approach, though. Instead, this chapter proposes a look to the interactions between two European countries, the US and some Latin American countries that would give the tone of how the two major legal traditions on copyright interact with the protection of author's fundamental rights.

The second chapter concluded that the author, as a human being, is located in the centre of the communicative rationality in which the system of laws would be based. For this to happen it is required to accept first that, according to Habermas, culture plays a fundamental role in the communicative rationality, and consequently, that the elements constituting culture are more or less capable of producing communicative power which would be transformed into popular sovereignty. This is because individuals can only exercise their social power through conditions of validity accepted by their equals under communicative conditions, which means that the public use of communicative freedom is not the same as the public use of the expressions communicated. Therefore, individuals should be able to freely find their channels to express their opinions and interests in order to generate social power as it was explained in chapter 2. The second condition to understand that the author is at the centre of communicative rationality requires to accept that authorship is a potentiality for each individual who should be able to find conditions of enough freedom that let her create copyrighted works.

What does it matter if those expressions are considered (or not) as copyrighted material? Because, copyright is a mechanism by which the system of laws can satisfy the requirements of equal opportunities of participation for individuals in the cultural life of a given society. It helps in avoiding the concentration of social power by four basic tools: 1) assigning rights to original expressions mostly in the hands of the one who has expressed them; 2) limiting the exercise of such exclusive rights in certain cases; 3) limiting also its protection in time; 4) constraining the subject matter of protection to the expression and not to the ideas; and 5) restraining the contractual freedom of right-holders in some cases when those rights are about to be transferred.

Copyright is aligned with the principle of free participation in the public decisions by those elements characterising it:

1) It promotes the access and participation of individuals in the cultural life of society;
2) It recognises a reasonable reward for those individuals who have created and communicated their expressions;
3) In order to satisfy both the reward and the access and participation, the rights that copyright assigns to the authors are not absolute and this is rationally accepted;
4) In terms of copyright, freedom of expression has implications both for authors and for the public;
5) The copyright system should support the free market of knowledge guaranteeing a constant influx of diverse cultural expressions that would transform individual's point of view constantly;
6) In response to the tensions and distensions between free access requirements and proprietary interests that characterise this market, copyright regulates most of them by rules such as the limited time for the exclusive rights, the limitations and exceptions, the tools created protecting author's interests, and some others, all of which are mechanisms created to avoid the concentration of communicative power in Habermas' terms;
7) Consequently, the system should be able to secure, through the mechanisms mentioned before, the provision of sufficient amounts of 'raw material' the market requires;

8) Due to the reasonability of the concept of author in terms of the potential participation of individuals in the social and cultural life through cultural vehicles protected by copyright, the system should be coherent with the democratic principle;
9) Therefore, and because of the connection between copyrighted expressions and their origin (the authors), protecting such individual interests is consistent with copyright tools such as moral rights but also with other tools protecting their economic (material) interests; and
10) Either in terms of property or in terms of exclusive rights, author's rights are important in the system of rights to facilitate individual participation in the cultural life of society which transform the system itself through the individuals.

Consequently, it is possible to assert that the elements recapitulated above are consistent with the process described and analysed by Habermas in which there is a constant interaction between individual and public autonomies through communicative rationality. Therefore, the expressions by which individuals tend to gather communicative power are potentially democratic in nature and this should help to understand the scope of the concept of 'author': anyone who can express his individuality could be an author under the requirements of originality that the law creates for this purpose, as will be demonstrated further below.

What makes an author, then? The answer needs to refer directly to the system of laws. National copyright laws might have different answers. The question would persist, even so, in the form of supporting the author as a core concept for the communicative rationality. For that purpose, the next step will correlate the concept of communicative power with the principle of authorship by which copyright assigns rights on original expressions.

Once this has been studied, it would be possible to identify practical problems towards the conceptualization of the author through communicative rationality in the copyright law. For the purpose of this thesis, and due to the extent of the analysis required, two basic problems will be examined in this chapter: first, the problem regarding authorship and its articulation in the system of laws, in particular regarding its protection as a fundamental right; second, the chapter will be focused on the exercise of private

autonomy in copyright laws, one of those practical problems attached strongly to the problem of the hinge between communicative rationality and copyright.

The consequences of those analyses would be, first, that protecting author's moral and material interests should be a principle that commands copyright in a rational communicative perspective, in order to guarantee author's dignity and autonomy. As a system, copyright could not be reduced to the extent of such principle, but it is a start, and one that uses the concept of author in its discourse as part of its own principles. Second, protecting authors through copyright should imply legal mechanisms that might enhance their position in the relation to third parties in the extension required to protect such moral and material interests. This could imply cases in which both authors and third parties would see their contractual autonomy restricted. For instance, as it will be shown in section IV.3 of this chapter, some countries impose restrictions to the scope of rights that can be transferred through assignment or to the duration of such a transfer (Mexico, Colombia are examples of this).

The study that follows will analyse, from a comparative perspective, statutes and the case law from countries in the Anglo-Saxon tradition of copyright and countries in the Civil Law tradition of author's rights. For this reason the countries to analyse will be the UK, the US, Mexico, Colombia, Argentina, and Spain. Due to the lack of enough case law, Chile, which presents an interesting perspective in the international arena (Chapter 4. II.F.3.), will not be considered here. These countries have been selected due to their different legal tradition and history. The Latin American countries are related to the civil law tradition through their Hispanic history of colonization, this will show an author's-based approach to copyright. Whilst the common law tradition is related to a protection based on the economic exploitation of the work, tradition that is shared by the UK and the US. Such legal traditions have shown some interactions that are interesting for the comparative analysis. For instance, Mexico and Colombia have signed separated free trade agreements between them and with the US, these agreements include a component of copyright. In addition, Spain and the UK are members of the European Union, therefore, there are connections between the two systems through the EU Directives and their case law. Argentina has the oldest law of the region (1954), yet still applicable with several reforms. Argentinian case law has

had to adequate the interpretation of an old law to the context of a more recent Constitution in which the economic, social and cultural rights have been introduced.

The interconnections at the international level among these countries will be explained in detail in the fourth chapter, section II. A, but for now it is important to consider that there are evident links between British and US copyright law, that Mexico and Colombia have signed agreements with implications for copyright with the US (NAFTA and US-Colombia TPA), that Colombia has signed an agreement of a similar kind with Europe, that Argentina still applies the oldest copyright law in the region which refers directly to the pre-war European legislation, that Mexico and Argentina are negotiating an FTA with Europe, and that the three Latin American countries received a direct influence from the Spanish law,[64] a country which is an EU member together with the UK. The size of the study proposed here requires neglect of a comparative analysis of other interesting jurisdictions such as France and Germany in Europe, or Chile, Brazil, Peru or some of the Central American countries. That would create a more insightful perspective of author's protection in these systems. That could be explored in the future.[65]

II. Communicative power and the principle of authorship

If authorship is a qualification that potentially any individual is able to achieve, since individuals are entitled to freely express their thoughts and eventually push their ideas onto a societal discussion (social power), those expressions, in some cases, can become copyrighted works. Then it is the law's work to establish under which conditions individuals can be considered authors and consequently benefit from the protection that copyright offers. Therefore, the question of who the author is becomes

[64] Jose Bellido, 'Latin American and Spanish Copyright Relations (1880–1904)' (2009) 12 The Journal of World Intellectual Property 1 <http://onlinelibrary.wiley.com/doi/10.1111/j.1747-1796.2008.00348.x/full> accessed 30 December 2014 12.

[65] For a comparative study on German and UK laws about copyright transfers see Dominic Skauradszun, 'Approaching or Overtaking: Transferring Copyright in Germany and in the UK' (2011) 6 Journal of Intellectual Property Law & Practice 651. However, in this case it is clear that the absence of consideration about human rights rationales affects the author's outcome.

important. The author might be a human being, but in some copyright legal systems a legal person or another person, different from the one who created the work, could also be considered as an author. Nevertheless, this is a characteristic that has not been recognised consistently. For example, while the 2003 WIPO Glossary states a complex concept of 'author' in which it is possible to include other persons different from those who have created the work,[66] in 1980, the WIPO Glossary proposed a straight concept in which the author is simply the person who has created the work.[67]

This is important as the revision of the evolution of the comparative law shows that only recently the national legislations studied here have defined the author. Those laws have chosen for a definition based on the individual: the author is the physical person who has created the work. This is the case of the UK (CDPA, 1988), Colombia (through the definition adopted by the Andean Decision 351/93), Spain (1987), and Mexico (1996). The previous copyright laws of these countries did not define the author. As it will be shown in the next chapter, this is coincidental with two major changes in the international copyright landscape: the US' adhesion to the Berne Convention in 1989 and the adoption of the TRIPS Agreement in 1994. In 2009, the EU Directive 2009/24/EC defined the author of software as the natural person who has created the program.

The importance of differentiating between authors and corporations in copyright should go beyond economic rationales.[68] By definition, corporations cannot create. Instead, human beings can, and they are entitled to the right to participate freely in the cultural life of society.

Communicative power is understood by Habermas as a *motivating* force capable of '…mobilizing citizens' communicative freedom for the formation of political beliefs that

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[66] Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (World Intellectual Property Organization 2003) 268.

[67] György Boytha, *WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights* (World Intellectual Property Organization 1980) 17.

[68] Regarding those rationales based on economics, see Martin Kretschmer and others, 'The Relationship Between Copyright and Contract Law' (2010) www.sabip.org.uk 19.

in turn influence the production of legitimate law'.[69] This would be the result of two elements, creativity and freedom, and would be expressed in some cases as original works.

Social power, defined by Habermas as 'the capability that an actor has of upholding his own interests towards or even against others in a given net of social relationships',[70] could use those expressions as tools, pushing interests through culture. Nevertheless, corporations, which would be based on principles of economic rationality, can only acquire the result of this power from the author and then use it for their social power (though, both authors and no authors can exercise social power). Thus, the acquisition of cultural expression is not and cannot be absolute. The laws of copyright, even in cases where they accept that other persons different than the author can be entitled to some author's rights, are attached to the principle according to which the author of a work is the person who has created it.

How would this be reflected in the copyright system? How would those two different possibilities of authorship interact with a concept of the author within the scope of human rights? Although some copyright legislations might include entities other than the creator or creators of a work as authors, such a possibility is mainly a legal fiction, constructed for pragmatic purposes responding only to the economic side the copyrighted work possesses, which can be separated from the concept of authorship and originality. For instance, the report from the Special Rapporteur in the field of cultural rights, Farida Shaheed, states that the protection for author's material and moral interests conceived from the point of view of the human rights instruments should regard only human beings individually or collectively considered.[71] The

[69] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 147.

[70] Habermas has described social power as a two-dimensioned concept which can both facilitate or restrict communicative power. As facilitator, it can mean 'that the material conditions for an autonomous exercise of equal liberties and communicative freedom are satisfied'. As restrictive, social power can provide 'some parties with a privileged opportunity to influence the political process in such a way that their interests acquire a priority not in accord with equal civil rights'. Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 175. See Chapter 2.

[71] See for this matter: Farida Shaheed, 'Copyright Policy and the Right to Science and Culture. A/HRC/28/57' (2014) para 27.

implications from and within the international level about this matter will be discussed in the next chapter of this thesis.

Nevertheless, the category 'author' is determined by the laws of the particular country. Thus, studies such as Ginsburg's about the concept of authorship in comparative law are important to consider in this discussion. In the case of this author, she has demonstrated, through six principles, the main trends of case law in the countries she studied over the concept of authorship.[72]

The principles Ginsburg suggests are: First, that *authorship places mind over muscle*, by which it is understood that the mere executant of the work is not necessarily the author, it is also required author's contribution in terms of intellectual labour. Second, that *authorship vaunts mind over machine*,[73] related to the previous principle, in this case, it is important to assess in what extend author's creation is determinant for the work. As Ginsburg states, the greater the machine, the greater the burden of showing author's creative role is. But it is the role of the author in terms of choices she made to the result of the work, what would relate to the concept of originality and therefore to authorship. In this section, these two principles will be put together as one, that authorship gives primacy to author's mind.

The third principle in Ginsburg is that originality is synonymous to authorship.[74] Originality is a core requisite for copyright protection. The connection between the concept of originality and authorship regards the extent and quality of author's participation in the creation of the claimed work. Originality claims that the work should be the result of the personal contribution of the author. However, the synonymy in the two concepts should not be confused with the subject related to each one. In this thesis originality will not be discussed in terms of the object protected but in terms of how

[72] Ginsburg studied these countries: United States, United Kingdom, Australia, Canada, France, Belgium and the Netherlands. Jane C Ginsburg, 'The Concept of Authorship in Comparative Law' (2003) 52 DePaul Law Review 1063, 1066.

[73] Jane C Ginsburg, 'The Concept of Authorship in Comparative Law' (2003) 52 DePaul Law Review 1063, 1072-1074.

[74] Jane C Ginsburg, 'The Concept of Authorship in Comparative Law' (2003) 52 DePaul Law Review 1063, 1078.

such a concept is applied to the author or other person. In terms of the subject matter, originality would be assessed towards the result of the alleged creation, in terms of the analysis proposed here originality will relate to author's personal contribution, freedom of choice and intent, because, as it has been indicated above, this is what constitute individual's active participation in the cultural life of society in terms of creating communicative power to mobilise other towards certain ideas or topics about society.

The forth principle Ginsburg suggests, is that the author should have sweated somehow at least.[75] This principle relates to the concept of effort and how much would be required to produce authorship. The consequence would be that if some effort has been invested, a reward should be obtained. Because an absolute creation ex nihilo is not possible, the amount of creativity required to produce authorship is not absolute. Therefore, less creativity in some cases is not enough to cause a denial of copyright if some effort can be evidenced. The problem with such principle is that the less author's personal contribution is present in the work, the less relation would be possible to identify to that author's active participation in the cultural life of society, which would mean that the work itself may show effort, but not communicative power.

Intent to be an author is the fifth principle Ginsburg notes.[76] The principle would state that the author should have the intention of creating the work to receive the benefits of copyright protection. According to Ginsburg, the surface of this principle fades easily in the assessment of the law. First, because authorship is a fact, even in the case in which some particular contribution could be shaded under the figure of a principal author, the original authorship persists. The second comment is related with the first one, Ginsburg states: an accidental authorship or even unconscious authorship does not diminish the relevant protection of such creations.

Finally, the sixth principle Ginsburg proposes is related to the economic investment towards the work. It has been stated in an original manner: money talks; maybe it also

[75] Jane C Ginsburg, 'The Concept of Authorship in Comparative Law' (2003) 52 DePaul Law Review 1063, 1082.

[76] Jane C Ginsburg, 'The Concept of Authorship in Comparative Law' (2003) 52 DePaul Law Review 1063, 1085.

writes, composes, paints, etc. The fiction by which authorship could be vested in a person different than the author has been accepted mostly in terms of economic efficiency.[77] Under such reasons, copyright might be assigned primarily on the person who has assumed the economic responsibility in the production of the work.

Ginsburg's conclusion over such a series of principles is that, even if the concept of author is generally referred to as the human being who has created a work by using his autonomy and knowledge, and who is the person able to control it, such a definition is not exhaustive within the different systems studied. Consequently, some of those principles observed by her could not apply together with the others also proposed. However, those principles could respond to the interest of human rights rationales in different pitches defined by their proximity to the common elements found in the theories of copyright and to the communicative rationality supporting a natural rights approach to copyright, as it has been studied in the previous chapter.

Ginsburg's framework offers a tool to evaluate the law of copyright in the countries studied, and to understand the comparative elements that such jurisdictions show in terms of the protection of their authors. The main trends that such a comparative study shows will be summarised here.

From that analysis, it seems relevant to highlight three of the six principles studied which would have a direct implication on the communicative rationality explained in chapter two. Those principles are: the synonymy between authorship and originality, the principle of intent, and the principle of 'money talks'. That does not mean that the other three principles (mind over muscle, mind over machine, and less creativity but at least some effort) are not important, but these offer less richness in terms of the analysis.

A. The principles giving primacy to author's mind

[77] Jane C Ginsburg, 'The Concept of Authorship in Comparative Law' (2003) 52 DePaul Law Review 1063, 1088.

Mind over muscle and mind over machine reasserts very effectively the importance of creativity and the relatively less important role of secondary efforts relieved of creative burden. Author's pre-eminence, stated in the second chapter as part of the common elements found in the theories examined there, has been reasserted in the case law supporting these principles. The main issue evidenced in the case law is the requirement of control the author should have on the resulting work. Therefore, mere mechanical or technical interventions are not considered sufficient for authorship. Cases as *Celebrity Pictures Ltd v B Hanna*[78] and *Creation Records v News Group*[79] in the UK, or *Lindsay v RMS Titanic*[80] in the US, distinguish between the author and mere executors of the work. Similar principles have been applied by the Spanish courts in cases in which the participation of performers in the creative process of a play was under the control of the director, diminishing their authorial participation.[81]

By the same token, the Andean Tribunal of Justice has clearly expressed that copyright protection pertains exclusively to human creativity, therefore, it is not possible to claim authorship in machine-created works if human intelligence has not been the determinant of such a creation.[82]

In the case of these two principles, the prevalence of the mind requires clarification on the limits between a work and the risk of protecting ideas. This can be seen in the US case *Gaiman LLC v McFarlane*, which shows the possibility of joint authorship when the plaintiff writes elements for some comic characters and the defendant draws such characters. In the Court's view, neither creations could subsist without the other.[83] One co-author can 'plot' his ideas and the other author 'weaves' those ideas in the work they are creating. The result is a work of joint authorship.

[78] *Celebrity Pictures Ltd and another v B Hannah Ltd* [2012] All ER (D) 208 (Jul).

[79] *Creation Records Ltd and Others v News Group Newspapers Ltd* (1997) Times, 29 April.

[80] *Lindsay v The Wrecked and Abandoned Vessel RMS Titanic* 1998 US Dist Lexis 13604.

[81] *Sentencia de la Audiencia Provincial de Barcelona Seccion 15 Sentencia No 148/08 [2008] www.poderjudicial.es*.

[82] *Proceso 121-IP-2013 (2013) XXXI Gac Of del Acuerdo Cart* 37.

[83] *Gaiman v McFarlane* 2004 US App Lexis 3396.

These two principles show the prevalence of the mind over the effort invested in the creation. By controlling the creation, the author determines the resulting work, giving birth to a creation that expresses her own intention. This connects the prevalence of the author found previously in the theories supporting copyright and the idea of individual's potential authorship, in terms of how any individual is capable of proposing her own interests communicatively in order to push an idea towards society and therefore participate in the construction of a collective will.

B. The principle giving attention to the effort

The principle of 'less creative but some sweat (effort)' also shows some autonomous importance, particularly in terms of considering that some sweat is not enough if is not accompanied by at least some creativity. However, such an element would be developed also in the relationship between authorship and originality.

The theories analysed in the previous chapter present a common element according to which copyright should guarantee the availability of sufficient 'raw material' for further creations. This is achieved through some mechanisms, one of these is the principle of no protection of ideas. However, because an absolute creation ex nihilo is not possible, the amount of creativity required to produce authorship is not necessarily high. In some cases, less creativity is not enough for denying copyright. The principle stated by Ginsburg refers to the theory of the 'sweat of the brow' as a condition for copyright recognition.[84] This could contradict the two principles mentioned above, as it gives attention to the effort even if it lacks creativity.

This principle presents the risk of giving more weight to the effort and disregarding the amount of creativity immersed in the work. For instance, in the US case of *Feist Publications v Rural Telephone Service,* the primary constitutional objective of copyright was stated in order to balance such a weight. Even if it might seem unfair that the data gathered by the effort and economic investment of someone would be freely used, said the Court, copyright's primary objective is not to compensate such

[84] Jane C Ginsburg, 'The Concept of Authorship in Comparative Law' (2003) 52 DePaul Law Review 1063, 1082.

an investment: 'copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.''[85] Instead, it gives weight to the public interest by stanting that the free access to enough raw material required for the free dissemination of ideas should be guaranteed.

In *Feist*, what is required is a 'minimal degree of creativity', or, what Justice O'Connor recognises, quoting the *Burrow-Giles* case, as 'the existence of intellectual production, of thought, and conception'. Not gaining such a threshold means no copyright protection.[86] In the Argentinian and Colombian jurisdictions, the principle operates similarly. For instance, in a case in which the claimant defended her copyright in the selection and design of news she had copied from different sources, the Argentinian Judge Russomanno argued that the effort by itself is not enough to categorise originality. Even if some ideas have been expressed, it would not be enough because that would create protection in the ideas themselves, which as a principle should not be allowed.[87] A Colombian criminal case of plagiarism used the same reasons in the opposite way. If an idea is so common that anyone could express it, the effort invested in expressing such an idea is what determines whether there is a copy or an original expression. In this case, a professor used some extracts of her student's thesis on a book she then published.[88]

One of the most important elements of analysis derived from this principle is that, although the author should participate actively and creatively, it is not required to be a genius. In the US, *Bleistein v Donaldson*[89] shows that a 'very modest grade of art' is enough for protection. In that case, some engravings created for advertising purposes were considered copyrightable works of art. The Supreme Court argued that neither the merit, the artistic value of the work, nor its nature should be considered regarding copyright protection. Nor should an author's personal qualities be a cause of rejection.

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[85] *Feist Publications v Rural Telephone Service* 1991 US Lexis 1856 Section II.A.

[86] *Burrow-Giles Lithographic Co v Sarony* 111 US 53, 60. See also *Miller v Universal City Studios, Inc* 650 F2d 1365 (5th Cir 1981).

[87] *SA The Buenos Aires Herald vs SA La Nación (CNCIV Sala D)* [1990] Cerlalc, Derecho Autor Reg.

[88] *Casacion No 31403 Luz Mary Giraldo de Jaramillo (CSJ Sala Penal)* [2010] www.derechodeautor.gov.co 30.

[89] *Bleistein v. Donaldson Lithographing Co*. 188 US 239 (1903) 250.

In the UK, the case of *Walter v Lane* decided over the 1842 Act shows the initial application of this principle. Although Ginsburg situates this case as a contradiction to the previous principle, for this case recognises copyright for transcriptions of a speech, it does not only give pre-emption of originality to the mere act of transcription.[90] This is because, at the time in which this decision was held, originality was not a requisite for protection under UK copyright law.[91] It was argued that the presence of some skills and labour from the reporters of a particular speech was not recorded in any other way. That was considered enough for the purpose of allocating copyright on such reports, and such a reasoning is what Gravells traces in the subsequent case law that followed. However, this case has created a discussion about its persistence in the UK law over the century. As it will be shown later, the mere argument of skills and labour has been superseded by the addition of some creative contribution (see next subsection).[92]

In the case of *Football Dataco Ltd v Yahoo! Ltd UK*[93], the European Court of Justice, Third Chamber, assessed the case of the protection of databases regarding the criteria established in article 3.1 of the Directive 96/9 on the Legal Protection of Databases. Such a criterion is related to the originality of the database in which author's selection or arrangement of the contents of the database constitutes her own intellectual creation. The mentioned article also indicates that no other criteria should be applied for the eligibility of such a creation. Is the author's own intellectual creation a concept requiring more than the mere skills and labour invested for the creation of the work, in the case of database? The Court found that the skills and labour invested in creating the data have nothing to do with the protection of the database. The criterion is related to the selection or arrangement of the database and not the data contained in it.[94]

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[90] Jane C Ginsburg, 'The Concept of Authorship in Comparative Law' (2003) 52 DePaul Law Review 1063, 1072-1073.

[91] See Nigel P Gravells, 'Authorship and Originality: The Persistent Influence of Walter v Lane' [2007] Intellectual Property Quarterly 267, 272.

[92] Estelle Derclaye, 'Debunking Some of UK Copyright Law's Longstanding Myths and Misunderstandings' [2013] Intellectual Property Quarterly 1, 8.

[93] Case *C-604/10 Football Dataco Ltd and others v Yahoo! Ltd UK and others*.

[94] Case *C-604/10 Football Dataco Ltd and others v Yahoo! Ltd UK and others* para 36.

Such selection or arrangement is related to the concept of originality which implies that the author has expressed 'his creative ability in an original manner by making free creative choices'.[95] Therefore, if setting the database is the result of technical considerations and rules, as in the case commented here, there is not enough room for creative freedom or originality. For the court, the mere skills and labour are not enough for complying with the criteria the Directive 96/9 establishes if there is no originality in the selection or arrangement of the data.

The case law examined for this principle shows how thin the line is between the absence of creativity and 'the sweat of the brow'. However, in the *Football Dataco Ltd* case, mentioned above, the European Court of Justice, has had helped in make such line thicker by clarifying the role of author's freedom of choice in the configuration of originality, beyond the mere skills and labour invested in the creation.

Guaranteeing the availability of raw material through the exclusion of ideas from copyright protection is an important element in its functionality from different perspectives. The availability of 'raw material' metaphor works from the economic perspective, but also helps in protecting the free expression of different approaches to the same idea. This is, for example, the context of the basic constitutional US standard of copyright protection, protecting the arts and sciences. It also values the role of the human being in transforming the material in a meaningful way, even in cases where such a transformation is not too elaborate. This tends to demolish the idealistic construction of the gifted author that has been over-dimensioned in some cases, giving enough content to the meaning of the concept of 'author' in terms of the persons benefited from both the copyright and the human rights protection.

C. The principle matching originality and authorship

The concept of originality from the point of view of authorship offers an interesting approach regarding the role of the author in the communicative theory. The subjective approach to support authorship has been used in many cases asking for author's personal contribution in the work. The relevant issue here is that originality as a core

[95] Case *C-604/10 Football Dataco Ltd and others v Yahoo! Ltd UK and others* para 38.

element in copyright is not conceivable without author's personal contribution.[96] This relation is relevant, for example, in some cases in light of the Constitutional clause of copyright protection in the US. It determines the protection (or not) for putative authors. However, the most relevant connection for this principle is the one that relates author's capabilities and the use of ideas. In this sense, the author operates canalising with his own (original) perspective the ideas that would be discussed by society. Despite how romantic this might sound, what the case law has tried to protect is everyone's possibility of communicating ideas, and at the same time impeding that ideas themselves are appropriated.

Matching the two concepts, as proposed by Ginsburg,[97] should not be confused with the subject related to each one. Originality is author's image as reflected in the mirror that is her work. In this section, originality will not be discussed in terms of the object protected (the literary or artistic work) but in terms of how such a concept could be applied either to the author or to another person. Thus, the objective elements of the work will not be considered here. The interest here is how relevant is the author for the very existence of the work. The basic stance is that there is no originality without an individual (an author) who produces authorship.

How is this author-work reflection working within copyright laws? In this scenario, the comparative law shows two different approaches. As it has been explained in the previous chapter, the Civil Law tradition considers author's personal contribution as the basic element supporting originality. On the other hand, the Anglo-Saxon approach uses author's effort on his creation as a threshold to decide whether someone is an author or not. In some cases, the mere effort, the 'sweat of the brow' and therefore the investment, might be enough reason for the allocation of copyright protection.

In those copyright systems where author's personal contribution has more weight, the consequence would be that authorship should be limited to the author (the human

[96] See for example Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 88.

[97] Jane C Ginsburg, 'The Concept of Authorship in Comparative Law' (2003) 52 DePaul Law Review 1063, 1078.

being who has created the work). Any other ownership of the work would be considered subsequent. Ginsburg argued that if a system tends to protect the effort rather than the personal contribution, the protection would be related to the investment rather than the creativity itself.[98]

Originality claims, in most of the cases, that the work should be the result of a series of not-excluding characteristics: 1) there should be a minimal amount a creativity; 2) some authorial uniqueness should be revealed; the author controls and is responsible for the original outcome is also characteristic; and, 3), in most cases, the principal characteristic found in the comparative case law is that a personal contribution should be visible in the work.

1. Minimal amount of creativity

In the UK, *Ray v Classic FM* is an important case in which J. Lightman concludes that some basic elements for authorship are required (in this case, within a joint authorship situation). Those requisites are 1) the provision of a 'significant creative input' for the work; 2) that the outcome of such an input should be more than an idea, it should be the expression of that idea in terms of a copyrightable work; 3) that author's contribution should 'find its way' into the finished work; and 4) the mere division of efforts between two parties does not create joint authorship: both parties must share the responsibility in the 'skills and labour of authorship'.[99] Consequently, the distance from the 'significant creative input' to the 'skills and labour' should be reduced. Both personal contribution and effort are required to construct authorship.

[98] Jane C Ginsburg, 'The Concept of Authorship in Comparative Law' (2003) 52 DePaul Law Review 1063, 1080. See also on this matter, Andreas Rahmatian, *Copyright and Creativity. The Making of Property Rights in Creative Works* (Edward Elgar Publishing 2011) 185-189.

[99] *Ray v Classic FM plc* [1998] All ER (D) 105 Section V. A previous case identified such an element as the incorporation of 'material alterations or embellishments'. In this case, Justice Whitford uses the concept to recall that the mere skills and labour might not be enough to assign copyright as in the case of transferring a bi-dimensional work to a three-dimensional one, that would require a lot of skill and labour but no necessarily material alteration or embellishment that produces originality. See *Cala Homes (South) Ltd and others v Alfred McAlpine Homes East Ltd* (1995) IP & T Digest 18; *Interlego AG v Tyco Industries Inc and Others* [1988] RPC 343.

2. Author's uniqueness

Also in the UK, in *Sawkins v Hyperion Records Ltd.*, J. Patten establishes that the minimal amount of creativity can be enough if the work shows a quality that could not be found in the 'raw material' the author used, if the work originates from the author, and if what is to be protected is not the common knowledge used by the author but how he expressed his thoughts about that knowledge.[100] In sum, the work would reveal author's uniqueness even if the effort invested in the creation is not too much. In this case, the putative author, by adding some missing elements to an antique piece of music, introduced not only his own skills and labour but also his own expression and creation. For the reconstruction of the score, there was no other option. The case gave more weight to author's contribution and not too much to the effort invested in the work. Lacking in quality (uniqueness) in the contribution, it does not matter how much effort the putative author invested in the work, he would not be considered an author.

An author's uniqueness is a narrative that gives weight to the difference the individual adds to the available raw material. Such a uniqueness, as stressed above, is not a romantic one, but a quality residing in any human being capable of communicating by any means. As mentioned above (on Chapter 2, II, A, 5, b)), the case law in the Civil Law tradition follows a similar narrative.

3. Responsibility in the outcome

In the UK case of *Ray v Classic FM,* another element was indicated as characteristic of authorship. An author's responsibility in the final work characterises authorship. The decision over the result through the process of creation and the final dissemination of the work is author's responsibility. Therefore, authorship resides in who holds such responsibility.

[100] *Sawkins v Hyperion Records Ltd* [2004] 4 All ER 418. This was confirmed by the Court of Appeal. See *Hyperion Records Limited v Sawkins* [2005] EWCA Civ 565.

However, this creates a problem, evidenced in the US case of *Aalmuhammed v Lee*. Although it was decided that Mr. Aalmuhammed's contributions had no decisive participation in the final film, and consequently he was not considered a co-author, the question of who had the control of the final product pointed to both the director and the producer. The case shows that the economic responsibility resided in the producer, but the intention of authoring the work resided in the director. The important element highlighted in the case is that, even if the producer had a decisive power in the film, the person 'who has actually formed the picture by putting the persons in position, and arranging the place…' was Spike Lee.[101] This problematic will connect with another principle stated by Ginsburg,[102] the role of the economic interests in the authorship. This will be discussed below, at subsection E of this section.

4. Personal contribution

That the author is the person who created the original work and the work is the result of author's personal contribution is a normal assertion in the Civil Law copyright systems. Nevertheless, the narrative describing the nature of the personal contribution is similar to that describing the interaction between the sweat of the brow and the minimal amount of creativity as described earlier for the Anglo-Saxon traditions.

Two US cases serve to show this point. In *Miller v Universal City Studios*, the Court of Appeals stated that copyright protects an author's original expression, but the facts and theories he used are not protected.[103] Adding to *Miller*, *Feist* (mentioned above) states that the originality threshold serves the purpose of the US Constitutional clause. Justice O'Connor criticises previous cases in which the prevalence of the principle of the 'sweat of the brow' has gone too far and states that the ''[s]weat of the brow' courts thereby eschewed the most fundamental axiom of copyright law — that no one may copyright facts or ideas.'[104]

[101] *Aalmuhammed v Lee* 202 F3d 1227 1234 (9th Cir 2000) para 22.

[102] Jane C Ginsburg, 'The Concept of Authorship in Comparative Law' (2003) 52 DePaul Law Review 1063, 1088.

[103] *Miller v Universal City Studios, Inc* 650 F2d 1365 (5th Cir 1981) para 24.

[104] *Feist Publications v Rural Telephone Service* 1991 US Lexis 1856 Section III.

Similarly, the Argentinian case law also emphasises that is the personal contribution which makes different the work from the common ideas and elements that exist already in the culture for the free use of everybody.[105] In the case, because the author had taken the photos inside the defendant's restaurant while a social event was taking place and of which the author was an invitee, the defendant argued the absence of protection due to the purpose for which the photos were taken. This was denied. The Argentinian case law is reiterative in asserting that the personal contribution enriches the cultural flow and the magnitude of such contribution is irrelevant. Therefore, if there is a contribution, it should be protected by the law.[106]

The connection between originality and authorship can be traced to the *Infopaq* case in the EU.[107] Originality should be understood in the sense of the product of author's own intellectual creation. Therefore, for the EU Court, article 2.A of the Directive 2001/29 regarding the reproduction rights of the work can only apply under such circumstances of authorship and originality. Moreover, the Court linked this principle with the interest in protecting author's dignity, as will be argued in the fourth section of this chapter.

The traditional core element of personal contribution has been established in the Colombian case law as well. Two cases of contended authorship in which the claimants alleged co-authorship in books narrating their experiences have shown that the principle protects author's expression and not ideas or facts. In both cases, the author was the same and the tribunals stated that copyright protects the way in which

[105] *Expte 85966/05 Di Gregorio, Constanza c/ Tango 1921 SA s/ daños y perjuicios (CNCIV Sala J)* [2009] www.elDial.com.

[106] See *Expte 27970 Torbey Salid Hassan c/ Telecom Personal SA sobre Daños y perjuicios (CNCIV Sala K)*; *R de C Hilda vs Juan y otros (CNCIV Sala B)* [2009] www.elDial.com.

[107] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR 6569 [35]-[40]. See also Estelle Derclaye, 'Debunking Some of UK Copyright Law's Longstanding Myths and Misunderstandings' [2013] Intellectual Property Quarterly 1, 8.

the author narrates the facts to the claimants, and even if they have told the author their version of the history, the author has created a story based on such facts.[108]

In addition, the Colombian case law shows a trend that will be analysed further in the section below related to the constitutional protection of author's rights. The Constitutional Court has argued for the protection of moral rights as fundamental rights for Colombian legal system, and has asserted two basic principles: first, that authorship is the result of man's ability of expressing ideas and sentiments in a particular way, and second, that denying such a right on the result of his creativity means to deny human rationality and creativity as a manifestation of his own nature.[109]

This connection between originality, authorship, and the protection of author's fundamental rights has been also stated in other jurisdictions. That is the case in Spain, where the Supreme Tribunal in its Administrative Chamber has examined the constitutionality of author's protection and has stated that the creative act expressed in the copyrighted work implies an immaterial element that links the author and the work. According to the Chamber, such a link is constitutionally protected by article 20.1, b) of the Spanish Constitution. The Chamber, by agreeing completely with the lower decision from the Viscaya's Contentious – Administrative Chamber, has incorporated in such constitutional protection the precepts from the UDHR as well as the mandates from the ICESCR regarding the protection of author's moral and material interests.[110] In its analysis, the Supreme Court's Chamber, and previously the Tribunal, have recognized that authorship is connected directly with the work as a result of the act of creation and this connection, constitutionally protected, overcomes the traditional private-law approach by extending its protection to the field of the public law.

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[108] *Rad 11985 Luis Alejandro Velasco contra Gabriel Garcia Marquez (Tribunal Superior de Bogota Sala Civil)* [1994] www.derechodeautor.gov.co; *Ref 35423 Miguel Reyes Palencia contra Gabriel Garcia Marquez (Tribunal Superior de Barranquilla Sala Civil y Familia)* [2011] Cerlalc, Derecho Autor Reg.

[109] *C-155/98 (Corte Constitucional)* [1998] www.corteconstitucional.gov.co/relatoria.

[110] *Sentencia del Tribunal Supremo Sala de lo Contencioso No 499/1987* [1987] www.poderjudicial.es.

By the same token, the Court of Justice of the European Union (CJEU), in the *Eva-Maria Painer* case, stated three elements of copyright protection regarding article 6 of the Directive 93/98 requirement of originality in photographs. Those elements are, first, that copyright protection can be found if the creation comes from the author and reflects his personality; second, that author's own personality is present when he has been able to express 'his creative abilities in the production of the work by making free and creative choices' (which connects directly with the intent principle, below, subsection D); and third, that regarding photographs, authors have a wide scope of freedom for their creative choices.[111]

On the above-mentioned case, however, an interpretation of articles 1.1 and 5.5 of the Directive 2001/29, and of article 12 of the Berne Convention, in light of the First Additional Protocol to the European Convention on Human Rights (ECHR) for the protection of property and of article 17 of the EU Charter was also asked. The question asked was if certain photographs in which freedom of choice is too minor should obtain a weaker protection or not protection at all The EU Court did not address such a question but, by establishing those elements mentioned above, that the creation is the result of author's own personality, and that such a result is the consequence of freedom of choices in the creative process, it is possible to connect author's personal contribution as a condition for copyright protection and such rights that both instruments protect. The reason for this is that, if the mentioned instruments protect property in general and intellectual property in particular, in the case of copyright protection, as it has been indicated in the *Painer* case, the personal contribution of the author and her freedom of choices are core elements for such a protection. Without these, no originality would exist and therefore no copyright would be possible.

The amount of case law mentioned above supports a high weight given to the subjective approach when assessing originality. Even in the 'less authorial' jurisdictions such as the US and the UK, the elements from the personal approach are similarly used. In no few cases, the analysis that the judiciary has made regarding the protection of the author has been directly attached to the protection of fundamental interests. Copyright plays an important role in balancing public and particular interests.

[111] Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] ECR para 89.

An example of this is the importance given to the principle of no protection of ideas in connection with the concept of originality and author's personal contribution.

To sum up, an author's communicative power is consistent with copyright and how authorship can be assessed, and protecting an author's fundamental interests is coherent within the system of laws. These assertions are possible because the dyad originality-authorship is a construction that can provide fundamental support for the system of laws protecting everyone's right of free participation in the cultural life of society, and this is only possible through the existence of a legal framework in which authors can express themselves and acquire some level of communicative power.

D. Intent

The question of intent offers a complex dilemma for the study proposed here. Is the author's intent determinant for copyright protection? The answer that Ginsburg offers is negative. However, intent might have three different perspectives.

In the first perspective, intent qualifies the author. According to Nimmer,[112] intent is what the author introduces in the significance of the work: the difference between the smashed doll lying in the bin and the smashed doll lying in the museum as a piece of art. But, as Ginsburg indicates, asking for intent might let outside of protection works created accidentally.[113]

Nevertheless, from the point of view of the communicative theory, intent is fundamental in the proposition of active participation of the author in the cultural life of society and in the possibility of gaining communicative power. An author's intention to create is not equal to author's intention to disseminate her creation. Is it possible to assert that copyright covers both actions? In most legislations, the act of creation is the fact originating a copyright. For instance, while in the UK the fixation of a work can

[112] David Nimmer, 'Copyright in the Dead Sea Scrolls. Authorship and Originality' (2001) 38 Houston Law Review 1, 210.

[113] Jane C Ginsburg, 'The Concept of Authorship in Comparative Law' (2003) 52 DePaul Law Review 1063, 1086.

be considered independent of its authorship, the US Code (section101) requires the fixation of the work, but this should be produced under author's authority.[114]

The CJEU has addressed also this matter in two cases that are worth mentioning. The first case was mentioned above regarding the connection between originality and authorship, which referred to the protection of author's personal contribution according to article 6 of the European Directive 93/98.[115] In that case, the element of originality was attached to author's freedom of creative choices. This would determine the extent of originality present in a given work and the consequent application of full protection of copyright for such a work. Such freedom goes directly to the element of intent, for an author's creative volition is what makes a copyrighted work possible. This has been asserted in a previous case in which the CJEU stated that the absence of volition deters copyright from protecting certain kind of contents. In *Premier League and others v. Media Protection Services Ltd,*[116] the subject matter of copyright was defined in terms of the author's personal contribution, excluding other elements such as football matches 'which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright.' As a consequence, it is not possible to claim copyright protection nor its restrictions in those contents which do not constitute author's original material.

It is possible to consider that an author creates a work and decides not to communicate it. In this latter case, its economic rights have not ever been exercised, but it is clearly an exercise of author's moral right of disclosure. Some theories of copyright assert that the reason for the reward that copyright provides is an author's decision to give to the public his creation. Consequently, intention is not something to simply dismiss in the case of copyright.

[114] See on this matter Elizabeth Adeney, 'Authorship and Fixation in Copyright Law: A Comparative Comment' (2012) 35 Melbourne University Law Review 677, 687.

[115] Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] ECR.

[116] Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* [2011] ECR I-9083.

In the second perspective, the absence of intent does not affect the work's communicative value nor the author's communicative power. The fact that in some cases the work is not the result of author's intention to create does not diminish its communicative potentiality. Perhaps a creation was not the intent of the putative author but it would be her decision to produce the understanding of such thing as a work. The effect is the same, the work communicates something. It might or might not be important culturally or commercially, but that is not a consequence of copyright and it is not under the control of the author either. The market of knowledge would be the one who decides about the weight that such a work would have to a given society.

Finally, in the third perspective, the lack of intent could affect authorship. More concise than the previous two perspectives, intent might have an important effect when defining who the author is, particularly in cases of joint authorship where the authors do not share the intention of sharing authorship, or in cases of work created under the authority of another person (as in the case of works made for hire).

Two options can be found of how intent can affect a joint authorship. In the US, intent is a requirement (Section 101, Title 17, US Code).[117] The US Court of Appeals for the Federal Circuit shows, in the *Gaylord* case, how the US government's allegations of joint authorship were denied based on two main reasons: lack of creative participation from the Government agents and the absence of intention of joint authorship. That absence of intention was proven through a signed contract between the author and the person who acted as a contractor for the US Government. On the contract, it was asserted that the author holds the copyright in the work.[118]

Nevertheless, in the case of the absence of contracts, the case should be supported by the facts in which author's intention to participate as an author is fundamental. The case of *Thomson v Larson*[119] presents three elements as requirements for authorship

[117] United States Copyright Office, *Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code. Circular 92.* (Library of Congress 2011) <www.copyright.gov>.

[118] *Frank Gaylord v United States* 2010 US App Lexis 3915.

[119] *Thomson v Larson* 1998 US App Lexis 13177 203.

in the case of joint authorship: first, there should be some control the putative author exercises in the creative process (decision-making authority); second, clear manifestations made by the co-author in her intention to share the rights; and third, from the point of view of the public, the indistinctiveness in the contributions of the authors. In this case, the plaintiff alleged joint authorship with the defendant for a dramatic work. She claimed authorship based on the dramaturgical assistance she gave to the defendant when preparing a new version of *Rent*, a dramatic work previously produced by the defendant. However, it was not possible to demonstrate that the defendant was conscious of such co-authorship, the decision-making was in his hands, and he did not express any intention of joining his authorship with the plaintiff. Therefore, the three elements stated by the Court were not met; consequently, no joint authorship was admitted.

In the UK, intent of joining authorship was alleged by the defendant as a requisite in the case *Beckingham v Hodgens and others*. For that purpose, a Canadian case was brought into discussion alleging the absence of such an intention from the putative author as sufficient reason to deny joint authorship for another author. However, Justice Floyd found no authority in such a case; the joint authorship was a matter of fact visible in the work. Whether the putative co-authors had contractually agreed on joining their authorship or not, both parts of the work were original enough for copyright protection and they were voluntarily merged to the point that one work could not have purpose without the other. Despite any agreement, there was a joint work and if one of the authors later alleged his lack of intention in joining his authorship with the other, this would be contrary to the very existence of the work as a whole.[120]

This difference in the UK case shows an approach that gives weight to the nature of the work rather than the contractual fiction that could be created for the distribution of

[120] *Beckingham v Hodgens and others* [2002] All ER (D) 24 (Jul). The Canadian case (*Darryl Neudorf v Network Expressions* [1999] RPC 935), established a three-stage test to constitute a joint authorship: 'i) Did the plaintiff contribute significant original expression to the songs? If yes, ii) Did each of the plaintiff and Ms McLachlan intend that their contributions be merged into a unitary whole? If yes, iii) Did each of the plaintiff and Ms McLachlan intend the other to a joint author of the song?' At para 47 in *Beckingham*.

authorship. The reasons underlining such a difference could be based on an approach closer to the position that links the author and the work.

In the UK there is also another perspective in which the question of intent makes the difference between copyright protection or not. It is the case of sculptures on one hand and works of craftmanship on the other. In the case of sculptures, the case of *Lucasfilm Ltd and others v Ainsworth and other*, the debate was related to whether the stormtrooper mask elaborated for the purpose of the first of the films of Star Wars screened was created with the intend of a sculpture or with a function for the purpose of the film. As it was created in this latter sense, the Court decided that it was not possible to claim that such helmet could be considered a sculpture. The interesting part of the analysis in *Lucasfilm Ltd* related to the concept of intention, is that if the helmet was created for the functional purpose of the movie, it lacks artistic purpose which is the visual appeal of the sculpture.[121] The Court of Appeals takes the test as proposed by Mann J in which it has been emphasised the role of the author's intention, her choice to create the sculpture is the visual appeal the author wishes to be enjoyed as such, this means for our concern, that it is the communicative intention of the author what gives weight to the protection through copyright. If the product was not created with such an intention of a visual appeal, it would not be considered a sculpture.[122]

Intent has also played a role in the case of works of craftsmanship. The problem for this kind of works relate to the fact that their functionality is also a characteristic. However, author's intention would be what determines if it is possible to consider the given object as a work of artistic craftsmanship. The artistic character, though not a condition related to the merit of the object, does refer to the intention the author had of creating something with an aesthetic appeal.[123]

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[121] *Lucasfilm Ltd and others v Ainsworth and other [2009] EWCA Civ 1328* para 74.

[122] *Lucasfilm Ltd and others v Ainsworth and other [2009] EWCA Civ 1328* para 54. In the reference the Court of Appeals did to Mann J, the judge proposes an interesting example giving weight to the intention: A pile of bricks on display at the Tate Modern can be identified as a sculpture as it is the intention it represents, another pile of bricks placed near a building project would not have the same intention and therefore, it could not be considered a sculpture.

[123] *George Hensher Ltd v Restawhile Upholstery (Lancs) Ltd [1975] 2 All ER* 420.

In both possibilities, the case of sculptures and the case of works of artistic craftmanship, author's intention related to the appeal of the work is relevant to assess its copyright protection. Here is important to highlight then, that intention in terms of copyright, relates to the will of the author to communicate in a particular way her own thoughts. If the intention was other, such as a functional commercial interest, as in the case of craftmanship in which the object appeals to attract the buyer, or a functional contextual interest as in the case of the helmets created for the purpose of the Star Wars films, there would not be copyright.

As mentioned earlier, the intention to create has been found protected as a fundamental right by the EU Court. Therefore, freedom of creative choices would be a central concept in the analysis of authorship as it defines the connection between author and his work. Can such a freedom be restricted through a contract?

The effect that this might have in the case of employed authors and in the case of works made for hire are to be examined in conjunction with the last principle stated by Ginsburg.[124] Suffice to stress for now that in some jurisdictions, the question of how the control that the employer or commissioner can exercise over the creative process of the employed author does not affect his authorship or the author's moral rights.

In Argentina, this matter was examined to the extent of recognising that the commissioner of the work could not claim authorship, as his participation does not reach the originality threshold, because his instructions were considered more likely ideas rather than proper creation. For the Argentinian Court, the legal fiction constructed through the figure of WMH does not affect author's fundamental rights.[125]

In Spain, two cases have brought attention to the role of author's freedom when subjected to a contract. In a first case, the question about the authorship of works created by public employees or those created by external contractors can show an idea of the problem of intent. The Supreme Tribunal Contentious Chamber (for the

[124] Money talks; Maybe it also Writes, Composes, Paints, etc. Jane C Ginsburg, 'The Concept of Authorship in Comparative Law' (2003) 52 DePaul Law Review 1063, 1088.

[125] *L 317837 Argentores c/ Telearte SA s/ Daños y Perjuicios (CNCIV Sala E)* [2001] www.elDial.com.

public administration) understood that a public employee is limited in his volition to the mandate of the law because of the vicarious position in which the employee acts in the name of the administration. This vicarious position 'impregnates' employee's actions and the result would be considered an act of the administration and not an act of a singular person. Instead, the contractor is not under the mandate of the law, but under the mandate of the contract which in addition should be categorised *intuitu personae*. Therefore, his actions and productions are a consequence of his own volition and decisions, thus his authorship should be recognised.[126]

The second case referred to the question of whether a work (the software CODEN) created by the author while he was hired by his employer belongs to the employee or employer. Under the Spanish copyright law, if the software created by the employee has been created as part of author's contractual obligations, it would belong to the employer.[127] The Supreme Tribunal decided in favour of the author by denying employer's interest, as it was demonstrated that the intention and initiative for the creation were always in the author's hands and not under employer's control.[128]

Is that freedom restrained in the case of works made for hire? Would those restraints enough reason to allocate authorship in different hands others than the author? Those questions will be analysed further below.

E. Money talks

The last of the principles to highlight is related to the power of money in the concept of authorship. Because of the principles stated above, asserting that authorship could reside in the hands of a different person than the author seems contradictory. Authorship relates to the creation of a work in which one or more human beings decided to express some ideas in a particular form. This is a definition situated in the sphere of the individual. Thus, a legal entity, such as a corporation, would not be

[126] *Sentencia del Tribunal Supremo Sala de lo Contencioso No 499/1987* [1987] www.poderjudicial.es.

[127] Article 97-4. Royal Legislative Decree No. 1/1996 of April 12, 1996. Consolidated text of the Law on [Copyright], regularizing, clarifying and harmonizing the Applicable Statutory Provisions 1996.

[128] *Sentencia del Tribunal Supremo Sala de lo Civil No 696/2007* [1987] www.poderjudicial.es.

capable of such a creation. Therefore, *its* authorship could only be considered as a legal fiction.

However, in terms of economic efficiency, it has been accepted that, in some cases, authorship could be vested in a person other than the author.[129] The laws of the countries under study differ on this matter in basically two ways. First, authorship can be considered originated in the hands of another person, not the author. That is the case of the UK's film copyright, as authorship, in this case, would be shared with the principal director, or in the case of the US for the works made for hire. Second, in most of the cases authorship persist in the author, but all or some of the rights are deemed the property of the entity that provided the financial muscle.

Authorship is discussed in this section; the second trend will be analysed in the fourth section of this chapter regarding the interaction of those figures of presumptive transfer and the protection of author's moral and material interests.

The fiction by which an entity that has no creative power is considered an author responds to economic interests. In some countries, such as Argentina, Mexico and Spain, this response creates a contradiction. These jurisdictions consider the author the first owner of the copyright comprehending both moral and economic rights. However, some of those legislations establish that in the case of software, for example, created under WMH or employment conditions, the employer or commissioner would hold all the rights in the work. The problem is that these jurisdictions also consider moral rights as inalienable rights of the author. Therefore, either the moral rights are not included in the presumed transfer, or the given law creates a fiction by which authorship exist but first copyright ownership is born into the hands of another person.

The comparative case law provides some light on this matter. For instance, the Mexican Supreme Court does not give complete prevalence to the economic interests. That Court examined the nature of the assignment of copyrights as a result of a WMH

[129] Jane C Ginsburg, 'The Concept of Authorship in Comparative Law' (2003) 52 DePaul Law Review 1063, 1088.

and stressed that '…nor the Constitution, nor the secondary law have created any condition for protecting copyrighted works based on the one who has had the initiative in creating the work. It has been shown here, that the Constitution and its regulatory law recognise author's talent and creativity in his work, in spite of the previous reasons or motivations to create the work.'[130] Furthermore, the Court has highlighted that constitutionally, the protection granted to authors regarding their creativity and talent and not to the funding used for the production of the work.

Another example of this principle can be found in the Argentinian case law. This is a case related to the protection of a work in spite of the use of previous ideas given to the author to guide his creation. In the case, the claimant asserted his moral rights as an author for he has created the work under a contractual relationship with the figure of the WMH. Connecting this principle with the principle giving weight to author's intent, the Chamber recognised that under the continental tradition, moral rights are not transferable, and author's intention to create the work is not reduced by the fact that the work was created for a third party and under that party's initiative. The main issue for the judges was that the use of another's person ideas does not reduce the active creation of the work, and it is such an action that copyright protects.[131] In this case, the author wrote a script based on the original idea created by another author. The script was commissioned by the defendant. This person alleged that, as it was a commissioned work, and the idea was provided, the claimant author should have no rights on the script, even moral rights. In the Court's decision, author's authorship persists beyond any contractual or legal fiction.

In *Slater v Wimmer* in the UK, the question was if the participation of Mr Wimmer was sufficient enough to reach the category of producer and therefore a joint author in the

[130] Free translation from *Amparo en revision 581/2005 (SCJ Sala 1)* [2005] Cerlalc, Derecho Autor Reg Section III. The First Chamber of the Supreme Court of Justice is competent to solve in final decision about the cases in which the Mexican Constitution is involved. This can occur by two ways: because a citizen pretends to tackle a given norm, like in the case commented upon here, or because a citizen claims protection in his fundamental rights, like in the case discussed below. This is the action of 'amparo', known as 'tutela' in Colombia.

[131] *L 317837 Argentores c/ Telearte SA s/ Daños y Perjuicios (CNCIV Sala E)* [2001] www.elDial.com.

film shot by Mr Slater.[132] As it has been mentioned before, this is one of the cases in which someone other than the author could hold authorship. UK's CPDA, Section 178 defines the producer as 'the person by whom the arrangements necessary for the making of the sound recording or film are undertaken'.[133] In this case, the characteristics of such a participation were specified: a producer is not only the person who supports the production economically, but should perform an active participation in facilitating such kinds of arrangements that makes the film production possible. Thus, such a participation goes further than the mere economic muscle—it requires some brain power as well.

Until now, it has been fairly clear that the construction of the fiction for authorship in the hands of another person rather than the author responds to economic rationales. However, the Spanish case law shows some contradictions. As mentioned earlier, Spanish copyright law states that the author is the person who has created the work, other legal persons can enjoy the protection of copyright but only under limited conditions. Both the economic and the moral rights originate by the fact of creation in the hands of the author (articles 1 and 2 of the Consolidated Text), and moral rights cannot be waived or transferred (article 14). However, in some cases, such a principle has been misinterpreted. In a 2014 case, the Spanish Supreme Tribunal argued that collective works can be authored by moral persons.[134] The legal basis for this reasoning is Article 8 of the Consolidated Text, Spanish Copyright Law, which states that collective works belong to the person (legal or natural) who has had the initiative and the coordination of the work and who edits and publishes the work under its name.[135] As for the condition of editing the collective work, the Tribunal considered that such an action means creative activities and, because attributing authorship for each contribution separately is impossible, the author would be someone who assembled the work. In this case, that person would be the legal person responsible for the creation of the work or those who worked on its behalf. This implies the fiction

[132] *Slater v Wimmer* [2012] All ER (D) 134 (Jun) [85].

[133] Copyright, Designs and Patents Act 1988.

[134] *Sentencia del Tribunal Supremo Sala de lo Civil No 155/2014* [2014] www.poderjudicial.es.

[135] Royal Legislative Decree No. 1/1996 of April 12, 1996. Consolidated text of the Law on [Copyright], regularizing, clarifying and harmonizing the Applicable Statutory Provisions.

of attributing authorship to a legal person which is itself a fiction and would create an exemption to the non-transferability of moral rights.

It is arguable, however, that the meaning of article 8 mentioned above refers only to the economic interests of the person who has the initiative and coordination of the work, and that such an economic interest includes the right to use its name as owner, but not as author, of the work. Furthermore, in the comparative analysis, a similar legislation can be found in Colombia. However, in that case, the statute clarifies that even if the entity that had the initiative and coordination of the work can publish it under its name, it cannot be in contradiction of author's moral rights in the work.[136]

How has the European Court of Justice studied this problem? It seems clear that the condition of author pertains to the creator. That is the first conclusion from *Luksan v. Van Der Let*[137] in which the Austrian judge asked for the EU Court's considerations regarding the interaction of the InfoSoc Directive and the Term of Protection Directive, and their application towards national laws in which authorship for films are recognised in the hands of the producer of a film. The Term Protection Directive establishes that the author on the film is the director.[138] The interpretation of the EU Court is first, that the Term of Protection Directive is not affected by the InfoSoc directive, and second, that it is consistent with article 14.bis from the Berne Convention. However, in spite of the original property of the film in the hands of the principal director as recognised by the Court, the imperative of the principle of 'money talks' leads to the conclusion that the producer should be able to exploit the film economically. The Court synthesises

[136] In Colombian Copyright Law, the collective works would be considered a copyrighted work if there is originality in the compilation of the elements it comprehends. In this case, the person (natural or legal) who has coordinated and published the work under his name owns the rights for the work (art. 5) b.). Notwithstanding, copyright on the works used for the compilations may remain in property of their original authors if they have reserved their rights through the relative contract. Otherwise, ownership in the works used for the compilation for the collective work belongs to the compiler (art. 19). However, author's moral rights would not be transferred in any way. Subject to art. 19, the director of the compilation holds the ownership of it (art. 83). Law No. 23 - On Copyright 1982.

[137] Case C-277/10 *Luksan v van der Let* [2012] ECR.

[138] Article 2.1. Parliament and Council Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) [2006] OJ L 372/12.

the duality in the nature of the film: ‘On the one hand, they are the results of intellectual creation and presuppose such creation. On the other hand, they are costly industrial products.’ What is important to address in this case, though, is that in complying with the Berne Convention, the Court also stated that some of the rights shall originate in the producer and not in the principal director. Nevertheless, this does not mean that the producer should or could be considered the author of the film. Nor does it mean either that national legislation can simply decide to allocate such rights in the hands of the producer.

The possibility for the producer to be originally entitled to some economic rights, even if according to the EU Law such rights belong in principle to the director, is subject to some conditions that the Court states in *Luksan*, particularly in protection of fundamental rights (article 17 of the EU Chart). Such conditions are: 1) the existence of a contract. 2) Therefore, the possibility to agree otherwise. 3) The guarantee for a fair remuneration if director’s rights are being restricted. Those conditions emerge from two basic rationales. First, the Term Protection Directive establishes as principle that the principal director of the film is the author. Second, article 17 of the EU Chart protects general property and specifically IP. As a consequence, if the national legislation pretends to limit director’s property rights, such limitations can only be created in order to protect the public interest. In this case, the Court says, such public interest consists of the fact that without the economic muscle of the producer, the film would not even exist and the public would not be able to enjoy this type of art.

The conditions mentioned above points to two elements to be considered further below. First, the direct application of author’s rights as a fundamental right; and second, the importance of the author’s will (in this case, for example, of the principal director of a film) in the assignment of rights. Two questions also rise. First, if the reasoning that is applied in this case protects author’s interests regarding film copyright, could the same principles apply to other cases where there is a clash between author’s interests and producer’s interests? (i.e., the case of collective works, software, or works made for hire? The answer seems positive in the comparative study indicated below, for instance in the case of Mexico, Colombia and Spain the WMH doctrine has some limitations as it will be shown in Section IV.3.a).(1) and (2) of this chapter. Second, in order to protect the author’s will and the producer's economic

interests, should such contracts be regulated more thoroughly? This might be one interesting solution. However, it will clash with the principle of freedom of contract on one hand and second with the interest of producers of reduce to the minimum the risk of 'noise' in the exercise of their rights, despite that perhaps superior interests are to be protected. Such possibilities will be explored in section IV of this chapter regarding the interaction between author's human rights and the principle of private autonomy.

F. Conclusive remarks

In conclusion of this section, given that anyone has the right and the potential interest of participating in the cultural life of their society, then for that purpose to be achieved, mechanisms protecting the equal conditions for all individuals to participate are required. Copyright laws can provide some elements for that purpose. They promise rewards in terms of economic and moral rights to those who qualify. However, there are conditions (for instance, one should be an author).

That is to say, authors exist because they propose expressions that add their own personal contribution to ideas in the terms of the principles studied above. If the minds of authors prevail over machines and simple non-mindful efforts, and if a positive intention to produce a work is fundamental for the connection between the work and its authorship, requiring also some creation that, in fact, will separate the work from the mere idea, and if originality is a constant that is linked to the fact of human creation, then authorship is basically a matter of human individuals.

In the case of legal entities, however, their fictional nature impedes their own capability of creation. Therefore, their possibility of participating in the cultural life of society can exist only through the protection of their economic interests (they would pay someone to create a work for them). Thus, as it will be stated in the next section of this chapter, their protection cannot gain the same level of protection as authors have. Consequently, a fiction is required. Either these entities gain an authorial condition

through a fiction, or they would obtain certain rights that protect their economic interests.[139]

In addition, those productions lacking originality in terms of personal contribution, as Geiger has suggested in a recently published article,[140] would enjoy a reduced amount of protection given, and even such a protection should be modified by excluding moral rights of the equation, for example. Those rights should be aimed at the protection of the investment, and as such, they would be limited by the constraints that economic interest should observe in terms of protecting the public interest.

III. Copyright laws about authorship from a fundamental rights perspective

The second chapter of this document proposed a correlation between copyright and the protection of author's fundamental rights. However, such a correlation is far more complex than the simple protection of author's property in terms of the basic meaning of copyright. The chapter also proposed that the instrumentality of copyright is no longer the question to ask regarding its interface with human rights. Instead, it recognises that a natural rights approach based on the communicative rationality could underpin the interaction between copyright and human rights towards the protection of authors' interests. The previous section has highlighted that authorship is basically a human potentiality promising authors the copyright protection under the conditions the law creates for protecting economic, moral, and social interests. The focus is now directed to the connection of both systems towards the protection of author's interests within the national jurisdictions under study.

From those principles underpinning authorship studied above, three have been highlighted and will be studied further. Those principles are: the identity between the concept of authorship and the concept of originality, the principle according to which

[139] The exceptionality of corporative authorship has been highlighted in Paul Torremans, 'Authorship, Ownership of Right and Works Created by Employees: Which Law Applies?' [2005] EIPR 220.

[140] Christophe Geiger, 'Reconceptualizing the Constitutional Dimension of Intellectual Property' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (3d edn, Kluwer Law International 2015) 152-153.

to be considered as an author, intent is required, and the principle according to which investment plays a major role in the concept of authorship.

The matter of identity between authorship and originality will be examined in this section from the perspective of the systems of laws of each country regarding author's fundamental rights. This is because by such an identity it could be understood that the constitutional dimension of copyright is fundamentally related to individual's freedoms and duties and not merely with economic interests.

Fundamental rights are often enacted as part of the constitutional charters of the countries. In the case of copyright, its constitutional assertion has been stated in two ways: as a mere property right within the concept of IP, or as a complex right that involves the protection of author's interests and the protection of societal interests in accessing science and culture.

The first question to answer here would be about the position of copyright or author's rights in the scope of fundamental rights for the jurisdictions under study in this thesis. This would be only possible under the understanding that the reference to author's rights related to the protection of the person that has created the work according to the principles studied above.

Given that most of the countries under study are members of the ICESCR,[141] the General Comment 17 from the CESCR is relevant.[142] This document states the basic elements of protection of author's rights as present in article 15.1.c of the ICESCR. First, the protection of author's moral interests is to ensure the link between the author and her work as a result of the expression of her personality. This has been explained here regarding the connection between authorship and originality. This protection regards the recognition as authors of the given work and the protection of its integrity in connection with the protection of the author's honour and reputation. Second, the

[141] The US has not *yet* ratified this Treaty, although it has signed it.

[142] Committee on Economic Social and Cultural Rights, 'General Comment No. 17 (2005) (Article 15, Paragraph 1 (C), of the Covenant) E/C.12/GC/17' (Committee on Economic, Social and Cultural Rights 2006).

protection of the author's material interests implies the adequate remuneration, contributing to the right of an adequate standard of living. Finally, the Committee stresses that these rights contain the elements of availability, accessibility, and quality of protection which entail the State's responsibility of protection.

The second question to answer on this matter is how the comparative case law has constructed the relationship between the author and the concept of originality within the constitutional protection of the author's rights. Through this, it will be shown that the author's communicative and social powers are fundamental elements of copyright's constitutional protection.

A. The Constitutional clauses for copyright

Four variables can be found concerning how the countries under study in this research constitutionally enact the protection of copyright (or author's rights).[143] Those variables are the absence of a constitutional provision, the constitutional provision in which the legislature is empowered to regulate copyright or intellectual property in general, the constitutional recognition of copyright or intellectual property as a singularised right, and the combination of programmatic and empowering clauses.

1. No constitutional provision

This is the case mentioned for France and more specifically for the UK. This first variable is common for some European countries, which do not have a constitutional clause for copyright or for IP whatsoever. Dietz has identified some quasi-constitutional clauses that might be of consideration in some legislations.[144]

[143] The sources for this section, in the case of the Spanish speaking countries, were consulted in its original language. In spite of possible failures of translations, an English version of the constitutional texts referred here can be found in the following websites: www.constituteproject.org, or http://confinder.richmond.edu/. HeinOnLine provides an extensive database of world constitutions. Oxford University also provides full access to their database of constitutions of the world at http://oxcon.ouplaw.com/.

[144] Adolf Dietz, 'The Place of Copyright Law within the Hierarchy of Norms: The Constitutional Issue' in Pierre Sirinelli (ed), *Exploring the Sources of Copyright. ALAI 2005 Paris.* (ALAI 2005) 56.

Nevertheless, in the case of the UK, according to Dietz, it is not possible to find a constitutional clause or even a quasi-constitutional clause in their copyright law (at least from the positive law perspective).[145] The old assertion enacted in the Statute of Anne which introduced two basic elements identified in the previous chapter (the protection of authors and the protection of the public interest)[146] is no longer present in the British legal system, at least not within the statutes. Those interests were weighted to define the basic elements of copyright in the primary copyright British cases, *Millar v Taylor* and *Donaldson v Beckett*, analysed in Chapter 2, II, B, 3. These cases have been part of the case law and the doctrinal approaches about copyright since decided. It is possible to argue then, that these primary cases fix the main elements of UK's copyright.

2. Constitutional provisions empowering the legislature

This was the case of the Spanish Constitution of 1931 in which the power to legislate IP was reserved by the State and the duty of executing the law was situated in the hands of the autonomous regions.[147] None of the countries under study in this thesis uses this variable in their present systems. This variable is interesting, though, because it does not create or recognise a fundamental right by itself, but enacts a purpose that the legislature developed. Nevertheless, the Colombian clause is worth mentioning: 'Article 61. The state will protect intellectual property for the relevant period using the means established by law.' Due to its position among the list of other recognised fundamental rights, State's power to legislate about intellectual property acquires a qualified position as a right rather than a matter of mere definition of constitutional fora.

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[145] Adolf Dietz, 'The Place of Copyright Law within the Hierarchy of Norms: The Constitutional Issue' in Pierre Sirinelli (ed), *Exploring the Sources of Copyright. ALAI 2005 Paris.* (ALAI 2005) 56.

[146] '…for the encouragement of learned men to compose and write useful books…' L Bently &M Kretschmer (Eds.), 'Statute of Anne' <www.copyrighthistory.org>.

[147] Article 15. Legislation [on the following subjects] is under the control of the Spanish state, and the execution may be under the control of the autonomous regions, to the extent of their political capacity, in the opinion of the Courts, on the following subjects: (…) Second. Legislation on intellectual and industrial property. Constitucion de la Republica Española 1931.

The Colombian Constitution protects copyright as part of intellectual property. The norm was introduced within the new Constitution for the Republic enacted in 1991. Its previous Constitution, from 1886, followed a tradition that came in 1858 when literary property was recognised in the constitutional level for the first time in this country. The present Constitutional intellectual property clause has been repeatedly interpreted by the Colombian Constitutional Court as part of the constitutional bloc. On those decisions, it has been stated that the moral rights should be considered as fundamental rights and the economic rights are constitutionally protected.[148]

3. Constitutional recognition as a singularised right

For instance, the Colombian 1886 constitutional clause stated this right as an extension of the property right: 'Literary and artistic property should be protected, as transferable property, for the life of the author and eighty more years, under the formalities established by the law.'[149] In other countries outside the scope of this study, the clause has been enacted as an independent right or in conjunction with other cultural rights.[150]

4. Combination of programmatic and empowering clauses

[148] For the concept of constitutional bloc and the development of Colombian Constitutional Court about intellectual property see Denis Borges Barbosa and Charlene de Avila Plaza, 'Intellectual Property in Decisions of Constitutional Courts in Latin American Countries' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015) 238. The concept refers to the elements of the legal system that, even if not mentioned in the constitution, are part of it.

[149] Constitucion de la Republica de Colombia 1886. Article 35. The 1886 text protected authors' rights as literary property for eighty years in a separate manner from the protection of other types of IP which were enacted as part of the presidential powers.

[150] The Peruvian Constitution is an example of such clause: 'Article 2: Every person has the right: (…) 8. To freedom of intellectual, artistic, technical, and scientific creation, as well as to ownership of such creations and to any benefits derived from them. The State promotes access to culture and encourages its development and dissemination.'

In this option, the US constitutional clause is perhaps the best example of this possibility. It empowers Congress to legislate about the matter and it states the purpose of such protection:[151] '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'.[152] In this case, the persistence of the clause is determinant in the interpretation of copyright law. However, the utilitarian approach commanding US' copyright laws might induce one to think that there is some distance between protecting authors and protecting investments. Yet the constitutional clause contains a direct call for the protection of author's interests and, in some judicial cases, its application refers directly to their protection and the implications on culture. The *Burrow-Giles* case,[153] mentioned in the section above, is a good example of such rationales.

However, this is not the only case. Argentina, Spain and Mexico have also introduced both formal and programmatic clauses even if they did it in separated clauses. For example:

Argentinian 1853 Constitution:[154]

> *Article 17. Property is inviolable, and no inhabitant of the Nation can be deprived thereof except by virtue of a judgment supported by law. Expropriation for reasons of public utility must be authorized by law and previously indemnified. Congress alone imposes the taxes mentioned in Article 4. No*

[151] Melville B Nimmer and David Nimmer, *Nimmer on Copyright* (Matthew Bender 2003) 1-6; Adolf Dietz, 'The Place of Copyright Law within the Hierarchy of Norms: The Constitutional Issue' in Pierre Sirinelli (ed), *Exploring the Sources of Copyright. ALAI 2005 Paris.* (ALAI 2005) 57.

[152] United States Constitution, Article I, Section 8. See United States Copyright Office, *Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code. Circular 92.* (Library of Congress 2011) <www.copyright.gov>.

[153] *Burrow-Giles Lithographic Co v Sarony* 111 US 53. See also *Feist Publications v Rural Telephone Service* 1991 US Lexis 1856; *Bleistein v. Donaldson Lithographing Co*. 188 US 239 (1903); *Eric Eldred et al v John D Ashcroft* 2003 US Lexis 751.

[154] The Argentinian Constitution has been reformed in 1949 and in 1994. In spite of that, article 17 has not been changed since 1853.

personal service can be required except by virtue of a law or a judgment supported by law. Every author or inventor is the exclusive owner of his work, invention or discovery for the term granted him by law. The confiscation of property is stricken out forever from the Argentine Penal Code. No armed body may make requisitions, or demand assistance of any kind.
(…)

Article 75.
The Congress shall have power: (…)
19. (…)
To enact laws which protect cultural identity and pluralism, the unrestrained creation and circulation of the works of authors, the artistic heritage, and cultural and audiovisual spaces.

Spanish 1978 Constitution:

Section 20. 1. The following rights are recognized and protected: a. the right to freely express and spread thoughts, ideas and opinions through words, in writing or by any other means of reproduction. b. the right to literary, artistic, scientific and technical production and creation. c. the right to academic freedom. d. the right to freely communicate or receive truthful information by any means of dissemination whatsoever. The law shall regulate the right to the clause of conscience and professional secrecy in the exercise of these freedoms. 2. The exercise of these rights may not be restricted by any form of prior censorship. (…)

Section 149. (…)
1) *The State shall have exclusive competence over the following matters: (…)*
9th. Legislation on copyright and industrial property.

Mexican 1917 Constitution:

Article 28. In the United Mexican States, all monopolies, monopoly practices, state monopolies and tax exemptions are prohibited. Protectionist policies are also prohibited. (…)

Privileges granted for a given period of time to authors and artists for them to produce their pieces of work and to inventors and those individuals who improve inventions will not be considered monopolies. (…)

Article 73:

The Congress shall have the power to: (…)

XXV. (…) legislate on copyright and other issues of intellectual property issues related to the same.

A wider examination of the different constitutional clauses will show that, either as a separated right or as part of the general protection of intellectual property, in almost all Latin American countries copyright is constitutionally protected. Moreover, in some cases, constitutions include the international instruments protecting human rights as part of its structure. That is the case in Colombian Constitution, in which article 93 introduces the '[i]nternational treaties and agreements ratified by Congress that recognize human rights and prohibit their limitation in states of emergency have domestic priority' and therefore are part of the Constitution: 'The rights and duties mentioned in this Charter shall be interpreted in accordance with international treaties on human rights ratified by Colombia' the article continues.[155] That implies that in the

[155] The Mexican Constitution shows a similar reference to the human rights treaties: 'Article 1: In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights. Such human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself.

The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favour of the broader protection of people at all times.

All authorities, in their areas of competence, are obliged to promote, respect, protect and guarantee Human Rights, in accordance with the principles of universality, interdependence, indivisibility and progressiveness. As a consequence, the State must prevent, investigate, penalize and rectify violations to Human Rights, according to the law.'

The Argentinian Constitution expressively recognises the constitutional character of certain human right treaties: 'The following [international instruments], under the conditions under which they are in force, stand on the same level as the Constitution, [but] do not repeal any article in the First Part of this

case of such countries, the obligations from the UDHR (article 27), the ICESCR (article 15) and in the case of the American countries the American Declaration of the Rights and Duties of Man (ADRDM) (article 13) have direct application as part of the fundamental rights of these nations.

The European law requires special mention. The question of whether the Treaty on the European Union (TEU) includes the protection of fundamental rights and in which manner has been assessed by scholars such as Craig & de Burca[156] and Chalmers, Davies, and Monti.[157] According to them, the EU Charter and the ECHR are part of the sources of the European Law, but its interpretation is subject to certain limitations in the case of the Charter as established in its Title VII.[158] European law, however, does protect copyright, particularly by the EU Charter through the protection of intellectual

Constitution, and must be understood as complementary of the rights and guarantees recognized therein: The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its Optional Protocol; the [International] Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment; and the Convention on the Rights of the Child. They may only be denounced, if such is to be the case, by the National Executive Power, after prior approval by two thirds of the totality of the members of each Chamber.'

Spain also introduces the supremacy of such treaties within their constitution: 'Part I. Fundamental Rights and Duties, Section 10: (…) 2. Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.'

[156] Paul Craig and Grainne de Burca, *EU Law. Text, Cases, and Materials* (6th edn, Oxford University Press 2015).

[157] Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (3th edn, Cambridge University Press 2014).

[158] See also Christophe Geiger, 'Reconceptualizing the Constitutional Dimension of Intellectual Property' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (3d edn, Kluwer Law International 2015).

property as a type of property. This is one of the main conclusions expressed by Geiger in his article about the constitutionalisation of copyright.[159]

The matter is important because the Charter introduces intellectual property as a right within the general protection of property, while the ECHR does not, at least in express. The other source recognised by the TEU is the general principles of law, which are directly connected with two other sources, first and more important is the constitutional traditions of the members, which is relevant regarding the Spanish Constitution in this case. The second, according to Craig & de Burca, extends the general principles of law to the international treaties '…on which the Member States have collaborated or of which they are signatories' as guidelines to be followed within the EU Communitarian Law.[160] Consequently, it is possible to assert that copyright within the EU Charter and the ECHR is protected as a fundamental right. For example, in the Spanish constitution. European case law supports such assertion also.

However, it is possible to apply the distinction the CJEU has identified between the essential function of copyright and the scope of copyright. Such a distinction is relevant for the analysis in question here, that is, how programmatic can be understood the protection of copyright as a fundamental right towards the promotion of the communicative rationality of a given society. The discussion about to which extent copyright can satisfy the collective interests of society pertains to the scope of copyright and its limitations. Principles such as the no protection of ideas, the duration of the exclusive rights, or the limitations and exceptions to copyright moderate the interaction between interests collective and private. On the other hand, the essential function of copyright, which is 'to protect the moral rights in the work and ensure a reward for creative effort',[161] refers to those cases in which copyright and freedom of

[159] Christophe Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015) 669-671.

[160] Paul Craig and Grainne de Burca, *EU Law. Text, Cases, and Materials* (6th edn, Oxford University Press 2015) 385.

[161] Joined Cases C-241/91 and C-242/91 *Radio Telefis Eireann and another v European Commission* [1995] ECR I-743 para 35. See also Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-271. In *Promusicae*, the Court accepts the principle

expression interact in what is referred to the interests of creators.[162] That is, to what extent copyright satisfy its promise of rewarding creativity and protect the identity of the author with her work. This connects the complex approach proposed in the second chapter regarding the implications of considering author's rights through a modern understanding of natural rights integrated into the rationality of the principles of autonomy and democracy through the concept of communicative rationality. While the scope of copyright points towards society, its essential function points to the creator himself and his rights and freedoms.

In addition, the CJEU in the *Laserdisken* case has also made references to the TEU's article 167 (former 151) which enacted the protection of culture as a principle within the EU. Such principle supports, in part, the Directive 2001/29, particularly regarding its recital 12th.[163] According to the CJEU, 'any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation and a rigorous, effective system for their protection is one of the main ways of ensuring that European cultural creativity and production receive the

according to which 'The balance between the relevant fundamental rights must first be struck by the Community legislature and, in the interpretation of Community law, by the court. However, the member states are also obliged to observe it when using up any remaining margin for regulation in the implementation of directives. Moreover, the authorities and courts of the member states are not only required to interpret their national law in conformity with the Data Protection Directives, but also to ensure that they do not act on the basis of an interpretation of those directives which conflicts with the fundamental rights protected by the Community legal order or the other general principles of Community law' para 56.

[162] This perspective differs from the assessment of possible conflict between copyright and freedom of expression as for example in Christophe Geiger and Elena Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (2014) 45 IIC - International Review of Intellectual Property and Competition Law 316 <http://link.springer.com/10.1007/s40319-014-0181-3>.

[163] Case C-479/04 *Laserdisken ApS v Kulturministeriet* [2006] ECR I-8089. The recital reads as follows: 'Adequate protection of copyrighted works and subject matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action.' Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

necessary resources and of safeguarding the independence and dignity of artistic creators and performers'.[164]

Taken together, these findings suggest a role for constitutional clauses in the protection of copyright. However, it is important to consider that the mere introduction of copyright clauses of any kind within the constitutions of the states does not necessarily mean the recognition of such right as a fundamental right. Quite often these rights, along with others, have been categorised as part of the second generation of human rights, which require the positive action of the state in its protection because they concern social, cultural, and economic interests.[165] According to Osiatynski, the general theory of human rights differentiates between the classical human rights in which the protection is negative, safeguarding the individual from state's intrusion, and the social, cultural and economic rights in which case the State should intervene to fulfil the aim proposed.[166] Even so, such an approach has been superseded as both kinds of rights require limitations and positive actions from the

[164] Case C-479/04 *Laserdisken ApS v Kulturministeriet* [2006] ECR I-8089 para 75. Other cases have emphasised other areas of connection between the protection of copyrights as property and other fundamental rights. That is the *Metronome Musik* case in which the role of the free market of ideas have been also assessed as relevant for the purpose of the essential function of copyright. See C-200/96 *Metronome Musik v Music Point Hokamp* [1998] ECR I-1953 paras 22-24. See also *Case C-306/05 Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA [2007] IP & T 521* para 67, in which it has been asserted that the expected remuneration for the communication to the public of a work is not related to the actual enjoyment of the work but to the legal possibility of enjoyment of such a work. The protection of privacy does not affect such a principle in the case of hotel rooms, as the potential enjoyment of works have been made possible by the Hotel not the costumer. Other cases have recongnised that other fundamental rights can be restricted only in the case in which it is justified for the purpose of protecting the public interest. Under such idea, it has been considered that the essential function of copyright is of public interest. See for example Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* [2011] ECR I-9083 para 95.

[165] See also Christophe Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015) 666-667.

[166] Wiktor Osiatynski, 'Social and Economic Rights in a New Constitution for Poland' in Andras Sajo (ed), *Western Rights? Post-Communist Application* (Kluwer Law International 1996) 1486, 1487.

State. However, says Osiatynski, there is a subtle difference between the two: traditional rights require the 'creation of a general mechanism which facilitates the implementation of rights', while the second generation of rights imply the entitlement of a particular benefit by which resources are redistributed.

In terms of what Osiatynski has identified as a characteristic of social rights, would copyright implicate the transfer of resources from one individual to another? The case law studied in the second chapter shows that such a transfer was discussed at the very beginning of copyright. The *Millar v. Taylor* and *Donaldson v. Beckett* UK cases, the US case of *Wheaton v. Peters,* and the French doctrinal discussion about the 'sacred' literary property, all suggest that something should be left in the hands of the audience when the work has been published. The action of publishing implies the transfer of certain resources from the individual control of the author to the audience. This is consistent with some of the common elements identified in the second chapter of this thesis, particularly the idea of an active access and participation in the cultural life of societies, the concept of a free market of knowledge and the availability of 'raw material' for ulterior creations. However, knowledge is transferred, but copyright, as an asset, is not. That creates a tension between the proprietary interests and the collective interests that copyright should be able to answer too. The complexities in such a balance have been studied widely by the academics.[167]

As such, this would be sufficient enough to understand that even without its express manifestation, author's rights would have been considered as a fundamental element in the structure of the state. Osiatynski's line of argumentation is a good example of such an assertion. After discussing to what extent the provisions for the protection of social and economic rights should be or not included in the post-communist constitutions, he concludes that the 'freedom of creative activities and scientific

[167] See, for example, some of the articles published in these books, Lawrence R Helfer and Graeme W Austin, *Human Rights and Intellectual Property. Mapping the Global Interface* (Cambridge University Press 2011); Lawrence R Helfer, *Intellectual Property and Human Rights* (Lawrence R Helfer ed, Edward Elgar Publishing 2013); Paul Torremans, *Intellectual Property Law and Human Rights* (Paul Torremans ed, 3rd edn, Kluwer Law International 2015); Christophe Geiger, *Research Handbook on Human Rights and Intellectual Property* (Christophe Geiger ed, Edward Elgar Publishing 2015) <http://www.elgaronline.com/view/9781783472413.xml>.

research, including the publication of results as well as the autonomy of academia, belong to the freedom of thought and expression'.[168] Consequently, the rights related to such a freedom should be included in the constitutions with full protection.

Is the protection of authors' moral and material interest an aspect of such a core element of freedom of thought and freedom of expression as stressed by Osiatynski? The hinge between copyright and freedom of expression has been an aspect of wide analysis in the literature. Often the case law and the scholars recognise the interaction of the two rights in a common level of fundamental rights. However, not so often they acknowledge the interaction between both in a level of complementarity.

From such a level of complementarity it is possible to argue that the mere constitutional introduction of copyright within the competences of the legislative branch is not enough in the case of copyright. Even in the case of hard approaches, like Osiatynski's thesis by which some of the social and economic rights do not require a constitutional assertion and should be left subjected to the competence of the legislature; copyright, due to its implications for democracy, should be outside of such a proprietary reduction. The next part of this section will examine the mechanism by which the expression of the author has been asserted as element of the constitutional protection of author's rights through the use of the concept of originality regarding the author.

B. The connection between authorship and originality from a constitutional perspective

The previous section in this chapter has analysed Ginsburg's six principles regarding the concept of authorship. One of such principles, the one to stress here, is the apparent synonymy between the concept of authorship and the concept of originality. Nevertheless, this is not a discussion about the concept of originality and its development, but a discussion about how the concept of originality understood as

[168] It is important to mention that the right of property and free enterprise have been also included in his list of rights to be included in the post-communist constitutions. For these two, the protection should be awarded as they are part of the classic personal freedoms, though.

author's personal contribution is immersed in the justification of protecting author's rights as a fundamental right.

The concept of the author under the legislation studied in this thesis relates the act of creation, the product of such a creation, and the doer of such an action. The different approaches the legislations of the countries under study have adopted regarding the concept of author and authorship, show that these concepts are attached to the natural or physical person who creates the work.[169] It can be seen also that the concept was not defined in previous legislations and it was introduced near to the date of US' adhesion to the Berne Convention in 1989. For example, in the case of the UK, the concept of the author was defined later in the UK Copyright Act (1988) as the person who creates the work. Similar provisions have been adopted by the other countries under study. That is the case of Colombia through the Andean legislation (1993), Spain (1987), and Mexico (1996). Nevertheless, US' Copyright Act has a complex provision (Section 101) in which the concept of the author is interlinked with the act of creation and the fixation of the work in a tangible form. In the case of Europe, only one of the European Directives on copyright identifies the author as the natural person who has created the work, in this case, the software.[170] The only exception in this case is the Argentinian legislation which keeps the structure of the pre-war laws in which the concept of the author is not expressed but assumed as the initial owner of the work.

Potentially, any individual could be considered as an author under the studied jurisdictions. The study on the principles in the first section of this chapter leads to the

[169] The author is defined as the person who creates the work (UK, Section 9, Copyright, Designs and Patents Act.); the physical person who has produced the intellectual creation (Colombia, article 3, Law No. 23 - On Copyright.); the first IP right holder (Argentina, article 4); the natural person who has created the literary or artistic work (Spain, article 5, Royal Legislative Decree No. 1/1996 of April 12, 1996. Consolidated text of the Law on [Copyright], regularizing, clarifying and harmonizing the Applicable Statutory Provisions.); the natural person who has created the literary or artistic work (Mexico, article 12, Federal Copyright Law, 1996 1996.). For the Argentinian copyright law see Leo G Koepfle, 'Copyright Protection Throughout the World. Part III The American Republics. Argentina.' in Guerra Everett (ed), *Industrial Property Bulletin*, vol III (The Division of Commercial Laws, Department of Commerce 1936).

[170] Parliament and Council Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs (Codified version) [2009] OJ L 111/16.

conclusion that, once legal requirements are met, authorship rises as consequence of human creativity; other kind of authorships, e.g. corporative, would be considered a legal fiction towards the protection of economic interests.

As it has been shown earlier, the courts from the countries under study have asserted that authorship cannot be uttered without a creation of some sort which should be original. They also have stated that such requirement has a constitutional status or is attached to the constitutional protection of author's rights. Why? Mostly because fostering creativity is an ultimate interest, but also, and rather consequently, because there is also a broader interest in fostering freedom of expression and therefore democracy. Those three elements (fostering creativity and freedom of expression and democracy) are often present in the decisions regarding the question of originality in the constitutional level of discussion and regarding the question of justifying of copyright.

Is freedom of expression (and freedom of creation) a condition for originality? Does the lack of freedom minimise author's creation? Such questions will be analysed in this section based on the comparative approach to the case law from the countries under study regarding their constitutional clauses or the absence of them. It will pay attention to the stream by which originality and the concept of authorship are connected and a relationship between author's communicative power and the concept of authorship can be found.

The order in which the countries will be presented might seem odd, but the purpose is to group the countries in the common law tradition and the countries in the civil law tradition. European Law is also mentioned because it applies for two of the countries.

1. United Kingdom

In the case of the UK, due to the absence of Constitutional norms for copyright, the references to these elements (authorship, creativity, freedom of expression) are not evident. The closer reference to the elements of creativity, freedom of expression in

terms of originality and the concept of authorship can be found in at least two recent decisions: *Ray* and *Sawkins*.

That originality implies an expression and not a mere idea is common grounded in the case law. This matter has been emphasized in the previous section of this chapter. However, such an expression should be an expression of thought and should originate from the author, but also such an expression should be free. The *Sawkins*' Court has asserted this last element of freedom as a tool to assess claimant's authorship regarding his participation in the reconstruction of certain pieces of sheet music[171]. In fact, for Justice Patten, the effect of recognising authorship was the result of the amount of freedom Mr Sawkins enjoyed when composing the missing elements of Lalande's work (a XVIII century French composer whose music was reconstructed by the claimant).[172]

The *Ray* case, on the other hand, shows that the test of originality recalls author's responsibility for her own writings. In this case, the question of joint authorship leads to the question of what elements constitute authorship. The basic answer was the provision of significant input, but also that the co-author shares the direct responsibility for the expression in the way it was created.[173] If the author is responsible for her creation, it is because she has created freely and her creative decisions produced such a responsibility. In absence of freedom, the responsibility would follow another path towards whoever has commanded such action.

Thus, these elements are present since the precursory cases of *Millar v Taylor* and *Donaldson v Beckett*. For the first one, in Lord Mansfield's opinion, it is a matter of justice that the author exercises his right to decide whether to publish or not his work[174]. Once the work is published, the author loses his control over it: the public benefits of it and the law become the mechanism by which the author can control, for

[171] *Sawkins v Hyperion Records Ltd* [2004] 4 All ER 418 para 439.

[172] *Sawkins v Hyperion Records Ltd* [2004] 4 All ER 418. para 430.

[173] *Ray v Classic FM plc [1998] All ER (D) 105*. See also *Brighton and another v Jones* [2004] All ER (D) 247 (May).

[174] *Millar v Taylor* (1769) 98 ER 201 [2398].

a limited time, if the work can be copied or published. In *Donaldson,* the structural principle of copyright by which the expression is protected, but not the ideas, is crucial in understanding the implications for freedom of expression that copyright can create.[175] The second chapter in this thesis refers to such discussions regarding the study of the rationales of copyright as a natural right.

The following quote would serve the purpose of demonstrating the above:

> The resemblance holds only in this. -As by the communication of an invention in trade, manufacture or machines, men are taught the art or science, they have a right to use it; so all the knowledge, which can be acquired from the contents of a book, is free for every man's use: if it teaches mathematics, physic, husbandry; if it teaches to write in verse or prose; if, by reading an epic poem, a man learns to make an epic poem of his own; he is at liberty.
>
> But printing is a trade or manufacture. The types and press are the mechanical instruments: the literary composition is as the material; which always is property. The book conveys knowledge, instruction, or entertainment: but multiplying copies in print is a quite distinct thing from all the book communicates. And there is no incongruity, to reserve that right; and yet convey the free use of all the book teaches.[176]

In conclusion, even if the UK does not state an evident correlation between copyright and freedom of expression, the elements of creativity, freedom, and responsibility over the creation of the work, and the implications for the dissemination of ideas that copyright has are all elements that have been considered under UK's case law.

Two elements can be highlighted in the decisions mentioned. First, freedom of expression, which in terms of the common elements discussed in the second chapter, regards the interests of access but also the interests of publishing and disseminating thoughts. The second element comprises the protection of proprietary interests

[175] *Donaldson v Beckett* (1774) 4 Burr 2408, 1 ER 837.

[176] *Millar v Taylor* (1769) 98 ER 201 [2331].

provided discursively *ab initio* for the author, but extends to third parties such as producers, publishers and other persons. Do these elements require a constitutional recognition? Probably not, but this is a consequence of the peculiarities of the British system, and it should not undermine the importance of those elements within the British system of laws.

2. United States of America

The next country to consider is the US. The first thing to establish is the scope of the concept of author. For this purpose, three cases will be mentioned: the *Burrow-Giles* and the *Aalmuhamed* cases, both mentioned above in the previous section, and the *Publications International* case.[177] In the *Burrow-Giles* case the Supreme Court analysed the constitutional meaning of the concept of author and considered that it should be widened to other expressions and not only the mere authorship of writings as it was mentioned in the original text of the Constitution. The Court asserted that, according to the Constitution, 'the author' refers to 'he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.'[178] Therefore, the author is entitled to the exclusive right on the production of his own genius or intellect.

In *Aalmuhamed* the Court for the 9th Circuit narrowed the concept of author in order to avoid the introduction of other contributors who might not have participated in the creation as such: 'Progress would be retarded rather than promoted, if an author could not consult with others and adopt their useful suggestions without sacrificing sole ownership of the work. Too open a definition of author would compel authors to insulate themselves and maintain ignorance of the contributions others might make.'[179] Therefore, a concept of 'author' based on the principle of no protection of ideas also

[177] Another case regarding the constitutionality of the originality requirement was mentioned previously in Section II. *Feist Publications v Rural Telephone Service* 1991 US Lexis 1856.

[178] *Burrow-Giles Lithographic Co v Sarony* 111 US 53, 58. In fact, this case connects such rationalisation to the English case *Millar v Taylor* (1769) 98 ER 201 asserting that copyright is 'the exclusive right of a man to the production of his own genius or intellect'.

[179] *Aalmuhammed v Lee* 202 F3d 1227 1234 (9th Cir 2000) para 27. See also *Burrow-Giles Lithographic Co v Sarony* 111 US 53.

serves to the constitutional mandate of promoting the arts and sciences, and it would be based on a communicative rationality of exchange of ideas. In this case, Spike Lee used claimant's advice in his film *Malcolm X*, but such advice could not reach the threshold of creativity and originality required constitutionally for copyright protection and consequently, Mr. Aalmuhamed could not be considered by the Court as an author of the film.

In the previous case of *Publications International* the Court of Appeals for the Seventh Circuit specifies that promoting the progress of science and art is possible by 'allowing others to build upon ideas or information' but the exclusive rights created by Congress 'shall accrue only to 'Authors and Inventors' with respect to their 'Writings and Discoveries''. Given that the Constitutional requirement of copyright is originality, explained by J. Kanne in this case as a 'minimum of creativity', then, if not present, there would not be authorship according to the Constitution.[180]

The author then is the originator of the work. However, a narrow definition of author should avoid the inclusion of contributors who do not have decision power (communicative power) in the final creation at least with a minimum amount of own creation.

The second element to consider in the US case law is the connection between author's creativity and freedom of expression. In *Eldred v Ashcroft*, the double purpose of the constitutional clause by which the function of copyright is to promote the useful arts and sciences and also to promote the creation and publication of free expression has been asserted. The Court highlighted: 'The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression.'[181]

[180] *Publications International, Limited v Meredith Corporation* 1996 US App Lexis 16281.

[181] *Eric Eldred et al v John D Ashcroft* 2003 US Lexis 751, 28. See *Feist Publications v Rural Telephone Service* 1991 US Lexis 1856; *Bleistein v. Donaldson Lithographing Co*. 188 US 239 (1903).

This double purpose of the Constitutional clause in the US has been also asserted more directly by the 5th Circuit in the case of *Miller v Universal Studios*. In this case, the discussion refers to the protection or not of facts or ideas. The Court addressed such a discussion by interpreting the constitutional clause and stated that the difference between not protecting facts and protecting expressions is important for the purpose of balancing the interest of stimulating creativity and people's 'need for unrestrained access to information'.[182] 'The line drawn between uncopyrightable facts and copyrightable expression of facts serves an important purpose in copyright law. It provides a means of balancing the public's interest in stimulating creative activity, as embodied in the Copyright Clause, against the public's need for unrestrained access to information. It allows a subsequent author to build upon and add to prior accomplishments without unnecessary duplication of effort' (at 24).

That the elements mentioned above are present in US' constitutional framework has been also stated in the *Eldred* case. In this case, the Court has asserted the double purpose of the constitutional clause by connecting Article 1, Section 8 and the First Amendment.[183] First, because 'copyright gives the holder no monopoly on any knowledge.' Second, because '[a] reader of an author's writing may make full use of any fact or idea she acquires from her reading'. And finally, because (quoting Harper & Row), 'the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas'. Moreover, the Court in *Eldred* recognised some 'built-in First Amendment accommodations': 1) No protection of ideas, 2) fair use doctrine.

The case law shows that copyright within the US system cannot be treated in the same manner as any other property. An author's property over his work differs from the property that any other person might have over it. This because the protection of author's rights might imply the protection of their property, but such a protection responds also to rationales that are distant from the mere economic interest and

[182] *Miller v Universal City Studios, Inc* 650 F2d 1365 (5th Cir 1981) para 24. Also see *Publications International, Limited v Meredith Corporation* 1996 US App Lexis 16281.

[183] *Eric Eldred et al v John D Ashcroft* 2003 US Lexis 751, 26.

include fostering creativity, the protection of freedom of expression, and democracy.[184] A good example of this might be seen in the *Trademark Cases* in which the US' constitutional level of protection for trademarks was distinguished from the constitutional copyright clause.[185] In this case, the Supreme Court found that the protection of trademarks does not correspond with the copyright constitutional clause but with the Commerce Clause. Such a distinction is important because without changing the proprietary nature of both rights (trademarks and copyright), the US' Court was able to differentiate the origin of each right and the aims to which each clause responds.

3. Europe

As noted above, the only existing definition of authorship in the European legislation is found on the Directive referring to software.[186] Paradoxically, for some authors, the production of software might represent the antinomy of authorship, for author's expression of personality might be difficult to support in these kind of works.[187] The extension of how copyright participates within the concept of originality in fostering freedom of expression can be traced through the case law in the CJEU.

Within this framework, the application of elements protecting author's moral and material interests in the discourse of fostering freedom of expression can be rich. Some cases are to be highlighted regarding this matter.

In the case of *Painer v. Standard VerlagsGmbH*, the Austrian Court requested the CJEU's opinion about the application of the ECHR and the EU Charter regarding the equality of protecting photographs within the Directive 2001/29. The CJEU, without referring to any of those two Human Rights instruments, recognised that the protection

[184] See for example *Harper & Row v Nation Enterprises* 1985 US Lexis 17.

[185] *Trademark Cases* 1879 US Lexis 1808.

[186] Article 2.1. Parliament and Council Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs (Codified version) [2009] OJ L 111/16.

[187] Christophe Geiger, 'Reconceptualizing the Constitutional Dimension of Intellectual Property' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (3d edn, Kluwer Law International 2015) 125.

of copyright is subject to the concept of originality as the result of author's expression of personality. Therefore, every expression that reaches the originality threshold should be protected equally as a copyrighted work.[188] The Court considered the threshold of originality in terms of freedom of creativity. It argued that the less degree of creative freedom that an author might have when shooting a portrait does not affect the general provision of protecting author's intellectual creation. The author '...can make free creatives choices in several ways and several points in its production'.

Creative freedom has been assessed as well by the CJEU in the case Football Dataco Ltd case. Here the question of whether the skills and labour invested in a given database is enough criteria to determine its copyright protection. The Court first indicated that the protection related to databases is referred to selection or arrangement of the database itself and not related to the data it contains. Second, that such selection or arrangement has to be original in the sense of author's expression of 'his creative ability […] making free and creative choices'.[189] Given that in the case, setting up the database was the result of technical criteria and certain rules, there was no room for such a creative freedom, therefore, no copyright protection can be allowed.

The connection between free creative choices and originality gives weight to the argument of the importance that the system gives to author's potential communicative power. Such a freedom protects not only the copyright assets but the possibility of their existence. It is in fact demanded by the law for the very existence of copyright protection. However, some could say that those are separate elements and that the protection of author's freedom of creativity is not the protection of copyright or author's rights. That would be a contradictory statement towards the basic elements that support copyright in terms of incentive and dissemination of knowledge, as mentioned earlier.

Painer shows the weight given to freedom of choice as a central element for copyright protection. The CJEU left in the hands of the national courts the decision of defining

[188] Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] ECR.

[189] Case *C-604/10 Football Dataco Ltd and others v Yahoo! Ltd UK and others* paras 32-39.

the threshold of originality in which such a freedom can be exercised. In the Court's words, the national courts should decide if '[the work] is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph'. The Court, however, did not utter a reference about the Human Rights instruments. There is not an evident reason for this in the case, but is possible to speculate that the Court, first, tried to avoid a jurisdictional nightmare, and second, it considered that the Directive itself provides enough elements of interpretation to assess the principles protecting author's creativity. In fact, the Court refers to the recital 17th of the Directive 93/98 which states a general principle of copyright and therefore of author's rights: a creation (in this case photographs) 'is to be considered original if it is the author's own reflecting his personality, no other criteria such as merit or purpose being taken into account'.[190]

The connection between the justification of protecting author's rights as a fundamental right and freedom of expression has been also asserted in the *Luksan* case. There, the Court referred directly to article 52 (1) of the EU Charter guiding the interpretation of the rules regarding the assignment of rights in the case of films. This might be an initial response for a matter that will be analysed further below regarding the possible conflict of interests among parties for the protection of the fundamental right of property (horizontal effect). The Court, in this case, has stated that author's rights prevail and cannot be 'undermined by the allocation of the exclusive exploitation rights to the film producer'.[191] Moreover, the Court weighed the public interest regarding the correct dissemination of the work within the interior market and the rights of the author (in this particular case the principal director) and it established that the director's rights could not be reduced without at least a fair compensation.[192]

The *Laserdisken* case is an interesting example on this matter. It reflects the importance given to freedom of expression *within* the internal market and its connection to the protection of copyright. The allegations from the claimant against the

[190] Council Directive 93/98/EEC of 29 October 1998 harmonizing the term of protection of copyright and certain related rights [1993] OJ L 290/9.

[191] Case C-277/10 *Luksan v van der Let* [2012] ECR.

[192] See also Case C-200/96 *Metronome Musik v Music Point Hokamp* [1998] ECR I-1953.

EU exhaustion of copyright and its implications on free access to culture was denied by the court with the simple argument that copyright ensures the author to introduce his work in the European market with no limitations. However, says the Court when referring to previous decisions from the ECtHR, the right to free access to information 'prohibits a Government from restricting a person from receiving information that others *wish or may be willing to impart to him*'.[193] By doing so, the CJEU understands that copyright has two dimensions, the protection of author's rights and the promotion of the dissemination of original expressions, for those expressions enrich society but they dissemination is under the control of the author.[194] Therefore, the CJEU has weighed the originator's right to communicate (or not) his work into a particular market/society against the right of the members of such society to have access to such a communication, and it has acknowledged that the latter could only be achieved by protecting the first.

The protection of authors in the context of the exercise of freedom of expression is clear, for instance, in the recitals 10 and 17 of the Directive 93/98/EEC.[195] These assert two basic principles: first, that copyright is fundamental for intellectual creation, and second, that the intellectual creation is original as it reflects author's personality. Perhaps where this connection is more evident is in the case of the Directive

[193] Case C-479/04 *Laserdisken ApS v Kulturministeriet* [2006] ECR I-8089 paras 64– 66.

[194] Case C-479/04 *Laserdisken ApS v Kulturministeriet* [2006] ECR I-8089 para 63.

[195] Council Directive 93/98/EEC of 29 October 1998 harmonizing the term of protection of copyright and certain related rights [1993] OJ L 290/9. The recitals read as follows: '(10) Whereas in its communication of 17 January 1991 'Follow-up to the Green Paper-Working programme of the Commission in the field of copyright and neighbouring rights' the Commission stresses the need to harmonize copyright and neighbouring rights at a high level of protection since these rights are fundamental to intellectual creation and stresses that their protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole; […] (17) Whereas the protection of photographs in the Member States is the subject of varying regimes; whereas in order to achieve a sufficient harmonization of the term of protection of photographic works, in particular of those which, due to their artistic or professional character, are of importance within the internal market, it is necessary to define the level of originality required in this Directive; whereas a photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account; whereas the protection of other photographs should be left to national law'.

2001/29/EC[196] which states the correlation of the four freedoms of the internal market with the protection of fundamental rights and principles of the Community, including intellectual property and freedom of expression (numbers 2nd, 3rd and 4th of the recitals). The Directive considers this as possible through the aims stated in the subsequent recitals, particularly number 10th, 11th and 12th. Although utilitarianism has been enshrined in the 10th recital which protects a return for the investments made for the production of works, the 11th refers also to the role that copyright plays for author's (and performer's) dignity and independence. Regarding the protection of author's interests in connection with their fundamental rights, those concepts are consistent with the protection of author's freedom of expression and their right to enjoy of the material interests resulted from the use of their works. Finally, by mentioning article 167 TEU (former article 151 TEC) the Directive confirms the EU interest in shaping copyright in light of superior interests regarding the protection of culture.[197] This gives structure to a complex system in which copyright is aimed to play its role supporting the very democratic principle of individual right to benefit from equal conditions of participation in the public decisions.

4. Spain

The other European country in this study is Spain. Its Constitution has a very clear mandate regarding the protection of author's interests and its connection with freedom of expression and therefore, democracy.[198]

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[196] Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

[197] In light of such principles, it is possible to assert for example that the Directive 2001/84/EC protects author's 'share in the economic success of their original works of art'. This case is interesting because the legal figure historically existed for years before becoming part of the legal systems in some European countries. However, the resale right (*droit de suite*) was not harmonised in the EU, therefore, with such an interest, those principles stated above were applied regarding this particular right. See also recital 11th from the Directive 2006/116/EC (Term of protection) and recitals 2nd and 5th from the Directive 2012/28/EU (Orphan works).

[198] Spanish Constitution mentioned above. For the Spanish case see also Gemma Minero Alejandre, 'Aproximación Jurídica Al Concepto de Derecho de Autor. Intento de Calificación Como Libertad de Producción Artística Y Científica O Como Derecho de Propiedad' (2013) 5 Dilemata 215.

In a case from the Civil Chamber of the Spanish Supreme Tribunal,[199] the judges argued that by creating an artistic work the author develops a communicative process. Such a process requires the protection of author's moral rights. The case refers to the possible relocation of an artistic work placed in a public space. The use of the work was contractually agreed with the city government. Later on, new plans for the city indicate that the sculpture would be moved from its original place. The Tribunal considered the case regarding the communication that the author pursued in placing his work in that particular site. They found that such a right, part of author's moral rights to protect the integrity of her work, was in connection with the right to access to culture, for the public would not be able to access the work in the way the author wanted. Nevertheless, the Tribunal suggests, such a right could be limited in some particular cases,[200] though in this case, the opposite right was the general interest of using public spaces. The Tribunal decided that the protection of the integrity of the work could be affected if the sculpture was moved, and that implies 'an interference with the dialogue between the author and the audience'. But if that were not the case, added the Tribunal, meaning that such a communication was not present, the sculpture could be moved under the condition of not creating a disproportionate sacrifice for the author, which would imply an abuse and yet, the moral right would not be affected.[201]

The element of communication in the above-mentioned case is important as the Tribunal linked such element with the concept of the social function of property (also enshrined by the Spanish Constitution), which in the case of copyright (*propiedad intelectual* from the Spanish use of the concept) means the satisfaction of the right to access to culture. This is important because in this case, such public interest was

[199] *Sentencia del Tribunal Supremo Sala de lo Civil No 458/2012* [2012] www.poderjudicial.es.

[200] The Tribunal refers to a previous case in which a *fresco* had to be demolished due to the risk it posed for the community. In that case, the protection of author's interests had to bend in favour of the general public interest.

[201] *Sentencia del Tribunal Supremo Sala de lo Civil No 458/2012* [2012] www.poderjudicial.es paas 35, 36. Free translation from the original in Spanish.

considered to be in the interest of protecting the integrity of the work as such, in the way the author had intended to communicate it.[202]

A previous case regarding this matter was decided in 1987 by the Supreme Tribunal in its Administrative Chamber (Contentious). In the case, a public office of the Basque Autonomous Government, called HABE, decided to publish the work of the plaintiffs with some sections omitted and without the indication of their names as authors. The main issue was whether the fundamental right to scientific production could be alleged against an administrative decision. The Tribunal considered that such a discussion implied not only the legal connection between the author and her work as a matter of private law, but also that such a link should be extended to the public law sphere. First, said the Tribunal, because scientific and artistic creations are protected by the Constitution, any conditions or constraints imposed to author's creative activity by the administration are prohibited. Second, the Tribunal stated that the act of creation is directly connected with the right of dignity and the right to free development of personality and therefore those rights are also in connection with author's moral rights. Furthermore, the Tribunal supported such an assertion on the applicability of the human rights instruments, particularly article 27th from the UDHR, article 15th of the ICESCR and the Berne Convention regarding the protection of author's interests.[203]

The importance of these two cases, separated for almost 15 years from one another, is the communicative element stressed by the judges. It highlights that copyright is a legal framework surrounding the communicative action between authors and audiences. Protecting author's freedom does not protect only her personal interests but also the audience interest in accessing author's work within the market of ideas. That is a fundamental right worth protecting, not only for economic purposes, but also for the principle of freedom of expression.

[202] Regarding this matter see also Gemma Minero Alejandre, 'Aproximación Jurídica Al Concepto de Derecho de Autor. Intento de Calificación Como Libertad de Producción Artística Y Científica O Como Derecho de Propiedad' (2013) 5 Dilemata 215.

[203] *Sentencia del Tribunal Supremo Sala de lo Contencioso No 499/1987* [1987] www.poderjudicial.es.

5. Colombia

Although Colombia belongs to the category of those countries in which their Constitution merely mentions the protection of intellectual property as a right that should be protected, their Constitutional Court has shaped the constitutional dimension of copyright through a series of decisions acknowledging its interaction with freedom of expression, the protection of author's dignity and social security, and the implications that these rights have for democracy and cultural diversity. Such a shaping activity comprises the examination of, first, special cases in which an author's rights have been considered under threat and their Constitutional protection was claimed,[204] and second, cases in which the constitutionality of certain pieces of legislation has been examined.

One of the first cases in which the Court assessed the scope of the constitutional protection of author's rights was the inclusion of the Phonograms Convention into the national legislation. In this case the Court acknowledged that protecting intellectual property and therefore copyright, is connected to other fundamental rights protecting: 1) the cultural wealth of the nation, 2) the right to have a job as a social obligation, 3) private property, 4) the obligation of fostering the access to culture, recognising that culture is the support of nationality, 5) and finally, the national cultural heritage. Therefore, for the Court, protecting copyright does not respond to a mere economic interest but also to a cultural one which reflects a humanistic, integral, and cultural philosophy that supports the constitutional framework for this protection.[205]

[204] Such kind of action, known as Tutela, protects citizen's fundamental rights through a fast procedure by which any court in the country is competent to take effective measures within 10 days to protect the fundamental right at risk. The 'Tutela' is similar to the Spanish and Mexican figure of 'Amparo', a type of writ invocated to protect such rights. Nevertheless, this is a residual procedure, meaning that it only applies if there is no other possible legal mechanism to protect the fundamental right under jeopardy and/or if the affectation of the right is imminent. The Constitutional Court has a general competence to revise selectively the 'tutela' cases ruled by any other judge in the country in a final instance as superior court in constitutional matters. In this case, the Court selected the case as it refers to the protection of author's economic rights.

[205] *C-334/93 (Corte Constitucional)* [1993] www.corteconstitucional.gov.co/relatoria.

The baseline for the recognition of author's moral rights as a fundamental right was created by the Court in 1998 when an article from the Law for the Promotion of Culture was attacked under claims of breaching the Constitution. This article establishes the inalienability of the moral and economic rights to protect the right of social security for authors, artists, and performers.[206] The decision of the Court discusses some questions which will be addressed in the next section of this chapter. For the interest of this section, it is important to highlight that the Court first asserted the fundamental protection of moral rights as an evident consequence of protecting author's freedom of creativity, which is a rational expression of human nature. Therefore, moral rights should be inalienable as, in fact, the national copyright law recognises. However, in the case of the economic rights, these are also protected by the Constitution as a mechanism to secure author's survival and dignity (in terms of an adequate standard of living) through the monetary utilities that her work can report.[207] However, those rights are not absolutely inalienable; their introduction into the market should be possible so they can produce the revenues they were created for. As a consequence, the inalienability of the economic rights should be accepted only in those cases in which author's social security is under threat.

The consequences of such a decision are yet to be discovered; the only decision applying directly is the decision from the Constitutional Court in the *Escalona* case.[208] In that case, the Court found that author's social security and dignity was in evident jeopardy and declared that, had the author not died during the trial, the contracts he signed with the publisher would have been revised in order to protect author's subsistence in congruence with his style of life. Nonetheless, other previous constitutional decisions are also based on those rationales.[209]

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[206] 'Articulo 33. Derechos de Autor. Los Derechos de Autor y conexos morales y patrimoniales de autores, actores, directores y dramaturgos, se consideran de carácter inalienable por las implicaciones que éstos tienen para la seguridad social del artista.' Law No. 397 - Law of Culture 1997.

[207] *C-053/01 (Corte Constitucional)* [2001] www.corteconstitucional.gov.co/relatoria.

[208] *T-367/09 (Corte Constitucional)* [2009] www.corteconstitucional.gov.co/relatoria.

[209] See *C-276/96 (Corte Constitucional)* [1996] www.corteconstitucional.gov.co/relatoria; *C-1490/00 (Corte Constitucional)* [2000] www.corteconstitucional.gov.co/relatoria.

One of these decisions, C-053/01, discusses the constitutional principle of social interest that creates conditions for Colombian copyright legislation. In that case, the norm attacked was part of an article that declares author's rights of social interest and consequently states that such rights should prevail over other rights as in the case of the neighbouring rights. This prevalence was supported by the Constitutional Court based on the social function that fostering artistic and scientific creativity has in protecting the free development of personality, freedom of expression, and the right to the recognition of own individual's work. The Court highlights the role that the protection of author's moral and material interests plays for society. Such interests and their protection should not be considered absolute, however. The social function of property, as stated in the Colombian Constitution, creates a counterweight for the exercise of such rights to satisfy societal interests.

Finally, the interaction between the right to creative freedom and the right to privacy were assessed in the case *La Bruja*[210]. *La Bruja* is a book that narrates the relationships between a woman, politicians, and the drug cartels in the country. This woman sued the author, arguing the book has infringed her privacy rights, and asked for a modification of the book erasing any connection with her name. The first instance accepted this theory and ordered the modification and republication of the book. The Constitutional Court decided to examine the case and found instead that the author's creative freedom should be protected. Given that the facts mentioned in the book were publicly known, the Court's main argument was that the work is the expression of author's original thoughts and, as such, it has an unbreakable connection with him. Therefore, any modification of such a work ordered by an authority is basically a case of censorship and should be prevented.

By linking the protection of copyright with other fundamental rights through the integral interpretation of the Constitution, the Colombian Constitutional Court has assembled a complex system supporting the protection of authors fundamental rights. It recognises the right to property but also determines that such a protection should be tuned with the scope of protecting the interests of society and authors themselves. Authors are protected through mechanisms that enhance their freedom of expression

[210] *SU-056/95 (Corte Constitucional)* [1995] www.corteconstitucional.gov.co/relatoria.

in connection with their personal contribution in the creation of an original work. But they should be also protected through mechanisms directed to their access to social security, well-being, and dignity. Without these elements, no freedom of expression would be possible.

6. Argentina

The Argentinian Constitution, which dates from 1853, protects intellectual property within the protection of property as a fundamental right (article 17). However, regarding the implementation of author's rights, article 75.19 gives faculties to the Congress to legislate about the protection of 'cultural identity and pluralism, the unrestrained creation and circulation of the works of authors, the artistic heritage, and cultural and audio-visual spaces'.[211]

The Constitutional protection of copyright and the condition of originality have been addressed by few cases in the Argentinian case law. Unfortunately, some of those cases confused the concept of originality with novelty. For example, in *Gvirtz*,[212] the National Chamber of Appeals for the Criminal and Correctional connected the two concepts to assess the originality of a given TV Show. It found that the absence of novelty implied the lack of originality to gain copyright protection. The Chamber, however, stated also that the concept of originality is derived from the constitutional protection of copyright. It is the result of an author's creative labour that expresses the 'fruits of her spirit'.

The constitutional protection of copyright and its relationship to the concept of originality has also been stated by the National Chamber of Appeals for the Commercial.[213] In the case, the Chamber asserted that the principle of no protection of ideas serves the purpose of free discussion, thus, for a work to be protected, it must express ideas with originality. This would be the result of author's intellectual creativity,

[211] Argentinian Constitution mentioned above (note 155).

[212] *C 26734 Gvirtz, Diego s/Ley 11723 (CNCRIM Y CORREC Sala V)*. [2005] www.elDial.com

[213] *C Pedro E vs M y Cia y otros (CNC Sala A)* [1989] Cerlalc, Derecho Autor Reg.

and the Constitution and the law protects these works under such principles. Therefore, ideas alone are free to be used, and this upholds freedom of expression.

Another decision, this time from the Court of First Instance in Civil and Commercial Matters of Rosario, assessed the constitutional character of copyright regarding an alleged abusive exercise of author's moral rights. Although in this case the protection of author's freedom of expression was not scrutinized, it is important to highlight that in this case the social function of property has been weighed against the valid argument of protecting author's moral rights (as has been shown in Colombian case law). In this case, the Court decided that exercising the author's moral rights can be abusive if it affects the communicative (and therefore social) function of the deceased author's work. This function determines that both the Argentinian Constitution and the human right treaties (included in the Constitution) concern the protection of the author's interests under limits that should protect the interests of society in accessing published works as well.[214] For this section, it is interesting to highlight how, in this case, the absoluteness of author's moral rights has been relativized for the protection of the communicative function of the work.

7. Mexico

Mexican case law shows a strong approach to the protection of author's interests. In a decision from the Plenum of the Supreme Court it was assessed if the right to receive royalties for the communication to the public of the work is an inalienable right or not. Although such a matter will be studied further below, in this section the attention will focus on some of the principles the Plenum has stated for their decision. According to the Court, the connection between freedom of expression (free emission, communication and reception of cultural information) and the protection of communication and publication of ideas should be considered essential for a

[214] *C 1420 Ediciones de la Flor SRL c/ Fontanarrosa Franco (CPICC Rosario)* [2013] https://es.scribd.com/document/135224740/Ediciones-de-la-Flor-SRL-c-Fontanarrosa-F-s-Accion-Mere-Declarativa-Expte-1420-08. See also Maximimliano Marzetti, '"Ediciones de La Flor v. Fontanarrosa Franco"' (2013) 44 IIC - International Review of Intellectual Property and Competition Law 851 <http://link.springer.com/10.1007/s40319-013-0115-5>.

constitutional state based on social and democratic principles. In addition, the protection of the moral and material interests of the author also has constitutional rank. Therefore, the interpretation of the law should consider these principles and balance the interests they protect.[215]

Although the concept of originality was not part of the considerations in the highest Court's decision,[216] one of the contested decisions that the Plenum has scrutinised did it (the one regarding the same problem adopted by the First Chamber of the Court).[217] In that decision, the Chamber studied the constitutional protection of creativity and originality. The Tribunal begun analysing the concept of author stating that, under the Mexican copyright law, this would be the physical person who has created the work. Such a person would be anyone capable to comply with the conditions the law establishes for copyright protection, one of which is originality. The author is then the first owner of the copyright, both in its moral and economic dimensions. For the Chamber, the protection established in the above-mentioned article 28 of the Mexican Constitution refers to the protection of author's creativity and, because of that, author's rights, constitutionally protected, depend on author's creativity, notwithstanding the fact the work was created under employment conditions or made for hire or

[215] *Sentencia No 20709 (SCJ Pleno)* (2007) XXVII 652 Sem Judic la Fed y su Gac. The court found these constitutional principles supporting copyright: 1) the protection of the moral and material interests of the author, 2) the prohibition of any deprivation of property without a previous judicial decision, 3) the free emission, communication, and reception of cultural information, 4) the protection of communication and publication of ideas through any media (literary or artistic), 5) education as a mean for people's constant economic, social and cultural improvement, and 6) freedom of contract and autonomy. Further analysis of this decision will be developed in the next section.

[216] The requirement of originality has been introduced in article 3 of the Mexican copyright law. Surprisingly, there are less judicial decisions regarding this matter in the Mexican case law than in other jurisdictions. The concept of originality has been stated in opposition to the concept of novelty applicable for inventions regarding the personal print author affixes in his work (*Sentencia No 163309 (Tribunales Colegiados de Distrito)* (2010) XXXII Sem Judic la Fed y su Gac. See also Gabriel E Larrea, Ricardo E Larrea and Luis Schmidt, 'Alai Mexico Group, Questionnaire – Boundaries and Interfaces' (2011) <http://www.alaidublin2011.org/>.).

[217] Free translation from *Amparo en revision 581/2005 (SCJ Sala 1)* [2005] Cerlalc, Derecho Autor Reg. The two higher chambers of the Supreme Court decided separately and oppositely on the same case. This is why the Plenum has had the last word closing the case.

independently. Consequently, originality would be a constitutional condition for copyright that is directly related to the author's creativity and freedom.

In line with the later, another axiomatic decision from the Mexican Supreme Tribunal in its First Chamber refers to the connection between the concept of freedom of creativity and the protection of an author's moral rights.[218] In this decision, the Tribunal declared that moral rights are protected by the Mexican Constitution and by the international instruments in which Mexico is part (e.g., the ICESCR). Once the Tribunal analysed in detail the concept of culture in its complex dimension, it concluded that the right of access to culture includes: 1) person's right to express herself freely, 2) the freedom to exercise her own cultural practices, 3) the freedom of developing and sharing knowledge, and 4) the right to the protection of her moral and material interests related to the work's product of her cultural activity. The decision is axiomatic as it finds that such complex right of culture would be affected when author's moral rights have been breached. By modifying the work and hiding author's name, the infringement affects the right to culture as a whole.

Furthermore, the Tribunal explained that there is a hinge between freedom of creativity and the protection of the result of exercising such right through a cultural expression, in this case an expression protected by copyright. According to the Tribunal, moral rights also protect the right of society of access to the message the author has created without changes or mutilations that affect the author's own intention. Therefore, for the Tribunal, communicating a mutilated version of author's work implies a breach of such moral rights affecting both author's and society's freedom of expression.

This is a case of horizontal effect. The mutilated version was communicated by a person who bought the copyright from a previous owner (not the author). Because such a publication comprises an action close to censorship, the clash between individual interests is present. On one hand the right of the copyright owner of publishing the work of which he has bought the rights, and on the other hand the right

[218] *Amparo directo 11/2011 (SCJ Sala 1)*.

of the author to see his work published integrally. In protection of author's rights, such publication could not be considered legal even if the copyright was legally bought.[219]

It is important to note here the weight given by the Court to the communicative power that the author's work represents and how this should be protected at the constitutional level. The cases presented above coincide in a wider conceptualization of copyright and author's protection in which property rights play a fundamental role along, with moral rights in the protection of author's interests.

Summarising, freedom of expression has a direct relation with the concept of originality, and therefore, with author's communicative power. The protection of author's moral and material rights through copyright laws implies that such principles are to be present in the system. The case law studied so far supports such an assertion.

C. Partial conclusions

The concept of communicative power has been stated by Habermas as a *motivating* force which is capable of '…mobilizing citizens' communicative freedom for the formation of political beliefs that in turn influence the production of legitimate law'.[220] It is clear, therefore, that this concept is intrinsically connected with the potentiality of creativity described, for instance, by Rogel Vide as a freedom of creation: freedom of creation is one step behind of authorship; the potentiality of being an author, which is constitutionally protected.[221] Nevertheless, it would not be just the expectation to obtain the qualification of author according to the law, the potentiality of creating something original. If authorship is the action by which a person became an author, and if this is only possible when the author meets the threshold of originality according to the national rules of copyright, then originality is a consequence of the free exercise of such a right. Therefore, originality can only exist if the individual has creative

[219] The consequences of such a horizontal effect will be studied in the next section of this chapter.

[220] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 147.

[221] Carlos Rogel Vide, 'Libertad de Creacion Y Derecho de Autor' in Luis Antonio Anguita Villanueva (ed), *Constitucion y Propiedad Intelectual* (1st edn, Reus 2014) 33.

freedom. Copyright creates the guarantees for such a freedom and for the dissemination of the resulting expression. By doing so, it satisfies, more or less effectively, the expectations of authors and society. Protecting authors' expectations should permit that society can satisfy theirs.[222]

By accepting that cultural expressions can be seen as communicative vehicles of thought, and by understanding that social power is 'a measure of the capability that an actor has of upholding his own interests towards or even against others in a given net of social relationships',[223] it is possible to assert that protecting author's moral and material interests in the systems of laws could overcome the conceptualization of these rights as mere property rights. Because of their free exercise of creativity, authors should be able to hold and freely exercise such powers (social and communicative). They could even transfer part of the social power the work can carry, but author's communicative power should be innate and copyright is meant to protect it. Accordingly, copyright would promote equal conditions of participation in the social life for authors so they can create autonomously. This would be a basic guarantee for democracy.

The connection between originality and authorship, as it has been described in this section, hinges on the communicative power of the author. Such power is not absolute, and it should be weighed against other interests, even those that would serve for the protection of author's own interests. As it is important to protect author's communicative power in order to maintain equal conditions of participation on the cultural life of a society, it is also important that such a communicative power is feasible and, in some cases, that means that the wealth a work can produce should be shared with enterprises who make possible such communication, e.g., the rationales created to support the distribution of copyrights in the case of films, or the examples in which the employer can hold in some extent the rights over the work the employee has created. However, such a balance, as unstable and idealistic as it appears, seems to

[222] The immerse promise of protection that the copyright laws carry has been explained in an earlier work. See David Felipe Alvarez Amezquita, 'La Libertad de Expresión Como Resultado y Garantía Principal Del Derecho de Autor' (2007) 1 Revista Iberoamericana de Derecho de Autor.

[223] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 175.

be desirable, and in case of changes in the weight, the courts are called to actively assess and restore it. This will be revisited in the next section.

IV. Human rights and the principle of private autonomy in copyright laws

One of the principal characteristics of copyright is its transferability. Most of the laws since the Statute of Anne recognise that at least the economic rights of the author can be assigned to a third party (in total or in part). Thus, once it is defined that the author enjoys constitutional protection regarding the creation of works, can an author challenge an assignment contract by claiming the protection of her moral and material interests? This is the question the Colombian Constitutional Court addressed in the *Escalona* case, which will be further studied below. In this case, the author claimed constitutional protection for his rights based on human rights principles and the application of the national regulation considering copyright inalienable if author's social security is under threat.[224] The answer to the question was positive in trying to balance the interests of the author and the interests of the acquirer of author's rights. The Court found that such acquirer, given the strong bargain position it held, is responsible for a duty of solidarity in assuring the protection of author's fundamental rights.

To be considered as an author, the case law analysed above has shown the applicability of six principles under which authorship can be allocated. Then, those principles have been narrowed regarding superior principles of democracy, freedom of expression, and freedom of creativity towards the protection of author's interests. In such an analysis, the case law has shown that author's rights have been constitutionally protected in some countries according to the general principles of freedom of expression and access to culture which have demonstrated a clear connection with the communication of knowledge and ideas, and originality. Such a connection can be understood through the functioning of 'the market of ideas' and it is consequently related to the exercise of author's communicative power.

[224] Article 33 from the Law of Promotion of Culture, was assessed by this same Court. See previous section III.B.5.

Would the author's interests really clash with other players in the chain of creation, production, and dissemination of copyrighted works? Not necessarily, but, as the case law studied in this chapter suggests, authors may require, in some cases, additional protection when negotiating their rights. Nevertheless, quite often the commercial relationships between authors and publishers or other corporations in charge of the dissemination of works are smooth enough to run quietly in the legal system.[225] In many cases, as it has been noted by scholars such as Fisk,[226] the entrepreneurial association between the author and the corporation can create more balanced relations in which author's freedom and creativity is fostered.

But absolute freedom of contract is not possible in those relationships. In a study about how the protection of fundamental rights can affect private law, Lawrence Fastrich presents an interesting analysis that would help in understanding the variability of the interactions between the fundamental protection of author's moral and material interests and the exercise of proprietary interests of third parties in the exploitation of copyrights. According to Fastrich, unless there is a balanced exercise of bargaining power, freedom of contract should face some restrictions.[227] The law and the case law will present that such rationality in the case of copyright is often accepted under the premise that the author is the weaker part in such a contractual relation.

Thus, such a desirable balance between authors and producers, as described in the last part of the previous section, entails a range of possibilities and multiple scenarios, some of which might create cases of a horizontal effect between these two persons. The concept of horizontality regards the possible affectation of fundamental rights by the action or omission of one individual to another.[228]

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[225] An interesting analysis on this matter can be found in Martin Kretschmer and others, 'The Relationship Between Copyright and Contract Law' (2010) www.sabip.org.uk 4.

[226] Catherine L Fisk, *Working Knowledge : Employee Innovation and the Rise of Corporate Intellectual Property, 1800-1930* (University of North Carolina Press 2009) Chapter 7.

[227] Lorenz Fastrich, 'Human Rights and Private Law' in Katja S Ziegler (ed), *Human Rights and Private Law. Privacy as Autonomy* (Hart Publishing 2007) 25.

[228] See second chapter, section III.A. See also Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, 1st edn, Oxford University Press 2002) 359.

Most of such a horizontal effect would occur around the contractual relationships between authors and others. The framework for the present section will be both, the contractual assignment of copyrights, and the transfer of copyrights because of the commission of works or in the case of works created under employment. The analysis would regard the required balance between possible conflicted interests in terms of protecting author's dignity and autonomy.

Such an analysis will use two spheres of sources, the sphere of positive legislation and its evolution during the consolidation of modern copyright law (which include post-Berne laws until present times),[229] and the sphere of the case law related to the protection of author's fundamental rights from the countries under study. Those cases have been selected in light of their connection to fundamental rights and their underpinning principles, and most of them have been mentioned in the previous sections of this chapter. Other cases, in which copyright entitlement has been solved in the scope of the applicable copyright law without considering either fundamental rights or principles, will not be considered as they do not show stress of the constitutional framework.

Regarding the protection of author's fundamental rights, the possible conflicts might arise from the core elements described in the General Comment 17, mentioned above. These are: the protection of author's moral interests (paternity and integrity) and the protection of author's material interests regarding their impact on author's adequate standard of living. Different choices may emerge depending on the nature of the right in question and the legal tradition in which such a right is inscribed.

In the case of moral rights, the possibility of a clash between stakeholders depends on the exercise and nature of such rights. For instance, the Anglo-Saxon tradition accepts that moral rights could be waived, while the continental tradition considers moral rights either as one sole thing with the economic rights (monistic approach) or

[229] For this purpose, an analytical and historical comparison of the pertinent copyright laws from the jurisdictions under study was made. Due to its size, this will not be introduced in this document, but the most relevant examples will be indicated. The study comprised the changes in the national and regional (the Andean Community and the European Union) legislation since 1886 onwards.

a separated branch (dualistic approach). In these two last possibilities, the moral rights are neither transferable nor waivable.[230]

In the case of economic rights, the situation is less evident. The variables are plenty in terms of whether the author is considered or not the first owner of the copyright, and the consequences of that might affect how the law is interpreted towards author's fundamental rights. In this case, two options will be considered, one is the assignment or transfer of the copyright from the author to another person by a contract, and the other is vesting the copyright (or part of it) to another person by mechanisms such as the WMH doctrine or similar figures such as works created by employees. These variables will be discussed in the sub-section below.

1. Balance

Copyright contractual relationships are often the result of a bargain between players with similar interests. Publishing or disseminating the work and obtaining some economic profit are the main interests at play. Fairness in these contractual relationships is desirable, and the copyright laws under study can show that they provide some tools for such an aim. For instance, in Europe, recital 31 from the Information Society Directive states that a fair balance is desirable for copyright relationships.

How this balance can be achieved? The first thing is acknowledging the conditions in the relationship. If the author is the weakest part of that bargain, in order to promote such a balance, the law should create some conditions to improve the author's bargaining position.[231]

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[230] In this case, Rigamonti proposes that the differences between the two main copyright traditions rely more on the way these rights are recognized and applied in practice and not much on their substantive protection. Cyrill P Rigamonti, 'The Conceptual Transformation of Moral Rights' (2007) 55 The American Journal of Comparative Law 67, 72.

[231] The weak position of the author has been often asserted. See, for example William Cornish, *Cases and Materials on Intellectual Property* (5th edn, Sweet & Maxwell 2006) 391. Cornish quotes this case: *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616. See also Claude Colombet,

a) Assignment or transfer

In the comparative perspective, the most immediate mechanism for the purpose of protecting author's interests is the requirement of certain formalities for contracts. Such formalities help to avoid simple consensual agreements in cases in which the author might find herself under stress. In the case of the assignment of copyright, all the countries under study require a written contract, the absence of which, in some cases, would affect the validity of the contract (UK, Colombia, Mexico, and the US) or its execution (the US and Spain[232]). Even greater formalities have been stated in particular cases such as in Mexico. In this case, the contract should be also attested by a notary public as condition of execution. Argentina not only requires the written agreement as condition of validity but its registration as well.

Other requisites, such as the registration of contracts, not for their validity but for their publicity, have been created to protect other interests (in particular, those of third parties in the property of the work). In these cases, the registration asserts assignee's property against such third parties.

Some other mechanisms for achieving balance are present in some of the legislation. For instance, when the contract does not mention certain elements, the law creates default conditions. Those elements are defined in the law. Examples of those are establishing the term of the assignment, the scope of rights assigned, or the territories in which the assignment will operate. The law from some countries supersedes the will

Major Principles of Copyright and Neighbouring Rights in the World. A Comparative Law Approach (UNESCO 1987); Martin Kretschmer and others, 'The Relationship Between Copyright and Contract Law' (2010) www.sabip.org.uk; Martin Kretschmer, 'Creator Contracts ('Supply Side')' in Martin Kretschmer and others (eds), *The Relationship Between Copyright and Contract Law* (SABIP 2010) <www.sabip.org.uk>; Richard Watt, 'Economic Theory of Copyright Contracts' in Martin Kretschmer and others (eds), *The Relationship Between Copyright and Contract Law* (SABIP 2010) <www.sabip.org.uk>.

[232] Although Spanish copyright law does not mention the execution of the contract, it mentions that the absence of a written contract would allow the author to request its resolution. See *Sentencia de la Audiencia Provincial de Alicante Sección 8ª No 236/2006* [2006] Cerlalc, Derecho Autor Reg.

of the parties if any of such elements are not present in the contract, benefiting the author by creating those default conditions. For example, some laws can limit the term of the transfer to 5 years, reduce the scope of the rights assigned to only those required for the execution of the contract, and / or define the territories in which the transfer would take effect. Mexican, Colombian, and Spanish laws are examples of such mechanisms. However, these are the product of recent changes. In fact, Colombian copyright law was amended in this matter in 2011; Mexico did it in 1996 and Spain in 1987.

However, other jurisdictions have shown a different approach. Under the premise of prevalence of the economic interest, it is possible to imply the transfer of copyright under certain conditions, even as an exception to the written formality required in the UK Law. Torremans highlights the possibility of recognising such implied terms in the case of assignment of copyright in the UK law.[233] Implied terms for assignment of copyright are subject to certain conditions stressed in *Fisher v. Brooker & Onward Music Ltd.* In this case, Mr Fisher participated in the recording of the final version of a song which, after its release, would be a hit in the music market. After the recording of a first version of the song, Fisher created and added his contribution. The question raised was whether Fisher was entitled to share the copyright in a second recording which included his contribution and which was finally the work published. The Court studied the possibility of accepting the existence of implied terms that would lead to the conclusion that Fisher had assigned his copyright to Essex Music and later Onward Music. In order to deny such implied terms, the Court assessed these three elements required for such alleged implication: 1) the existence of a previous agreement between the parties in conflict from which the implied terms can be derived; 2) business efficiency, which in this case was not alleged nor studied; and 3) the existence of customary usage in the particular industry that would lead to imply such assignment in the case (which was not proved).[234]

[233] Paul Torremans, *Holyoak and Torremans Intellectual Property Law* (7th edn, Oxford University Press 2013) 318-319. See also William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property Patents, Copyright, Trade Marks and Allied Rights* (8th edn, Sweet & Maxwell 2013).

[234] *Fisher v Brooker and another* [2006] All ER (D) 306 (Dec) paras 58-60.

It is possible in certain limited cases to imply the assignment of copyright. The *Ray* case, mentioned in the second section of this chapter, shows a perspective in this matter.[235] In the study of the principles for authorship, the case has been placed in the principle of 'money talks' because the judgement analysed the possibility of assigning author's rights to a third party, or at least to concede a grant through implied terms in the contract. In this case, the Court referred to the construction of the implied terms; it recalled the principles for such implied terms as mentioned above, and it recognised that this is an intrusion on the freedom of contract and therefore it should be constrained to strict conditions.[236] Although it is possible to consider that in certain cases the assignment of copyright might be implied, under certain conditions, the Court in *Ray* asserted that a minimalistic approach is desirable in order to not unreasonably affect the rights of the contractor and therefore the balance between the parties.[237]

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[235] *Ray v Classic FM plc* [1998] All ER (D) 105.

[236] The Court in this case refers to Lord Bingham in the *Philips* case. See *Ray v Classic FM plc* [1998] All ER (D) 105. See also *Cala Homes (South) Ltd and others v Alfred McAlpine Homes East Ltd* (1995) IP & T Digest 18.

[237] The Court indicated: '(8) circumstances may exist when the necessity for an assignment of copyright may be established. As Mr Howe has submitted, these circumstances are, however, only likely to arise if the Client needs in addition to the right to use the copyright works the right to exclude the Contractor from using the work and the ability to enforce the copyright against third parties. Examples of when this situation may arise include (a) where the purpose in commissioning the work is for the Client to multiply and sell copies on the market for which the work was created free from the sale of copies in competition with the Client by the Contractor or third parties; (b) where the Contractor creates a work which is derivative from a pre-existing work of the Client, e.g. when a draughtsman is engaged to turn designs of an article in sketch form by the Client into formal manufacturing drawings, and the draughtsman could not use the drawings himself without infringing the underlying rights of the Client; (c) where the Contractor is engaged as part of a team with employees of the Client to produce a composite or joint work and he is unable, or cannot have been intended to be able, to exploit for his own benefit the joint work or indeed any distinct contribution of his own created in the course of his engagement […] In each case it is necessary to consider the price paid, the impact on the Contractor of assignment of copyright and whether it can sensibly have been intended that the Contractor should retain any copyright as a separate item of property; (8) if necessity requires only the grant of a licence, the ambit of the licence must be the minimum which is required to secure to the Client the entitlement which the parties to contract must have intended to confer upon him. The amount of the purchase price which the Client under the contract has obliged himself to pay may be relevant to the ambit of the licence.' *Ray v Classic FM plc* [1998] All ER (D) 105 Section VIII.(a).(7).

In particular cases, a principle has been recognised that helps in the balance of the relationship. It is the principle of restrictive interpretation of contracts.[238] In this case, the interpreter of the contract should understand that the assignment cannot go further than what has been mentioned in the contract. In practice, this means that no right, term, or territory is comprised in the transfer if not mentioned in the contract. This tends to discourage general clauses of transfer in the copyright contracts (Articles 77 and 78 of the Colombian Copyright Law, Law No. 23, 1982 and Article 31 of the Decision 351/1993 from the Andean Community of Nations).[239]

As it will be explained below, in the case of the UK and the US, their legislation at the dawn of the 20th century protected authors or heirs with the possibility of reversion of the assignment in the case of the UK, and the renewal in the case of the US. This raises questions about the exercise of autonomy for contractual relationships, which will be analysed in the third subsection of this section.

b) Works made for hire or similar provisions

If the mechanism for the entitlement of the copyright is the WMH or other mechanism by which the employer or the commissioner of a work becomes the owner of the copyright, the comparative law shows a different approach. First, in this case, the weight given to author's will is reduced in favour of a presumption, in most of the cases, of transfer. As a presumption, it flips the burden of proof in the case of disputed authorship, therefore, it is the interested party, in this case the author, who should

[238] Claude Colombet, *Major Principles of Copyright and Neighbouring Rights in the World. A Comparative Law Approach* (UNESCO 1987).

[239] Article 31 reads as follows: 'Any transfer of the economic rights, and also authorizations or licenses for use, shall be understood to be limited to the forms of exploitation and other procedures expressly agreed upon in the relevant contract.' Articles 77 and 78 of the Colombian Copyright Law read as follows: 'Article 77. The different forms of use of the work shall be independent of each other; authorization by the author of one form of use shall not extend to other forms.' 'Article 78. The interpretation of legal transactions concerning copyright shall always be restrictive. The recognition of rights broader than those expressly granted by the author in the instrument concerned shall not be allowed.'

demonstrate that the deemed transfer should not apply.[240] However, even in these cases, the author is protected by some tools.

At first, it is important to mention that to date, the laws under this study accept the principle by which the author would be considered the first owner of copyright.[241] This might not be a general principle historically, but for the analysis here, even in those cases where the copyright is not vested initially in the hands of the author, such a circumstance has been considered as an exception within the national legislation and it is, as explained in the first section, a legal fiction.[242]

The tools mentioned above seem to confirm this, at least theoretically. First, in most of the cases a written contract is required for the purpose of this mechanism. Second, in all the legislations analysed, the author's will is safeguarded by stating that the effects of the presumed transfer of the copyright is subject to the absence of an agreement to the contrary. Even more, in the case of US section 101, for commissioned works it is required that the author accepts that the work in question will be considered as a WMH.[243] Third, in some cases, the transfer is limited somehow (Colombia, Spain). Fourth, in other cases, the transfer only applies for certain kinds of works and not for all (the US for commissioned works). Fifth, in the case of Mexico, the WMH doctrine creates a sui generis condition by which both the author and the employer should share the benefits of the use of the work, but only the employer can

[240] William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property Patents, Copyright, Trade Marks and Allied Rights* (8th edn, Sweet & Maxwell 2013) 523.

[241] For the US case, see *Burrow-Giles Lithographic Co v Sarony* 111 US 53. Moreover, as it will be argued in the next chapter, by a bilateral agreement, the US has recognised this in article 16.5.6 of its TPA with Colombia.

[242] See for example HIL (Hugh Ian Lang) Laddie 1946-2008 and others (eds), *The Modern Law of Copyright and Designs [Electronic Resource] / Laddie, Prescott & Vitoria.* (4th ed /, London : LexisNexis 2011) para 22.23-22.24.

[243] In the US Copyright Law, the concept of Work Made for Hire (WMH) includes both works made under employment and commissioned works. For the latter it is referred to collective works, motion pictures, and other works enunciated within the definition. For these kind of works is required that the authors have agreed by a written contract that the work will be considered as a WMH (Sec. 101, Def. (2), United States Copyright Office, *Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code. Circular 92.* (Library of Congress 2011) <www.copyright.gov>).

decide the uses to be authorised. In the case of the US and the UK, the WMH applies for works created as a result of the employment conditions (see subsection 3 below).[244]

A very descriptive case of balancing interests with respect of the WMH doctrine is the case of the works created for advertisement in Mexico. In this case, the Mexican law establishes that the first six months of exploitation of the economic rights by the commissioner are covered by the first upfront payment; but once such a period terminates, any use of the work should be paid again to the author at least in the same amount paid originally. After three years, any use will require a new contract with the author.[245]

The most important conclusion here is that authors find it possible to contractually reverse the effect of the deemed transfer of the copyright. Nevertheless, if the postulate of author's weaker bargain position is accepted, the possibility of an author introducing a change in the employment agreement in order to retain the copyright is highly unlikely. There are cases, as in *Brighton*,[246] in which the defendant was able to retain her right to the work since the beginning.

In general, the desired balance among parties in the contractual relationships find some helpful tools in different jurisdictions: either statutory mechanisms or jurisprudential developments tending to protect author's weaker position in those relationships. In some cases, the support for such policy is clearly the protection of author's moral and material interests, in others it is the principle of guaranteeing a proper reward for the creator.

[244] William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property Patents, Copyright, Trade Marks and Allied Rights* (8th edn, Sweet & Maxwell 2013) 257. See also the section referred to this matter in Robert A Gorman, Jane C Ginsburg and Anthony R Reese, *Copyright, Cases and Material* (8th edn, Thompson Reuters 2011).

[245] Article 74. Federal Copyright Law, 1996.

[246] *Brighton and another v Jones* [2004] All ER (D) 247 (May).

2. Dignity

The concept of dignity has been part of the integral view of human participation in society and it is considered as a duty to respect another one's rights.[247] According to Habermas, this concept (assimilated to the concept of integrity) is the support of 'symmetrical relations of recognition' and regards the discourse theory explained in the previous chapter.[248] Alexy, for example, has set the concept in terms of the negative liberty co-related with the right to freedom which cannot affect the rights of others.[249] Protecting an author's dignity would mean that, in the protection of other interests, economic or of another kind, the author cannot result in a worse off situation than other members of society. That is to say, if copyright protects an author's rights to incentivise creativity, the creator should not be affected in his rights in a worse manner than others would if their own rights are not protected as a consequence of the protection of an author's fundamental rights.[250]

An example of this idea can be seen in practice in the US case of *Eldred v. Ashcr*oft. In this case, the aim of protecting authors under equal and fair conditions lead the Court to recognise the tradition of extending the term of protection of copyright in favour of authors' interests. Quoting Huntington, the Court summarised the issue: '[J]ustice, policy, and equity alike forb[id]' that an 'author who had sold his [work] a week ago, be placed in a worse situation than the author who should sell his work the day after the passing of [the] act.'[251]

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[247] Philip Alston and Ryan Goodman, *International Human Rights. Text and Materials* (Oxford University Press 2013) 182-183.

[248] Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 271. See also Chapter 2, II.B.2.a).

[249] Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, 1st edn, Oxford University Press 2002) 233-234.

[250] Merges states this principle as follows: 'the creator of a work should be respected and recognized in ways that extend beyond the traditional package of rights associated with property: the right to exclude, to alienate (sell or license), to use as one wishes, and so forth. There is often a nonpecuniary dimension to situations where this principle is relevant, and indeed the interests it protects are often said to continue after a creator sells the rights to a given creative work.' Robert P Merges, *Justifying Intellectual Property* (Cambridge University Press 2011) 156.

[251] *Eric Eldred et al v John D Ashcroft* 2003 US Lexis 751, 13.

In view of the discussion and analysis proposed in this thesis, two interconnected dimensions of an author's dignity can be identified. One is the dignity in relation with well-being, understood as obtaining an adequate means of living, either in the modern concept of accessing social security, health, education, and other requirements, or in the traditional concept by which well-being is the consequence of property.[252] This first dimension is important inasmuch as an author's well-being would be the consequence of the effectivity of copyright principles, thus, a given public policy for author's social security through welfare laws should not be required. The second dimension of an authors' dignity is related to the practice of their freedom. In this dimension, an author's freedom of creativity is crucial. Although their autonomy can be seen somehow reduced, as in the case of certain elements of the WMH, authors' creativity, and therefore the consequential originality of her work, continues to be a fundamental element of his communicative power. Due to its connection with an author's autonomy, this dimension will be analysed in the subsection below.

Dignity in welfare

An author's dignity should not be different than anyone else's dignity. The problem here is not to define the content of author's dignity, but rather to find how such a principle can be applied in the case of copyright contractual relationships.

[252] Based on a neutral approach to the concept, some markers of well-being have been suggested in these two connected articles: Estelle Derclaye and Tim Taylor, 'Happy IP: Replacing the Law and Economics Justification for Intellectual Property Rights with a Well-Being Approach' (2015) 37 EIPR 197; Estelle Derclaye and Tim Taylor, 'Happy IP: Aligning Intellectual Property Rights with Well-Being' [2015] Intellectual Property Quarterly 1/14. Although these markers are useful for measuring IP well-being capability, it is important to consider that these authors' suggestion is based on an utilitarian-only approach to the justification of IP, and, as they recognise, other justifications as those based on the natural rights might play a role there. Perhaps the fundamental effect of the natural rights approach, suggested here, is that protecting copyright should be paternalistic as there are individual subjects that reasonably require special treatments due to their position within society. See Dworkin's definition of paternalism in 'Happy IP: Replacing the Law and Economics Justification for Intellectual Property Rights with a Well-Being Approach' 10.

The complex notion of dignity in the case of the author and her contractual relationships has been used in support of certain judicial cases. It also has been in the discourse of copyright scholars from both the common law and the civil law approaches. For example, in spite of the alleged utilitarian approach that characterises US copyright law, in 1909, the country created a mechanism by which the term of protection would be renewed one time in favour of the author or her heirs. In this case, they would be able to recover control of his work once the first term of protection has ended (Section 23, 1909 Act). In order to continue with such a benefit in the new 1976 Copyright Act, the US Congress created a mechanism by which the copyright return to the author under previous notice after 35 years of assignment (Section 203).[253] In supporting this mechanism, it has been argued that the author and her heirs can protect their future income, particularly in cases in which the work produces wealth after some time has passed since assignment.

Protecting author's income has been an issue of political interest since at least the earliest discussions regarding copyright. This is a point stressed by Justice Willes in *Millar v Taylor*[254] when discussing the importance of the Statute of Anne. He claimed that the Statute purported the protection of authors and their families, as publishing their works without their consent would create 'very great Detriment, and too often […] the Ruin of them...'. Even more, for Willes, the reference to the author's family clearly supports the idea that the Parliament in the Statute opts for protecting the author and not the proprietor (the assignee). Two basic principles can be drawn from this. First,

[253] Conditions provided, and notwithstanding the case of works made for hire, the transfer of copyright executed after January 1, 1978, is subject to termination in favour of the author (section 203.a). By such termination, all the rights transferred revert to the author (section 203.b). Conditions: 1) it should be effected by the author or if dead, the persons mentioned in section 203.a.2); 2) it should be effected within 5 years after 35 years of the execution of the transfer, or 35 years after the publication under the grant (if the right of publication was granted), or 40 years (whatever happens first) (section 203.a.3); 3) an advance notice in writing should be produced stating the date of termination and shall be served not less than 2 years or more than 10 before that date; 4) is should be recorded at the Register of Copyrights. Finally, no agreement to the contrary is valid about termination (section 203.a.5). United States Copyright Office, *Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code. Circular 92.* (Library of Congress 2011) <www.copyright.gov>.

[254] *Millar v Taylor* (1769) 98 ER 201 [2333], [2334].

that the author has the right to participate in the economic success of her work; second, that the author is the weaker party in the bargain.

In line with such argumentation, Lord Diplock reasserted that principle in *Schroeder Music Publishing v. Macaulay*.[255] In this case, an author entered into a contract at a young age in which he transferred all the copyright in his future creations for five years (or ten, if the contract continued), receiving only the amount of £50 as compensation. The fairness in the bargain was under scrutiny, and the Court found that in this case author's weaker position, particularly in the case of standard contracts, affected the enforceability of the contract and would be considered unperformed.

In contrast with the cases mentioned above concerning implied terms for the assignment of copyright, this case shows that in the UK such line of argumentation in defense of the author as a weaker party in the contractual relationship has at least been considered.

An example of how such principles have been made part of the policies is the recital 31 of the Information Society Directive which states that, as a principle among right-holders, there must be a fair balance between rights and interests.[256] The dignity of the author is mentioned in the same Directive (recital 9), and if those recitals are interpreted systematically it would be clear that the aim of an appropriate reward for the author for the use of their work, as proposed in recital 10 could not be achieved without the fair balance claimed in recital 31.[257]

The studied jurisdictions show some mechanisms available for the promotion of the author's dignity. In the case of the US, the above-mentioned termination of the contract of assignment; in the case of Mexico the limitation of the transfer to 15 years (with some exceptions). Another example, though less strong than those mentioned

[255] *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616. William Cornish, *Cases and Materials on Intellectual Property* (5th edn, Sweet & Maxwell 2006) 390 – 392.

[256] Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

[257] See Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR 6569 paras 36- 37.

previously, is the right for an equitable remuneration for the authors who transfer their rental right in the case of films (Europe, Spain, the UK, and recently Colombia).

The Colombian Constitutional Court and other courts have relied on this concept of a weaker position to assert the importance of protecting authors' interests, particularly in the case of protecting their income. The *Escalona* case, mentioned above, defines the scope of an author's dignity in connection with contractual practices, and the judicial defence of an author's interests in cases of a conflict as a result of the contract. For the Court, it is possible to consider that a person is defenceless not only if she cannot face another person's attack because there are no legal mechanisms at hand for her protection, but also in the case in which that person is weak in her contractual position and such mechanisms, if existent, are meaningless.

The precision in the concept of dignity helped the Colombian Court to define the scope of the Fundamental Jus which would be the limit for the protection of fundamental rights through the Constitutional mechanism. What is not within the Fundamental Jus pertains to the ordinary jurisdiction and is out of the possibility of horizontal effect. Consequently, author's dignity in the *Escalona* case was associated with the concept of his welfare and social security. The Court refers in this case to a previous decision that define the inalienability of author's rights which will be discussed in the next subsection.[258] Such a concept secures a minimal income for the author that would allow an adequate standard of living.

3. Autonomy

In terms of freedom of contract and the protection of author's will, the concept of autonomy creates some conundrums to analyse. These are related to the principle of freedom of contract against the protection of author's interests, the protection of author's freedom of creation in correlation with the concept of originality, and the problems that might arise from the protection of author's moral interests towards the exercise of contractual assignment of rights, WMH, or works created by employees.

[258] *C-155/98 (Corte Constitucional)* [1998] www.corteconstitucional.gov.co/relatoria.

a) Freedom of contract

The problem with the two principles stated above in sub-section 2, the principle of dignity and the principle of freedom of creativity, is that for the law to protect such interests, the principle of autonomy that commands contractual relationships *inter pares* must be reduced in favour of one of the parties. In this section, the restrictions to such an autonomy will be discussed in the comparative law. The aim is to find trends in the different systems that would demonstrate the pertinence of such protections and its connection with the teleological principle of protecting author's moral and material interests as a fundamental right.

The exercise of copyright, particularly in the case of the economic rights, is based on the principle of private autonomy. It should be possible for the author to freely transfer her rights to a third party in order to obtain economic benefits from his creation. However, the legislation about this matter shows that freedom of contract is not absolute in the case of copyright.[259]

(1) Assignment of copyright

Some countries restrict an author's freedom of contract more than others. Of the six countries under study, Mexico is the one that imposes more conditions in the contractual relationships. The UK and Argentina are probably the least interventionist. However, in the legislative history of the UK, certain limitations were adopted to protect the interests of an author's heirs. That is the case in section 5.2 in the 1909 Copyright Act which, under certain conditions, make it possible to reverse the assignment of copyright to the author's estate 25 years after his death. Even if the author had agreed in life to dispose of such rights, the contract in those terms would be considered null and void. Colombian law from 1886 had a similar provision. However, since 1946, it was possible for Colombian authors to dispose of those reversionary interests in detriment of their heirs. The Copyright Act of 1956 in the UK eliminated the figure from

[259] The principle of freedom of contract is more evident, although not absolute in the UK. See for this matter the study proposed for the evolution of this theory in Patrick Selim Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1979).

the legislation. A similar situation occurred with a Spanish provision enacted in 1879. Colombia and Mexico have similar provisions for reversion of assigned rights.[260]

Colombian law intervened strongly in author's contractual relationships through an unexpected statute. A law created for the promotion of culture included an article declaring authors' rights inalienable for the purpose of guaranteeing their social security. The Constitutional Court studied the statute and reduced its effect to those cases in which author's social security is in jeopardy.[261] The decision argued both the

[260] In the 19th century Spanish law established that in the case of presence of legal heirs, the assignment of the copyright would last for 25 years after the death of the author, and then, the copyright should be reverted to the heirs for the subsequent 55 years (article 6, Law of January 10. About [Copyright] 1879.). In the UK's Copyright Law of 1911, the assignment shall be reverted 25 years after the death of the author. Any reversionary interest in the copyright would become part of the author's state after his death. Conditions to the limitation: 1) the author should the first owner of the copyright; 2) about such a reversionary interest, any agreement in which the author might have entered in, will be deemed null and void; 3) it does not apply to collective works (section 5.2). In case of partial assignment, the assignee is the owner of the rights assigned and the assignor will remain as owner of the rights not assigned (section 5.3, Copyright Act 1911.). For the comparative analysis of these provisions in both the UK and Spain, see Paul Torremans and Carmen Otero Garcia-Castrillon, 'Reversionary Copyright: A Ghost of the Past or a Current Trap to Assignments of Copyright?' [2012] Intellectual Property Quarterly 77.

Other examples of this possibility are present in Colombia. The Law from 1886 established that In the case of presence of legal heirs, the assignment of the copyright would last for 25 years after the death of the author, and then, the copyright should be reverted to the heirs for the subsequent 55 years (article 15, Literary and Artistic Property. Law No. 32, 1886), Arcadio Plazas, *Derechos Intelectuales, Doctrina Y Legislacion*, vol 1 (Libreria Voluntad SA 1942). In 1946 an amendment was introduced according to which it is possible for the author to neutralise this limitation in the contract with the assignee. Therefore, if agreed, the copyright would be transferred with no limitation in time (article 91, third paragraph, Copyright Law No. 86, 1946). Eduardo Santa, *Regimen de Propiedad Intelectual Y de Prensa. Leyes, Decretos Y Resoluciones Sobre La Materia*, vol 1 (1st edn, Ministerio de Gobierno 1962). The same regulation, 1946 amendment included, was adopted by the current law (Article 23, Law No. 23 - On Copyright.)

In Mexico, no assignment of copyright should last more than 15 years unless the nature of the work or the magnitude of the investment justify it (article 33). Software is not subject to such a limitation in the term of assignment (article 103, part 2, Federal Copyright Law, 1996.).

[261] *C-155/98 (Corte Constitucional)* [1998] www.corteconstitucional.gov.co/relatoria. This case has been mentioned earlier in the discussion of the Constitutional approach to the concept of authorship.

importance of economic rights' transferability and the principle of protection of author's interests in the two dimensions mentioned above, author's freedom of creativity and the economic reward required for the guaranty of author's survival. This is why, in the final decision, absolute inalienability was denied and fitted to an unstable concept of risk in which protecting author's social security should prevail over the assignment. Such a strong tool to destabilise right-holder's ownership has not been used as much as would be expected. Nevertheless, the tool exists and it was alleged in the *Escalona* case, studied below. More research on the possible impact of such a tool is needed.

Mexico's highest Court examined a similar issue regarding the normative restriction to waiving an author's royalties resulting from the communication to the public of her work.[262] The Plenum of the Court was required to decide whether such a rule would imply the inalienability of the royalty or not. For this purpose, the Mexican Court introduced an amplified concept of the beneficiaries of the Constitutional protection of copyright: they are not only the authors, but also those persons who intervene in the development of copyright industries.

As it has been mentioned above when analysing the Mexican approach to the fundamental protection of author's rights, the Court introduced a complex study which begins with the premise that copyright should not be reduced to a mere question of private (or civil) law. It has wider connotations in which the Constitutional protection of author's rights is coherent with the protection of freedom of expression in connection with the free emission, reception, and communication of cultural information and the protection of author's moral and material interests. The exercise of such a complex right has a direct implication in author's autonomy, says the Court,[263] as it affects the principles of freedom of contract when the public policy finds that is necessary to restraint such autonomy in order to protect authors in their weaker position as much as it could affect author's own interests. In its analysis, the Court found that the Mexican Congress deliberately decided to withdraw from the bill the inalienability of this right and leave enacted a non-waivable right. A wider analysis of Mexican copyright law would show that other mechanisms have been enacted to protect

[262] *Sentencia No 20709 (SCJ Pleno)* (2007) XXVII 652 Sem Judic la Fed y su Gac 652.

[263] *Sentencia No 20709 (SCJ Pleno)* (2007) XXVII 652 Sem Judic la Fed y su Gac 652.

author's rights, as it has been mentioned in the previous sub-sections. For example by creating restrictions in the scope of the transferences, reducing the effect of the transfer in the case of works created for advertisement, and creating statutory implied terms, which would fill certain gaps in the contracts such as the definition of the duration of the transfer.

In Colombia, the *Escalona* case[264] has been the only case so far in which author's rights inalienability has been argued. The Court recognised as a principle that the law of contract should be protected, otherwise, the consequent legal instability would be highly prejudicial for the economy of the industry. However, the Court decided to address the case that challenged the assignment contracts an author signed, and, in spite of the death of the claimant, it first studied the legal feasibility of revising private contractual relationships from the perspective of the protection of fundamental rights. The Court analysed three basic elements for this purpose.

First, it analysed the horizontal effect of the constitutional protection of fundamental rights—in this case, author's rights. As it was mentioned above, the effect of protecting author's interests as a fundamental right in the system of laws is that it would clash with other fundamental rights, in particular the right to property. The literature in this area has been focused mostly on the interaction between societal interests (freedom of expression, access to culture, education) and the exclusive exercise of copyright. However, in the dimension proposed here, the clash would occur when author's rights affect other proprietary interests. This would be only possible in the case of real and present danger to the fundamental interests of the interested party, in this case, the author.

Secondly, the principle of *pacta sunt servanda*. The horizontal effect, as it will be explained below, implies that the judiciary should consider that some individual's actions might affect another individual's fundamental rights. In virtue of such a possibility, the judge might be able to break the contract or amend it in order to restore the desirable balance among parties.

[264] *T-367/09 (Corte Constitucional)* [2009] www.corteconstitucional.gov.co/relatoria.

Finally, the Court also considered the residual nature of the Constitutional action against contracts. The proper mechanism to solve disputes in the case of contracts would have been the civil jurisdiction. However, the Court considered that if it is a case of a weak position of one of the parties and the case of risk for that party's fundamental rights, the Constitutional action is viable as a mechanism to protect such rights.

The Court's findings rely on those three elements to find that if alive, the revision of the contracts between Mr Escalona and the musical publisher would have been accepted in order to protect his dignity.

(2) Works Made for Hire or similar figures

In the sphere of WMH the situation tends to be stringent towards the author as this figure tends to protect the economic interests of the investor (see 'money talks' principle in the first section here).

In the cases of WMH, the production of software and films, the legislations of the countries under study create presumptions in which the copyright is vested or assigned to the producer. However, as a manner of balance, those presumptions are constrained in certain conditions that more or less could protect author's interests.

Nevertheless, not every employment relationship has, as a consequence, the transfer of author's rights. There are some requirements that can be exemplified in some cases. In Spain, for instance, the First Chamber of the Supreme Tribunal assessed the conditions required for the transfer of rights under cases of WMH. In that case, the Court discarded the publishing contract as a WMH as it lacked two elements: the intention of the parties to transfer the copyright and that there was not a concrete contractual specificity in the expected content of the work. Due to the obscurity of the clauses of the contract, the Court applied the rules of the Spanish Civil Code by which

'[t]he interpretation of obscure clauses in the contract must not favour the party who caused the obscurity'.[265] Consequently, it declared that the contract was not a WMH.

In other legislations, financial muscle affects, in similar manner, the copyright entitlement. Colombia has rules related to works created under labour relationship and works made for hire. In this case, only those rights required by the employer or commissioner at the moment of creation of the work would be deemed transferred. Nevertheless, if by the contract the author retains his rights, the presumption stated in the law would be superseded.

The level of autonomy in these cases has been also assessed by the Colombian Constitutional Court in respect of the mechanism of presumptive transfer of the copyright in the case of film productions and the WMH.[266] In this case, the plaintiff attacked the laws enacting such transfers under the argument of an unreasonable limitation to the freedom of contract. The Court highlighted that, even if the presumptive transfer is the rule, the author keeps the possibility to negotiate and retain his rights. The statute protects the economic interests of the corporations and investors who take the risk of producing and publishing or disseminating the work at their expenses. An author's contractual autonomy is safeguarded as she can introduce an agreement rejecting the presumptive transfer within the contract. The Colombian Court bore in mind that copyright can only be originated by the hands of the author, therefore, third persons who have not participated in the creative process can only own the patrimonial rights derivatively from the author. In the case of moral persons, the Court denies completely the possibility of authorship, as they do not have creative capacity.[267]

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[265] See *Sentencia del Tribunal Supremo Sala de lo Civil No 55/2005* [2005] www.poderjudicial.es. Codigo Civil 1889. Article 1288. Translation available http://www.wipo.int/wipolex/en/text.jsp?file_id=221319#LinkTarget_6410.

[266] *C-276/96 (Corte Constitucional)* [1996] www.corteconstitucional.gov.co/relatoria.

[267] *C-276/96 (Corte Constitucional)* [1996] www.corteconstitucional.gov.co/relatoria. This principle has been also stated by the Andean Tribunal of Justice: *Proceso 24-IP-98* 14.

The restrictive interpretation of the WMH has been assessed as well in the US. In *Community for Creative Non-Violence v Reid*,[268] the scope of section 101 of the 1976 Copyright Act, when referring to the concept of WMH, is defined. First, in the case of commissioned works, the concept applies for certain types of work enumerated in the statute.[269] Secondly, the matter of what should be considered as '…a work prepared by an employee within the scope of his or her employment' should be assessed when the case is referred to as a work created under employment. The protection for authors consists in that any other kind of works not considered under the statute would not be deemed transferred to the employer.

The UK shows a slightly different approach. First, under the current law, the commissioned works are not considered part of the WMH.[270] Second, in the case of employment, the transfer is subject to demonstrate three basic conditions as mentioned by Bently and Sherman:[271] that the author is an employee, that the work was created in the course of employment, and that there is no agreement on the contrary.

In the UK, the case *Ray v Classic FM* mentioned above shows an interesting point of view about the matter under discussion. Notwithstanding the definition of conditions for authorship mentioned before in connection with the concept of originality, the case also explores the importance given to the economic muscle invested in the production of the work. Because the contract between the author (the claimant) and the corporation (the defendant) was not an employment contract, section 11.2 of the CDPA-UK would not apply. Consequently, no copyright would be in the hands of the defendant. However, Justice Lightman faced the problem of deciding in equity if the defendant is entitled to some amount of copyright. Given that the purpose of the contract was to obtain a certain work for the use of the company and some money

[268] *Community for Creative Non-Violence v Reid* 1989 US Lexis 2727.

[269] See Robert A Gorman, Jane C Ginsburg and Anthony R Reese, *Copyright, Cases and Material* (8th edn, Thompson Reuters 2011) 325.

[270] Paul Torremans, *Holyoak and Torremans Intellectual Property Law* (7th edn, Oxford University Press 2013) 236.

[271] Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 133-135.

was paid for such a work, the doctrine of implied terms in the contract was applied. As a consequence, it was accepted that a permission to use the commissioned work would be implied but 'the licence accordingly is to be limited to what is in the joint contemplation of the parties at the date of the contract, and does not extend to enable the Client to take advantage of a new unexpected profitable opportunity'.[272]

Comparatively, this is a similar reason to the one applied by the Argentinian courts. The lack of regulations on the matter led the judiciary to interpret the contract in equity. While protecting the interest of the author, the judiciary has also found the way to respond to the economic interest of the investor. The case law has analysed the possible consequences of contracts in which the creation is commissioned and has established that the transfer (or eventually the mere license) for the use of the work would be the result of the parties' volition expressed on the written agreement that the law requires for these circumstances. Such an agreement would be interpreted restrictively in favour of the author. Therefore, no more rights than those considered in the contract by which the work was commissioned would be considered assigned to the commissioner.[273]

In addition to the previous considerations, the principle of 'money talks' and the analysis of the rules in protection of the elements of dignity and autonomy regarding the assignment of copyrights and the WMH doctrine leads to the conclusion that the protection of author's rights, as established in the systems of laws of most of the countries under study, requires strong mechanisms of protection to produce a balance between the fundamental interests of authors and other copyright owners.

The trend is, in general, the limitations on the assignment of rights through different tools such as reversionary rights, limitation in time or in the scope of the transfer, or even, in some cases, by declaring the total or partial inalienability of the copyright. In the case of WMH or similar agreements, the author is affected by a presumed transfer that subsumes her will by the effect of the law. Nevertheless, in these cases, the

[272] *Ray v Classic FM plc* [1998] All ER (D) 105 Section VII.a.(9).

[273] *C 393625 Santander De Santamaría María Cristina c/ López Gutiérrez Benilde y otros s/ daños y perjuicios (CNCIV Sala F)* [2004] www.elDial.com.

causes for such presumption are usually restrictive and the law, in any case, opens the possibility for the author to contractually revert the effect of the presumption. The comparative study shows that freedom of contract is importantly restricted to secure higher aims such as the protection of author's rights, but also to guarantee a proper return on the investment the other party has incurred.

b) Freedom of creativity

Another sphere of autonomy to be analysed is the freedom the author can exercise while creating the work. In this case, the complexities of creation and production would show some peculiarities. There is not the same level of autonomy in the case of computer programs as in the case of poetry. However, both examples are protected under copyright. Should the rules of assignment or transfer of right apply in the same way in both cases? In the case of works created under commission or by employees, are they as free as independent authors whom create their works by their own initiative?

Three examples serve to understand this problem. First the case of WMH under the US Copyright Law (Section 101 US Code) and the case *CCNV v Reid*, mentioned above. Second, the modifications to the rules applied for WMH in Colombia. And third, the *Stevenson and others v MacDonald and other* in the UK in which it has been distinguished between the employer's control and author's integration to the company.

In the first case, the distinction that the Supreme Court clarifies in the *CCNV* case between commissioned works and works under employment is important. In this case, the exercise of control in the creation of the work was considered in order to justify the WMH for commissioned works. 'Because a party who hires a 'specially ordered or commissioned' work by definition has a right to specify the characteristics of the product desired, at the time the commission is accepted, and frequently until it is completed, the right to control the product test would mean that many works that could satisfy § 101(2) would already have been deemed works for hire under § 101(1).' However, the Court in its analysis of how the statute was approved found that such a control was not the reason used in supporting the figure. Thus, a control-based

rationality would have affected the balance between the parties in the case of commissioned works.[274]

On the other hand, in the case of employment under the US copyright law, the Court has defined thirteen factors (in search for 'predictability') which have been enumerated by Nard et al.[275] Those factors would help to assess in which case, under the common law of agency, it could be claimed that the work created by the employee belongs to the employer. It has been argued by the cited authors that such number of factors does not help for the predictability of the subject matter to be transferred as a single factor would do. Nevertheless, those factors are relevant in this analysis as they imply a general sense of employer's control on author's creation. Nard et al. summarize the factors from which is possible to highlight some that show such a level of control: 1) the hiring party's control over the 'manner and means' for the creation of the product; 2) the source of tools for the creation; 3) the right to assign more projects to the author under the same relationship; 4) author's scope of decision about hiring assistants and about the duration of the work; 5) whether the product is part of the hiring party's business and whether it is in business. These factors show that control is important for the *CCNV* Court regarding the employment situation to apply the WMH doctrine.[276]

The control issue has been also treated in the change in the legislation concerning WMH in Colombia. The original law from 1982 stated a specific rule for commissioned works that would not include the employment relationship.[277] Most of the argument about such a difference was that the presumption of transfer would only apply under

[274] *Community for Creative Non-Violence v Reid* 1989 US Lexis 2727 para 748. For the Court, 'importing a test based on a hiring party's right to control, or actual control of, a product would unravel the 'carefully worked out compromise aimed at balancing legitimate interests on both sides.'

[275] Craig Allen Nard, David W Barnes and Michael J Madison, *The Law of Intellectual Property*, vol 1 (2nd edn, Wolters Kluwer 2008) 416–417.

[276] Similar factors have been mentioned by Bently and Sherman regarding the employment conditions for the works created in the course of employment under UK Copyright Law. Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, Oxford University Press 2014) 134.

[277] The original article 20 in the 1982 Colombian Copyright Law was written only for the purpose of commissioned works made under a contractual plan for the creation of the work. Under such conditions, copyright would be transferred for the requesting party, and only author's moral rights (paternity and integrity) should remain in the hands of the author. Law No. 23 - On Copyright 1982. Article 20.

certain conditions. Such conditions were that the work should not exist before the contract was signed, that the producer should be responsible for the production of the work, and most important, that a previous plan for the creation of the commissioned work should have been agreed on previously. The plan served two basic purposes: the possibility of identifying the work product of the commission (and therefore the subject matter to be transferred) and that the plan determines the creation itself.

The reform adopted in 2011 changed Colombian legislation concerning WMH and included both the commissioned works and the works created under an employment relationship as in cases of WMH.[278] The statute, however, has abandoned the condition of a previous plan and it does not refer to any difference or qualification between commissioned works or employee's works whatsoever; it simply states the consequences for such kind of works, as it has been mentioned above.

Finally, the UK case of *Stevenson, Jordan and Harrison Ltd v McDonald & Evans* calls the attention to the fact that in some cases, control under a contract of service is not possible. Whether a work has been created under a contract of service or not, determines if such a work pertains to the employer or the employee. In the case, the question regarded if, while some sections of a book the author wrote were written because of lectures the author gave during his service to the plaintiffs, other sections were written for the purpose of a manual delivered by the company to its clients, all of those sections or only some of them would belong to the author's employer? According to the Court, while the sections written for the manual were an integral part of the company business and the author have worked as an employee, the copyright in such sections belong to his employer. The sections resulted from the lectures are not an integral part of the business, rather they would be considered an accessory to the

[278] The reform to the Colombian Copyright Law introduced in 2011 states that When the work has been commissioned or has been made by an employee, the law presumes that only those rights the hiring party requires for its regular activities at the moment of creation would be deemed transferred. Those rights outside such regular activities would remain under author's control. The contracting parties could decide differently by consensual agreement. In any case, such a relationship (employer – employee or commissioner – commissioned) should be agreed by writing; otherwise no presumption would apply (Art. 20, as it was amended in 2011 by the Law 1450, article 28. See Law No. 1450 - by which the National Development Plan 2010-2014 has been established 2011.).

contract of service. In the words of Denning, L.J., while the work created as an integral part of the business under the contract of service, even if created not necessarily under the control of the employer, would be considered anyhow as part of the business. However, the work created under a contract for services is accessory to such services, for instance delivering a lecture, and therefore it would not belong to the employer.[279] The important part here is to highlight that control is not necessarily the only standard applicable upon works created by employees, if the work was created as an integral part of the business by the author, it would belong to the employer.

The factors considered under US and UK laws are helpful in assessing the cases in which a work should be considered owned by the employer. In general terms, control over the creation is the main factor that determines the allocation of the copyright. But if the work is the result of activities which are integral part of the employer's business, this would be also a factor to consider for the allocation of the copyright as in the case of the UK. In the case of Colombia, the lack of determination of any factor lead to the Courts in the future to assess which cases the work might be exploited by the employer. However, it should be noted that, in the Colombian case under the new legislation, a work created under employment are not to be transferred in full to the employer but only those rights required at the moment of creation of the work would be assigned.

Although Argentinian law have not enacted general rules for the case of WMH, the case mentioned above about contracts in which the creation of a work was commissioned require the express assignment of the copyright within the contract. Thus, in the case of software, the conditions differ, and it is worth mentioning it as an indication of the probable route Argentinian law might follow. In this case, the software created under employment belongs to the employer only if the author was hired for such a purpose. That implies that some certainty should exist within the contract to identify in which cases the presumption would apply.

EU Law in the case of software makes those conditions more evident. Two mechanisms of creation might determine the transfer. Either the work has been

[279] *Stevenson, Jordan and Harrison Ltd v McDonald and Evans [1952] 69 RPC 10 22.*

created under the execution of duties as employee, which would be easily to prove, or the work was created following employer's orders. In both cases, it is clear that the author lacks freedom in the terms of her creation and is subjected to the constraints of the employment relationship.

From the point of view of the authors, however, in the case of commissioned works, the control rule seems to be a two-edged weapon. On one hand, the author is taking most of the risks in the creation and, as a consequence, it seems reasonable that in most of the cases the copyright would be kept in her hands (unless the law says otherwise). That would be the main conclusion of the *CCNV* Court in the US. On the other hand, the Colombian legislation has shown that it is possible to manage the control under commissioned works through the requirement of a previously agreed plan that would constrain author's creativity but also would provide certainty about whether a work falls under the WMH doctrine or not.

In the case of employment, certainty and control are factors at play. Employed authors normally are under the control of their employer and the clearer that relationship is, the more certain would be the ability to define which creations belong to the author and which ones are deemed transferred.

On the other hand, if the author lacks control of the creative process, this will imply that the rights would be given to the employer. Fisk has explained this phenomenon in the US as a mechanism by which creativity has been bureaucratised.[280] The collectivisation of creativity tends to reduce the scope of freedom that an employed author might have.

This could be seen as an extreme position, but it is undeniable that the less mechanisms the authors have to keep the control of their works, the less the principles that underline the protection of artistic and literary works are reflected in the practice of copyright.

[280] Catherine L Fisk, *Working Knowledge : Employee Innovation and the Rise of Corporate Intellectual Property, 1800-1930* (University of North Carolina Press 2009) Chapter 7.

In the same token of autonomy, the author's intent and will is openly protected. The best example of such a protection is the ban on the assignment of future works of the author in a general clause. A statutory provision in this case has been often enacted. By such provisions, undefined future works cannot be transferred. This is the case of Colombia, Spain and Mexico. In this last case, Spanish law makes clear the incidence of this in terms of freedom: the prohibition is also extended to contracts in which the author agrees not to create.[281] In the UK, prospective copyright has a special treatment in terms of the effects of the assignment agreement. For this section, what is clear is that the prospective copyright is referred to copyright that will or may come into existence but in reference of a future work. This might imply that such a work should be expected.[282]

The conclusion of this discussion might lead us to assert that if the author must relinquish his autonomy and/or his dignity somehow, her communicative power is also diminished and therefore, the strength in the protection of the work in terms of fundamental rights would be also diminished.[283]

c) The problem with moral rights

Although moral rights have been placed at the very core of author's rights as fundamental rights in some systems of laws, in other cases, even in those countries

[281] The assignment of rights over the group of works that an author might create in the future, should be considered null (article 43.3). Any contract by which the author accepts not to create some work in the future should be considered null (article 43.4). Non-existent modes of exploitation at the moment of the contract are not part of the contract (article 43.5). Royal Legislative Decree No. 1/1996 of April 12, 1996. Consolidated text of the Law on [Copyright], regularizing, clarifying and harmonizing the Applicable Statutory Provisions.

[282] For further analysis of this see HIL (Hugh Ian Lang) Laddie 1946-2008 and others (eds), *The Modern Law of Copyright and Designs [Electronic Resource] / Laddie, Prescott & Vitoria.* (4th ed /, London : LexisNexis 2011) para 24.6.

[283] A similar conclusion regarding the different uses that different kind of creators and their works can generate has been asserted by Gervais. See Daniel Gervais, *(Re)Structuring Copyright* (Edward Elgar Publishing 2017) https://www.elgaronline.com/view/9781785369490/9781785369490.xml 194-199.

where moral rights have been considered as part of personal rights, it is possible that someone other than the author could exercise some of these rights.[284]

However, even in the case of certain utilitarian approaches, moral rights are considered an important element in the cultural market.[285] Despite this, these rights mark a series of difficulties in the scope of their exercise and their protection through fundamental rights.

It is traditionally admitted that moral rights are or should be out of transferability. The complexities regarding this matter can be seen in some of the countries under study where in some cases moral rights can be vested in different persons and not in the author. Part of the literature about comparative copyright law have addressed this problem, showing the fluxes and counter-fluxes between the Continental author's right approach and the Common Law approach.[286] The basic point of contact is the Berne

[284] The conceptual evolution of moral rights in a comparative and historic perspective has been studied in Cyrill P Rigamonti, 'The Conceptual Transformation of Moral Rights' (2007) 55 The American Journal of Comparative Law 67. This author proposes an interesting dimension of moral rights as limitation of the freedom of contract in protection of author's rights.

[285] The implications for moral rights from the utilitarian point of view has been examined in Posner's approach to such a problem. In Posner's conclusion about this matter, the question about the quality of the product in a given market might be objective from the point of view of the consumer. This means that '[s]ociety might be more impressed by the contribution that the printer or binder or illustrator or publisher or even the readers had made to a book than by the writer's contribution. Or might think the writing less important than the ideas written up, which might come from someone else.' Richard A Posner, *Frontiers of Legal Theory* (Harvard University Press 2001) 45. Furthermore, continues the author, it is possible that the price of a 'Rembrandt' would not fall if it is discovered that it was painted by someone else, because any Rembrandt would be useful for categorizing the seventeenth-century period. However, he writes, the fact that the painting price falls because of such circumstance explains that works of art are credence goods due to the impossibility of determining their quality objectively. See also Josef Drexl, 'Constitutional Protection of Author's Moral Rights in the European Union - Between Privacy, Property and the Regulation of the Economy' in Katja S Ziegler (ed), *Human Rights and Private Law. Privacy as Autonomy* (Hart Publishing 2007) 162-163.

[286] See for example Jean-Luc Piotraut, 'An Author's Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared' [2006] Cardozo Arts & Entertainment 549; Elisabetta Bellini, 'Moral Right and Droit Moral : A Matter of Paradigms' [2005] RIDA 3; Denis S Karjala and Keiji Sugiyama, 'Fundamental Concepts in Japanese and American Copyright Law' (1988) 36 The American

Convention and its article 6bis. Whether this Treaty imposes inalienability for moral right or not will be addressed in the next chapter.

Moral rights have implications on author's communicative power, as has been asserted in the case law mentioned above. Their protection in the scope of fundamental rights has been asserted in cases from those countries in which the personal approach and the continental tradition is more persistent. Inalienability is only one dimension of the importance of moral rights in the protection of author's interests. In other cases, the exercise of these rights can affect even the same principle of freedom of creativity that is meant to be protected. This can be seen in cases where the author of a given work exercises his moral rights in order to impede the creation of a new work based on his, as in the case of parodies.

Josef Drexl published an interesting article regarding this matter in the area of influence of the EU Law.[287] The author assesses the option of protection of moral rights in the scope of some European countries. For the author, even after considering the disparities in the protection of moral rights that countries like the UK, France or Germany can offer, and, despite the structural differences between monistic and dualistic approaches, the most important difference he highlights is the possibility of waiving these rights. That is not the case for the Latin American countries mentioned in this study, there the moral rights are inalienable, non-waivable, and perpetual, and even, in some cases such as in Colombia, these rights have been integrated as part of the core of the constitutional protection.[288]

Journal of Comparative Law 613 <http://www.jstor.org/stable/840277>. The concern have been also expressed in the international perspective: Jane C Ginsburg, 'A Tale of Two Copyrights : Literary Property in Revolutionary France and America' (1990) 64 Tulane Law Review 991; Delia Lipszyc, *Copyright and Neighbouring Rights* (UNESCO 1999); Paul Goldstein and Bernt Hugenholtz, *International Copyright. Principles, Law, and Practice* (Oxford University Press 2013); Cyrill P Rigamonti, 'The Conceptual Transformation of Moral Rights' (2007) 55 The American Journal of Comparative Law 67.

[287] Josef Drexl, 'Constitutional Protection of Author's Moral Rights in the European Union - Between Privacy, Property and the Regulation of the Economy' in Katja S Ziegler (ed), *Human Rights and Private Law. Privacy as Autonomy* (Hart Publishing 2007) 167.

[288] *C-155/98 (Corte Constitucional)* [1998] www.corteconstitucional.gov.co/relatoria. See also Denis Borges Barbosa and Charlene de Avila Plaza, 'Intellectual Property in Decisions of Constitutional Courts

In conclusion, in terms of autonomy, moral rights might belong to the author, but the legal treatment of these rights imply that these would be attached to the rights of privacy and freedom of expression as has been highlighted above in the case law studying the connection between originality and authorship. Nevertheless, as Torremans highlights, '[i]f someone is not identified as the author, he cannot be granted moral rights from the substantive law point of view.'[289] Waiving these rights seems to be the mechanism available to lift the restrictions that might create a burden for third parties interested in the acquisition of copyrights. But this is only possible in UK's and US' laws, and since these rights are considered fundamental rights of the author[290], the effect of such a possibility should be considered. In terms of the communicative rationality, waiving moral rights would create distance between the author and her work, affecting author's communicative power as it will be moved to the right holder. In simple terms, by understanding the role of the author in democracy it would be seem contradictory that moral rights can be waived. The role of the individual in participating actively in the cultural life of society would be severed as no connection would be possible between who gave origin to the work and the work itself. This would then affect the possibility of recognising the other, the one who contributes, as it is only possible to identify the contribution, and eventually associate it to the interests of a corporation. As a response to such a problem, a prohibition to waiving these rights seems logical and exist in most of the countries under civil law tradition. In other jurisdictions, the mechanisms for protecting these rights have been developed by collective bargaining.[291]

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in Latin American Countries' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015).

[289] Paul Torremans, 'Authorship, Ownership of Right and Works Created by Employees: Which Law Applies?' [2005] EIPR 220, 221.

[290] See Committee on Economic Social and Cultural Rights, 'General Comment No. 17 (2005) (Article 15, Paragraph 1 (C), of the Covenant) E/C.12/GC/17' (Committee on Economic, Social and Cultural Rights 2006).

[291] See for instance, the guidelines FERA has suggested in: FERA, 'Directors' Contract Guidelines' (2011) http://www.filmdirectors.eu/wp-content/uploads/2011/11/guidelines_digital.pdf 47. Also see, Bernt Hugenholtz, 'The Great Copyright Robbery. Rights Allocation in a Digital Environment', *A Free Information Ecology in a Digital Environment* (IViR 2000) <https://www.ivir.nl/publicaties/download/thegreatcopyrightrobbery.pdf>.

In the cases of the Latin American countries and Spain, moral rights continue attached to the work. An example of how far this can go is found in the Mexican legislation about commissioned works for advertising. In this case, the law used a practical mechanism, making possible the custom of not mentioning authors' names. In that case, authors can simply accept that their name will be omitted in the publication or dissemination of the work, but that does not mean that they have relinquished their moral rights.[292] Still, in the range of author's autonomy, it is possible to publish the work anonymously. Often considered a strategy protecting author's freedom of expression, for instance in cases in which the publication may denounce people who can put author's life in risk, it can be also used for economic purposes as in the practice of advertising.

V. Conclusions for this chapter

Comprehending copyright towards a modern understanding of natural law and the communicative theory, as it has been proposed with Habermas, would imply understanding that, despite a mere proprietary approach to copyright, author's rights play a substantial role for the democratic principle.

The previous chapter has shown some considerations regarding the role of copyright in the theory of communicative reason. Such a theory recognises first, that communicative power is important regarding the construction of a system of laws in which culture operates as carrier of knowledge and, second, that because of constitutional principles, those individuals who create cultural devices are entitled to some basic rights to protect their dignity and autonomy. Those rights are associated with copyright. For instance, copyright promises a reward for author's intellectual labour when it transcends his private sphere's boundaries, and it can protect author's freedom of expression. In addition, it helps in the mobilization of knowledge among society members through the market in which works are disseminated. However, copyright should also procure that enough 'raw material' is available for further creativity, and this is possible through principles such as the no protection of ideas, or

[292] See Article 23 for the Mexican Copyright Law.

the duration of the exclusive rights and the possible limitations and exceptions to such rights. The copyright system, then, operates in a twofold way in which freedom of choice applies for all society members and authors, but it is not absolute as it imposes certain limitations to both of them, for instance in the case of protecting author's interests, certain limitations can be imposed to freedom of contract, but freedom of choice also implies that original creativity is a potentiality in every individual which if expressed would produce copyright.

The relation between the protection of the author and a modern understanding of natural rights mentioned in the second chapter have brought the conclusion that author's moral and material interests are worth to be protected in a complex mixture of interests that supersede the mere rewarding-economic reasonability. Towards the democratic principle, the author plays a fundamental role by creating vehicles of knowledge charged with communicative power. Consequently, copyright should be able to satisfy the right to access to and participate in cultural life with one foot in principles related to constitutional democracy, and another in the idea of a market of knowledge in which it plays. In addition, the right to be protected as author in relation with her creations relates to the role of the individual in the construction of consensus towards society, based on culturally constructed reasons. Freedom of choice is fundamental for such a role, on one hand, because such freedom has been assessed as core element to determine the originality. On the other hand, because a more diverse and open offer of cultural vehicles would impact positively individual's freedom of choice to access to knowledge. Finally, the right to obtain a reward or property for her creations is the promise the law gives to protect author´s freedom but also to enhance the diversity of cultural power inserted in a given society. Those interests are represented in the core elements of author's fundamental rights indicated through the General Comment 17, mentioned above. Thus, these elements respond to the principles of dignity and autonomy for authors.

Regarding the principles for authorship studied in the first part of this chapter, the discussion so far has demonstrated that authorship requires creativity and therefore human intervention in the meaning of originality. The analysis of the relationship between authorship and originality from the constitutional perspective has shown that fostering authors and protecting freedom of creativity are core elements for the

systems, for these protect equal conditions for all individuals to participate in the cultural life of society.

In the case law studied in the previous sections, it has been shown that freedom is an important precondition for author's creativity. The exercise of freedom of creativity implies the potential originality in the creation and consequently the existence of copyright. In the aftermath, the purpose of copyright guarantees a reward for the author, but the purpose of protecting author's rights is, additionally, the guaranty of the author's communicative power. The laws under study here have shown that some national public policies have adopted certain mechanisms in order to provide balance for author's contractual relationships. The aim of such balance is the protection of author's dignity. However, the law is not necessarily efficient in providing such a balance, which is unstable by nature. The policies that a country adopts are the result of slow movements and often it is not possible or feasible to anticipate the implications that new developments in the use and commercialisation of works (such as the use of works through the Internet) might have.[293] The case law should then enter in motion to promote and reshape the balance.

The answer to the question about how far a particular system can protect author's rights depends on many factors. On the analysis proposed in this chapter, the factors considered are the two basic mechanisms for the transfer of copyrights, the assignment by contractual agreements and the WMH doctrine or other similar mechanisms.

From those two factors, the principles of dignity and autonomy were studied from the perspective of the desired balance between the interests of authors and other right-holders of the copyright. For the analysis of how such a balance could be achieved, the case law and the comparative study of the legal instruments of the countries considered were studied. This has shown that some restrictions have been

[293] A good example of such a circumstance has been assessed for the proposed reform of the European Copyright laws in the digital market. See European Commission, 'Digital Single Market, Copyright' (*Digital Single Market*, 2016) <https://ec.europa.eu/digital-single-market/copyright> accessed 4 March 2017, 29.

implemented aimed to protect freedom of creativity and expression, the dignity of authors and the protection of their bargain position.

Those restrictions are: the creation of some formal requirements for the contracts (for example, the requirement of a written contract), the limitation on the scope or the duration of the rights transferred, the creation of supplementary clauses or implied terms favourable to authors that would replace gaps in the contracts, and, one of the most important, the reversion of the transfer. Some other restrictions apply as principles; one of those is the restrictive interpretation of contracts in favour of the author and another is the principle of inalienability of some rights, such as the moral rights, or the *droit de suite*.

Such restrictions could only operate within the system of laws. If the statutes do not produce effective tools for that purpose, the judiciary would be allowed to create them under very constrained conditions. This is particularly important in the case of the protection of authors as a weak party when negotiating their rights. The disparities between different countries regarding the protection of this weak position creates a necessity of establishing a basic structure of principles that would support such decisions. Such a structure would be based on the communicative rationality towards guaranteeing equal opportunities of participation for individuals in societal decisions and therefore in the cultural and scientific life of the community. For that purpose, the protection of author's moral and material interests would provide the supporting structure that would give base to these two elements. On one hand, it should support that authors benefit from the success the works they created through the principles of dignity and autonomy. On the other hand, it should be possible that, while protecting those interests, others also benefit from the chain of creation, production, and dissemination of works, either because they make such dissemination possible or because they are members of society which, through the same idea, enjoy the right to freely access and participate in the cultural and scientific life of their societies.

Consequently, once those principles have been identified by the judiciary, their assessment would review the mechanisms that the statutes have been implementing, and then the courts should decide whether the desirable balance has been altered and, if so, the mechanisms to restore it.

In the cases in which those two principles, autonomy, and/or dignity can be jeopardised, the judiciary would require intervening and protect such interests. In that case, horizontality seems to be an option. Nevertheless, for certain countries, direct horizontality might not be the proper path as in the case of the UK.[294] In other countries as in Colombia or Mexico, such path has been used in limited cases in which the judiciary has found that there is no other available mechanism to protect such fundamental interests.

Besides, the intervention of the judiciary, though it could be efficient, is the least likely due to two main reasons. One is that where it is possible, it would be only a subsidiary mechanism in which the Court can intervene in particular cases as last option in order to protect fundamental rights. The other reason is that court decisions in most of the cases solve particular conflicts. Only some jurisdictions can assess the constitutionality of the law and intervene directly in how they should be interpreted under constitutional principles. This is why the analysis proposed seeks for support in such constitutional principles to support author's protection.

In this thesis, the horizontal effect has been mentioned as a tool that might help in understanding the possible conflicts in protecting those principles. Horizontality can be, in fact, a very limited option in its application within the system of laws. This is because most of those systems should have created legal mechanisms with enough effectivity for the solving possible conflicts between stakeholders.[295] One example of such effectivity is the inalienability of moral rights which is mentioned above. Another example of this variable is the hardness of certain legislations in the case of contractual relationships between authors and third parties. Fewer cases have pushed enough in the particular system in order to obtain an assessment of horizontality for the

[294] Alison L Young, 'Horizontality and the Human Rights Act 1998' in Katja S Ziegler (ed), *Human Rights and Private Law. Privacy as Autonomy* (Hart Publishing 2007) 41ff.

[295] Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, 1st edn, Oxford University Press 2002) 358ff. See also Alison L Young, 'Horizontality and the Human Rights Act 1998' in Katja S Ziegler (ed), *Human Rights and Private Law. Privacy as Autonomy* (Hart Publishing 2007) 41ff; Lorenz Fastrich, 'Human Rights and Private Law' in Katja S Ziegler (ed), *Human Rights and Private Law. Privacy as Autonomy* (Hart Publishing 2007) 24.

protection of author's interests. An example of this is the *Painer* case where the CJEU did not answer the question of the application of the EU Convention and the EU Charter in the assessment of EU Copyright law.[296]

The result of those legal mechanisms available in the systems of laws under study is the creation of certain limitations to contractual autonomy. Although most of those limitations have been created as statutory enactments, some have been the result of the judiciary's active participation in the protection of author's interests. Then, some areas of action can be identified in order to further protect those principles and interests stated above: 1) the instance of legal policies in which the State could decide to structurally protect such interests; 2) the constitutional and international law's support of decisions from the judiciary when the legal instruments are not enough or have not been used correctly, and, finally, 3) the sphere of decision-making of stakeholders. In this last instance, the stakeholders' own policies of copyright management could achieve a better balance towards author's interests.

The instance of legal policies can create mechanisms of protection of authors in their contractual relationships. However, the most important drawback is that the creation of limitations to contractual freedom would not be easily accepted. Bearing this in mind, two possibilities arise as the most likely.

The first would be the creation of provisions called to fill eventual gaps in the contracts, for example in the case of assignment, if the contract does not define the scope of the transfer or its duration. The law could create statutory terms limiting the scope of the transfer to those rights related to the main interest of the assignee at the moment of the contract, or to limit the duration of the transfer for some years. In the case of WMH, some limitations in the scope of rights transferred could balance the relationship author-producer. Here, the rationality of the communicative theory could play an important role. The more communicative power a work has, the more protection its author/s would require. If the work has less communicative power, for instance in those types of works in which author's freedom of choice is limited, the effect of the transfer

[296] See Section III.B.3.See also: Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] ECR.

could be higher. Similar provisions as those shown in Mexico and Colombia, close to the doctrine of implied terms but bearing in mind not only the immediate purpose of the contract but also the superior interest in protecting the author could be adopted.

Other mechanisms within the possible introduction of legal reform of copyright contracts is the adoption of reversionary clauses limiting in time the duration of the transfer. Another is the introduction of mandatory limitations to the scope of the rights transferred, for instance, related to the nature of the commercial activities of the transferee at the moment of the contract.

Anticipating the activation of those legal mechanisms that would protect author's interests, stakeholders can assess their relationships and design contractual mechanisms in which, within the scope of action that private autonomy protects, some balanced clauses that protect author's interests could be created. The position of the author in the contractual relationship can be also improved by extra-legal mechanisms such as collective bargaining of contractual relationships or by improving the role that in some countries agencies and agents play in negotiating contracts. In this case agencies are not necessarily able to cover the whole spectrum of creators, though, and is important that not all jurisdictions have or can develop those structures of the same kind.

The second option then, relates more to the practice than to the contracts. Taking into account that in most of the cases in the jurisdictions studied, the WMH or the commission of works open the possibility of contractual agreement by which the author can retain some of the rights, the problem could be shifted towards improving author's bargaining position. It is possible to introduce figures of collective bargaining in certain sectors of the industry in which author's are not best sellers but rather contributors,[297] such as the sector of illustrations for books, writers, or musicians whom often have no power to negotiate their rights individually with companies long time structured for the dissemination of works. The terms introduced by collective bargain could have the same effect, reducing the scope of rights transferred and/or creating limits to the

[297] See Martin Kretschmer, 'Creator Contracts ('Supply Side')' in Martin Kretschmer and others (eds), *The Relationship Between Copyright and Contract Law* (SABIP 2010) <www.sabip.org.uk> 67.

duration of the transfer. In addition, as it has been indicated above, in Section IV.3.c), in some jurisdictions is possible to reassert moral rights through collective bargain introducing clauses for the protection of integrity of the work and the attribution of the creators.

For instance, the 'Fair Contract Initiative', developed by the Authors Guild Foundation in the US proposes a series of principles towards the fairness in the contracts for book publishing.[298] Here we can highlight three of those principles, as they are related to the components of possible legal reform proposed here. Those principles are: 1) that the partnership between the author and the publisher should be reflected in how the profits are shared. 2) The publishing contract should be limited in time.[299] As indicated earlier in this section and as it has been demonstrated in some of the jurisdictions studied, limiting the duration of the transfer would help in improving author's bargaining position. The Authors Guild also indicates possible clauses of 'use it or leave it' in which is required from the assignee to exploit the rights transferred or return them. 3) A principle of transparency in publishers accounting practices relates to the provision of accurate and timely information to the author regarding the use of her work and the royalties it produces. This is similar to the duty of transparency which will be also introduced in the EU initiative for a reform of Copyright in the Digital Single Market as it will be explained in the next chapter, section II.F.6.

Collective bargaining could be mandatory, restricting freedom of contract in some sectors of the cultural industries in which a public policy has been determined requiring to protect the interests of authors often treated in weaker conditions than others. If not mandatory, its possibility would be defined by the capacity of interaction between

[298] The Authors Guild, 'Fair Contract Initiative' (*The Authors Guild*, 2015) <https://www.authorsguild.org/where-we-stand/fair-contracts/> accessed 24 October 2017.

[299] For instance, the Federation of European Film Directors (FERA) proposed some guidelines regarding the contractual relationship between directors and producers. In what is related to the transfer of copyright, one of the main issues they suggest is that the assignment should not go further than 30 years. The guidelines also highlight the importance of specifying the scope of rights transferred and stating in the contract that those rights not mentioned are not part of the transfer. See FERA, 'Directors' Contract Guidelines' (2011) http://www.filmdirectors.eu/wp-content/uploads/2011/11/guidelines_digital.pdf 31.

strong guilds and the relevant industry, the stronger the guild the more likely for it to introduce collective bargains conditions in favour of their members. The benefit of this possibility is that both guilds, and companies know the characteristics of the business and can assess and reach understandings satisfying the interests of both parties. Collective bargain, however, has a drawback in the comparative perspective. Not all the countries have the same level of organisation of guilds of authors. For instance, Latin American countries have not developed such structures enough yet.

Another mechanism between the legal and the private spheres is the promotion of managerial principles of administration of copyright. In not few of the cases studied above, the problems regarding authorship and the assignment of rights arise because of the informality in the practices of the industry and the lack awareness of the legal implications of certain decisions that authors and publishers and other parties have taken.

Traditionally, in the international level, the matter of regulating contractual relationships has been left to the national jurisdictions. The next chapter will analyse how international copyright laws are starting to turn such tradition by suggesting some regulations for the contractual relationships of authors. This will be related to the implications in the international law that the legal instruments protecting author's moral and material interests within the scope of international human rights might have.

Chapter 4 International protection of author's moral and material interests

I. Introduction

This thesis has argued that literary and artistic works can be considered as vehicles of knowledge and opinion. It also has argued that protecting author's rights is not only a matter of economy but a matter of democracy, linked with the concept of communicative power and the possibility of exercising social power as described by Habermas. In this sense, a mere proprietary understanding of copyright would be superseded by a contemporary concept recognising first, the role of authors in the communicative rationality and second, the importance of their protection in fostering the democratic principle. Moreover, because the democratic principle is intersubjective, individual mutual recognition is often made possible through cultural expressions which, if original, would qualify the individual as an author granting her moral and material rights.

The international landscape regulating the exchange of works can have a direct impact on how that social power is exercised. The more diverse the cultural production, the wider the social power is distributed among actors in society. The market of knowledge plays a crucial role in this scenario as it allocates and regulates most of those cultural vehicles.

The third chapter in this thesis, through the comparative study of the countries selected, has shown three issues to consider, one is the connection between the concept of originality and the concept of author, another is the possibility of corporate ownership within the copyright system, and finally, the recognition of a special status for the author in the law which would improve her position towards the main interest of copyright: the promotion of creativity, the reward of the author and the satisfaction of the public interest in benefit from the work and protecting her autonomy and dignity. Those issues have been developed towards the protection of author's rights in the constitutional, legal, and jurisprudential framework in the countries studied.

Some of the principal tools for achieving the protection of author's rights in the national spheres studied in the previous chapter are directed to balancing the contractual relationships between authors and secondary right-holders. The third chapter identified some restrictions implemented towards such a balance, which may have played a role in the international development of author protections. Some of the mechanisms found in the comparative study were formal requirements for contracts, limitations on the scope of rights transferred or in the duration of the transfer, the enactment of supplementary clauses or implied terms for copyright contracts, or the possibility of reverting a transfer. In addition, in some cases, the judiciary has intervened to protect an author's weak position. Those mechanisms or restrictions could become protective of author's rights through human right rationales.

This fourth chapter explores how the international spheres of copyright and human rights address the issues of connecting authorship with originality, the possibility of corporate ownership and the recognition of author's special status. This will help identify coincidences between the national and the international levels of protection for author's rights and also to identify possible points of contact between the two spheres of international law.

Within this international dimension, the role of the author is a matter of concern for various reasons. One is the different treatment that authors receive in the national spheres regarding the protection of their rights. Another is the scope of the concept of author for international instruments within the sphere of copyright and within the sphere of human rights. In addition, there is the matter of regulating freedom of contract in favour of authors in the international context.

The sources for this study are the international instruments related to the protection of author's rights, either in the sphere of intellectual property and international trade, or in the sphere of human rights. Only those instruments pertinent to the countries studied in the previous section will be considered. However, the study proposed here will not be limited to those legal elements as in the case of the human rights instruments. The statements protecting author's rights convey principles rather than norms. Therefore, their interpretation requires the use of authoritative guidance, as, for example, in the case of the General Comment 17 of the ICESCR. For this reason,

the section related to the human rights instruments require an examination of the sources available for the study.

II. The protection of the author and the international copyright framework

Because the market of knowledge transcends the borders of any country, copyright requires a framework regulating the international dimension. The international landscape for copyright reveals a history of exchanges among several players at different moments of its development.

An example of these dynamics is indicated by the 2016 Human Development Report (UNDP), which refers to the problems that intellectual property poses for development. The report highlights the difficulties in the interaction between developed countries and developing countries regarding the balance of intellectual property licensing. According to the Report, the stalled negotiations of the DOHA agenda within the WTO have led the developed countries to negotiate bilateral agreements of trade in which intellectual property plays a fundamental role. However, the balance in those negotiations is not the same as the one that can be produced within the WTO or other multilateral spheres such as WIPO, where the developing countries have gained more power. The report calls for the conclusion of the DOHA agenda and for the revision of the ability of the current intellectual property international system to help with the aims of development, stating that 'if intellectual property rights enforced through World Trade Organization mechanisms prove to be an obstacle to the timely diffusion of required technology, the international community must take a hard look at reshaping the way such assets are protected and remunerated internationally.'[300]

Is the protection of author's interests playing any role in such an agenda? A view of the development of international copyright might show that the author has not been considered an important part of the international agenda. There are two main reasons for such peculiarity. One is that notions such as author, authorship, and originality have

[300] UNDP, 'Human Development Report 2016. Human Development for Everyone' (2016) <http://hdr.undp.org/en/content/human-development-report-2016-human-development-everyone>.

been often assumed as well-known and uncontested. Another reason is that the mechanisms for the protection of author's interests, particularly those referred to the author's contractual relationships, have been left to the sphere of national jurisdictions for their definition.

One of the issues that should be considered is the role of the protection of author's interests in the international arena. First, however, it is important to highlight briefly the framework of the international copyright applicable to the countries studied in the previous chapter.

A. The framework of international copyright towards the compared jurisdictions

Although it was one of the Berne Convention's objective, the universalization of copyright was not possible in 1886 nor even in 1948. Another geographical area in which international copyright was under construction, was the Inter-American Copyright System (IACS), developed for the region from 1902 until the adoption of the Universal Copyright Convention (UCC) in 1952.[301] Within the IACS and the UCC-52 and 71 the US was a major player, therefore it is important to consider its role regarding this subsection.

While one of the major players in the copyright landscape has been the US, until very late in the history of the Berne Convention, it avoided the treaty. Such a reluctance was based, among other reasons, on the relation between the author and the publisher or any other third party interested in the acquisition of the copyright. For instance, Seville highlights how the US pushed against the French approach to author's rights and how therefore, the effort for the universalization of copyright was not accepted in

[301] Delia Lipszyc, 'Esquema de La Protección Internacional Del Derecho de Autor Por Las Convenciones Del Sistema Interamericano' in Delia Lipszyc (ed), *La protección del derecho de autor en el sistema interamericano* (Universidad Externado de Colombia 1998). An initial approach to the history of Latin American relationships with Europe regarding copyright international law see Jose Bellido, 'Latin American and Spanish Copyright Relations (1880–1904)' (2009) 12 The Journal of World Intellectual Property 1 <http://onlinelibrary.wiley.com/doi/10.1111/j.1747-1796.2008.00348.x/full> accessed 30 December 2014. Ricketson also mentions the early development of Latin American copyright in Sam Ricketson, 'The Birth of the Berne Union' 11 Columbia Journal of Law and the Arts 9.

general due to the strong differences among the countries discussing the Berne Convention.[302] This pragmatic dichotomy would mark the development of the international copyright in the first part of the twentieth century. In 2002, Gervais mentioned this matter as one of the foreseeable elements of discussion for the upcoming transformations of international copyright.[303] Fourteen years later, the evidence shows that this has not fully happened yet, but it seems that the protection of author's interests in their contractual relationships could be gaining a renewed attention in the international forum.

The framework of an international copyright reveals certain complexities. Scholars such as Gervais and Seville have proposed its organisation in phases. The first of the phases proposed by Gervais corresponds to the pre-Berne era in which bilateralism was used. The second phase refers to the multilateralism characterised by the Berne Convention, but also by the IACS and the UCC. It is in this phase that most of the human rights instruments were also adopted. The third phase moves to the sphere of international trade (TRIPS). Finally, the fourth phase regards the negotiation of the WIPO Copyright Treaty (WCT) in a new context of multiple countries converging, in which reaching a consensus (a characteristic of the Berne Convention) was very difficult to achieve.[304]

A fifth phase could be added, however. Although the post-WTO phase is still in motion, another one had started at a different pace but almost at the same time. It is the phase of a new bilateralism in which countries have been trying to align their interests in a TRIPS-WCT plus form.

From the point of view of this study, this phase can be seen spinning around two centres or poles, the US and European. This phase is characterised by its inception

[302] Catherine Seville, *The Internationalisation of Copyright Law* (Cambridge University Press 2006) 52.
[303] Daniel J Gervais, 'The Internationalization of Intellectual Property: New Challenges from the Very Old to the Very New' [2002] Fordham Intellectual Property, Media and Entertainment Law Journal 929.
[304] Daniel J Gervais, 'The Internationalization of Intellectual Property: New Challenges from the Very Old to the Very New' [2002] Fordham Intellectual Property, Media and Entertainment Law Journal 929.The phases of bilateralism and multilateralism have been also explained in Catherine Seville, *The Internationalisation of Copyright Law* (Cambridge University Press 2006).

under the umbrella of general free trade agreements negotiated independently, and therefore it will be treated separately. The first of these instruments to consider, for the purpose of this work, is the Free Trade Area of the Americas (FTAA), in spite of its stagnation in 2004. This initiative can be considered the starting point of definition of the following negotiations (only preceded by NAFTA) of the following treaties led by the US. The EU took the baton and started a series of negotiations of FTAs which, in sum, would create a net of international instruments between the countries under consideration in this work.

Nevertheless, these phases envisage the evolution of the international copyright law but do not consider sufficiently other relevant elements in such a development.

One of those elements is the geopolitical characteristics of the framework. Although this has been mentioned by Gervais regarding the participation of non-European countries in the late discussions of the Berne Convention, the author does not consider the pre-existent system of treaties created in the dawn of the twentieth century for the American hemisphere. For instance, the UCC, created as a bridge for those countries outside the Berne system in 1952, could be considered in its transitional dimension for the geopolitics of international copyright, particularly in Latin America. In this case, the role played by the US in the definition of the text of the UCC-52 is important regarding the adhesion to the Berne Convention by the US. The same happens with the series of treaties developed in the Americas and known as the Inter-American Copyright System.[305]

The second element is outside the international copyright system and refers to the parallel development of human rights instruments (ADRDM, UDHR, ICESCR, and ECHR). While the second phase of multilateralism (post-1886 Berne Convention) was underway, human rights protection for authors was discussed and enacted within the UDHR and the ICESCR, and in the ADRDM for the American countries. The ECHR for Europe also corresponds to this phase.

[305] Plinio Bolla, *De La Convention Universelle Sur Le Droit D'auteur À Une Convention Internationale Sur Les Droit Dits Voisins* (Recueil des Cours 1958) 107.

The impact of such decentralised developments should be considered in the long term. As mentioned in the previous chapter, the protection of author's moral and material interests has been part of the Latin American scene at least since the ADRDM, and somehow this has resisted the economic pragmatism that tends to lead the international copyright trade. Two clusters of international copyright law can be identified during this period: the European and the Inter-American. This second did not last as the European did, but it will be useful for understanding the Latin American scenarios shown in the previous chapter.

The IACS comprehends a series of multilateral treaties developed under the scope of the Pan-American conferences. Eight treaties were adopted within the system:[306]

Treaty	Colombia	Argentina	Mexico	US
Mexico:1902	1902[307]	1902[414]	1902[414]	1908
Rio de Janeiro:1906	1906[414]	1906[414]	1906[414]	1906[414]
Buenos Aires:1910	1936	1950	1910[414]	1911
Caracas:1911	1911[414]			
Havana:1928	1928[414]	1928[414]	1928[414]	1928[414]
Montevideo:1939				
Washington:1946	1972	1953	1947	1946[414]

Table 1 Countries in the IACS

The framework of international instruments to be considered for this section are the Berne Convention, the system of treaties that comprises the IACS, the UCC (1952 and 1971), the TRIPS Agreement, and the WCT. These correspond to the second, third and fourth phases of internationalisation proposed by Gervais. Regarding the fifth phase indicated above, the FTAA and the bilateral agreements signed or under discussion relevant for the countries studied in the previous chapter will be considered. The treaties from the IACS will be also considered as relevant for the interest of the chapter.

In addition, some cases of soft law should be also considered as they can play a role as sources for understanding the development of the international dimension of

[306] Delia Lipszyc, 'Esquema de La Protección Internacional Del Derecho de Autor Por Las Convenciones Del Sistema Interamericano' in Delia Lipszyc (ed), *La protección del derecho de autor en el sistema interamericano* (Universidad Externado de Colombia 1998).

[307] In these cases, the Country was signatory of the Treaty or Instrument but has not ratified it.

copyright. These are the Tunis Model Law, proposed by UNESCO and BIRPI (then WIPO) offices in the 60's and 70's as a guidance for developing countries, and the Model Law for Employed Authors proposed by WIPO and UNESCO a decade after.[308] These two initiatives were the result of the expansion of the second phase of internationalisation in which some developing countries observed the necessity to adapt their national laws to the international standards. Such a requirement meant that both major traditions in the international copyright laws were to be considered as these countries were, in most of cases, former European colonies, and applied their legal traditions.[309]

The framework indicated above allows an analysis that could help to understand the problems the international copyright faces in relation to the protection of author's interests. As some scholars have highlighted,[310] one of those issues is that the framework has not been fertile for adopting particular rules regarding the contractual relationships between authors and eventual right holders. Nor has it been keen regarding the mere definition of author and authorship.

B. The connection with originality

[308] For the role of soft law within international copyright law see Maciej Barczewski, 'From Hard to Soft Law - A Requisite Shift in the International Copyright Regime?' (2011) 42 IIC - International Review of Intellectual Property and Competition Law 40.

[309] For a recount of the main issues of the Tunis Model Law see Issa Ben Yacine Diallo, 'Committee of African Experts to Study a Draft Model Copyright Law. Report' (1965) XVIII Copyright Bulletin 11. See also UNESCO, 'Tunis Model Law for Developing Countries. A Paper. CPY-85/WS/32' (1985); Vojtech Strnad, 'Report on the Work of the Main Committee II (Protocol Regarding Developing Countries)' (1967). In the case of the Model Laws for Employed Authors see David Roy Irving, 'Committee of Governmental Experts on Model Provisions for National Laws on Employed Authors. UNESCO/WIPO/CGE/EA/4' (1986); UNESCO Secretariat and WIPO Secretariat, 'Draft Annotated Model Provisions for National Laws on Employed Authors. UNESCO/WIPO/CGE/EA/3' (1986); Arpad Bogsch, 'The First Hundred Years of the Berne Convention for the Protection of Literary and Artistic Works', *The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986* (WIPO 1986).

[310] See, for example, Paul Goldstein and Bernt Hugenholtz, *International Copyright. Principles, Law, and Practice* (Oxford University Press 2013) 246-247.

Originality is a key concept defining the scope of protection of copyright. Despite those cases in which an objective approach refers to the level of effort invested in the work, the jurisdictions studied in the previous chapter have shown a connection between this concept and author's personal contribution. The international instruments on copyright might have a similar background, but as it will be shown in this section, this is not evident.

1. Multilateral treaties

Although there is not a definition for the concept of authorship or originality within the Berne Convention, both terms have been used in the Treaty. If originality requires an author's active participation in the creation of a work reflecting his personality, and not a mere 'sweat of the brow', then authorship, in principle, should refer to a human being.[311]

According to Ginsburg, and Goldstein and Hugenholtz, the connection between authorship and originality is similarly addressed by the common and the civil law traditions.[312] Thus, the connection should retain some holding at the international level. For instance, a trend accepted by authors such as Fiscsor and Masouyé, in their respective guides to the Berne Convention, indicates that the concept of originality would include the author in its definition.[313]

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[311] See Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (World Intellectual Property Organization 2003); György Boytha, *WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights* (World Intellectual Property Organization 1980); Sam Ricketson, 'The 1992 Horace S. Manges Lecture - People or Machines: The Berne Convention and the Changing Concept of Authorship' 16 Columbia Journal of Law and the Arts 1; Paul Goldstein and Bernt Hugenholtz, *International Copyright. Principles, Law, and Practice* (Oxford University Press 2013).

[312] Ginsburg, 'A Tale of Two Copyrights : Literary Property in Revolutionary France and America' (n 201). Paul Goldstein and Bernt Hugenholtz, *International Copyright. Principles, Law, and Practice* (Oxford University Press 2013).

[313] Claude Masouyé, *Guide to the Berne Convention for the Protection of Literary and Artistic Works* (William Wallace tr, World Intellectual Property Organization 1978); Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (World Intellectual Property Organization 2003).

The Berne Convention mentions originality when referring to translations, adaptations, and arrangements of music and other alterations. It does not define the concept but it is possible to say that, within the Treaty, it is attached to its protected subject matter: literary and artistic works (article 2.3). This is more evident in the case of cinematographic works. The requisite of originality, as stated in article 14bis.1, could be spread on the general application of the Convention. In fact, the text of article 14 in the Berlin revision defines originality in the following terms: 'Cinematographic productions shall be protected as literary or artistic works, if, by the arrangement of the acting form or the combinations of the incidents represented, the author has given the work a personal and original character.'

The connection between authorship and originality was also debated by Piola Caselli in his report for the 1928 Rome conference for the Berne Convention. He addressed the problem while supporting the Italian proposal for the protection of moral rights.[314] From his point of view, moral rights are there to protect author's intellectual personality, hence, those rights should be considered inherent to the author. This is the meaning of the phrase 'independently of the author's economic rights, and even after the transfer of the said rights' (article 6bis). This character of inalienability was determinant for the English opposition to the Italian proposal.[315]

The WCT does not incorporate the concept of originality either. Within the definition of the scope of protection (article 2) it refers to the principle of no protection of ideas but it does not specify that the protected expressions should be original. Similar provision exists in the TRIPS agreement, article 9.2. The matter of compilations of data and databases receive similar treatment. In this case, what is important is the selection or arrangement of elements that constitute intellectual creations (article 5 WCT and article 10.2 TRIPS).

[314] Edoardo Piola Caselli, 'General Report of the Drafting Committee' (1928).

[315] Cyrill P Rigamonti, 'The Conceptual Transformation of Moral Rights' (2007) 55 The American Journal of Comparative Law 67.

The UCC does not define originality either. Arpad Bogsch, while commenting on the 1952 text, does not include the concept of originality as part of the elements used to describe the works protected under the scope of the Convention.[316] A similar comment might apply in the case of the 1971 text. The question of originality was left in the hands of the contracting parties.

In general, the treaties from the IACS did not define originality. The Montevideo Treaty (1889) used the concept in the case of misappropriation, if the transformation of a work does not present the character of an original work (article 9).[317] A similar approach was used in the Mexico and the Buenos Aires conventions. The condition of originality might be considered as an accessory element of judgment in cases of unlawful appropriation of a work.[318]

Originality was at least mentioned in the revision of the Buenos Aires Convention that took place in Havana in 1928. Article 4bis introduced this concept as a characteristic of the cinematographic works. The complex nature of the cinematographic work implied that the use of other works in the film would not affect its originality. As in the previous treaties, the concept of originality was also used in the case of misappropriation of copyrighted works.

The Washington Convention of 1946 did not introduce substantive changes in the matter of originality. The concept is used with the instrument, for example in the case of derivative works such as translations or even cinematographic works which should be protected 'as original works'. As will be mentioned below, the recognition of the paternity and integrity rights in this Convention introduces a more authorial approach

316 Arpad Bogsch, *The Law of Copyright under the Universal Convention* (A W Sijthoff 1972).

317 Here and henceforth the source for the Inter-American treaties for the IACS will be UNESCO, 'Interamerican Conventions on Copyright. RIADA/INF/3' (1966) <unesdoc.unesco.org/images/0015/001554/155495EB.pdf>. This was a report created for the Inter-American Meeting of Copyright Experts, held in Rio de Janeiro that year.

318 The Rio de Janeiro Convention (1906) adds a system of international registration for the American countries that simplified the previous requirement of sending copies of the registered work to each country in which the stakeholder was interested in obtaining protection. The Convention, however, does not create any substantial change in the system.

and this is perhaps the most important element to consider for the connection between originality and authorship. Without personal contributions determining the creation of the work in terms of originality, there would not be integrity nor paternity to protect. Even in the case in which those rights could be assigned or waived, their origin is the author. Although it has been mentioned that such authorial approach should be balanced in the interest of the public, the literature from those times agrees on this authorial approach.[319]

2. The sphere of international trade

The records of the discussions regarding this matter within the TRIPS agreement show how, for most of the countries, the references to the Berne Convention included a concept of originality in connection to the author.[320] An example of this is the final text for the protection of computer programs in which it was stated simply that these creations will be protected as literary works.[321] A definition of originality was proposed by the Nordic countries and also by Switzerland, but both initiatives were superseded by stating the reference to the Berne Convention instead. The simplicity of the formula regarding the protection of software as literary works implied the full acceptance of a concept of originality that incorporated author's personal contribution.[322]

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[319] See Max M Kampelman, 'The United States and International Copyright' (1947) 41 The American Journal of International Law 406 <http://www.compilerpress.ca/CW/Library/Kampleman US & International Copyright AJIL 1947.htm>; 'The Inter-American Copyright Convention: Its Place in United States Copyright Law' (1947) 60 Harvard Law Review 1329 <http://www.jstor.org/stable/1335299?origin=crossref>.

[320] See Secretariat Negotiating Group on TRIPS, 'Synoptic Tables Setting Out Existing International Standards and Proposed Standards and Principles. MTN.GNG/NG11/W/32' (1989). This document records how the concept of originality under the definition of 'works' was understood in terms of intellectual creations.

[321] See WIPO International Office, 'Existence, Scope and Form of Generally Internationally Accepted and Applied Standards/Norms for the Protection of Intellectual Property MTN.GNG/NG11/W/24' (1988). This document was presented to the Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods while the discussions of the TRIPS Agreement.

[322] The original Nordic proposal reads as follows: 'An author of literary or artistic works, a work being an original intellectual creation or an expression thereof, shall enjoy copyright protection.' The proposal also mentions that the expression literary and artistic work shall include every production covering

3. The model laws

The Tunis Model Law adopted a regular position in which originality is not defined but it is mentioned as condition for copyright protection. Section 1.1 shows a direct connection between authorship and originality: 'authors of original [works] are entitled to the protection'. The comments accompanying the official document indicate that such a text obeys the principle of protecting literary, artistic and scientific works to the benefit of their authors.[323]

The discussions towards the adoption of the model law rejected a concept of originality in which a sufficient effort would have been expended in the work as a condition for protection. This proposal was refused as confusing, and the mere reference to originality preceding the general mention of literary, scientific, or artistic works was approved as it stands in the final text.[324] The protection of moral rights (paternity and integrity) in connection with author's reputation is another example of the possible link between originality and authorship in the model law.

The Model Law for Employed Authors does not consider the matter of originality in connection with authorship in legal terms. However, in the first draft for the model law, the secretariats of both UNESCO and WIPO stated as a principle that the author is the

computer programs and showing also a non-fixation based approach. Norway Delegation GATT, 'Proposal by the Nordic Countries for the Negotiations on Standards and Principles for Trade-Related Aspects of Intellectual Property Rights. MTN.GNG/NG11/W/36' (1989). The Swiss proposal reads as follows: ''Work' means any original intellectual creation, of literary or artistic character, irrespective of its value or purpose. Computer software shall be considered to be a work within the meaning of the preceding definition.' Secretariat Negotiating Group on TRIPS, 'Synoptic Tables Setting Out Existing International Standards and Proposed Standards And Principles. MTN.GNG/NG11/W/32/Rev.2' (1990). In the same document the Japanese proposal emphasized clearly the authorial approach: 'A production in which thoughts or sentiments are expressed in a creative way and which falls within the literary, scientific, artistic or musical domain is 'work' that is entitled to copyright protection.'

[323] WIPO and UNESCO, 'Tunis Model Law on Copyright for Developing Countries' (1976).

[324] Yacine Diallo (n 218).

intellectual creator of the work.[325] This is important because the centre of the discussion in the model law was whether work's first ownership could be vested in the employer. By recognising that the author is the creator of the work, the two international offices might have supported the theory according to which any initial ownership on the work in the hands of someone different than the author would be a legal fiction.

4. Conclusion

In conclusion, the concept of originality has not been defined by international copyright laws. However, the preparatory works and discussions of the instruments studied above show that the connection between authorship and originality was considered relevant for understanding the concept. Most of the treaties adopted a minimalistic approach, allowing enough space for national legislations to develop the concept. Nevertheless, it has been commonly accepted that an author's personal contribution plays a substantial role in defining copyright's subject matter.

C. Authors and authorship

The concepts of 'author' and 'authorship' have been used primarily with an implicit meaning in the international instruments about copyright. Often, the concept of 'author' has been treated as the physical person who has created the work.[326] However, an amplified concept of 'author' could include other persons, legal or physical, that had acquired the copyright through contracts or other legal means such as the WMH, employment, or, in some cases, cinematographic works or software. Nevertheless, as there is not a binding multilateral instrument defining who the author is, these are constructions from the national jurisdictions.

[325] UNESCO Secretariat and WIPO Secretariat, 'Draft Annotated Model Provisions for National Laws on Employed Authors. UNESCO/WIPO/CGE/EA/3' (1986).

[326] Quoting Ricketson, see Paul Goldstein and Bernt Hugenholtz, *International Copyright. Principles, Law, and Practice* (Oxford University Press 2013).

The main differences in how the concept has been understood can be seen in the two glossaries that WIPO had published about copyright within a time frame of twenty-three years.[327] The glossary written by György Boytha in the 80's reflects a concise concept of author: the person who has created the work. Ficsor's glossary reflects the complexities that some countries have shown about this concept. Ficsor appeals to a notion based on the first creation of the work to define who the author is, and then, comments that in some cases, the laws can stipulate that another person (legal or physical) can also be considered the author.

The question about the concept of 'author' has moved from what was considered common knowledge towards a blank notion that is to be filled with national laws to a complex notion in which other legal entities could also be considered as authors.[328] This complex notion can be found in contradiction to the interpretation in which the concept has been used in its human-only sense from a human rights perspective.[329]

1. Multilateral treaties

It has been often accepted that the Berne Convention refers to the author as the initial creator of the work.[330] Even those who criticise the Convention as a misconception of the nature of modern creation accept that the treaty is author-centred.[331]

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[327] György Boytha, *WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights* (World Intellectual Property Organization 1980); Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (World Intellectual Property Organization 2003).

[328] Sam Ricketson, 'The 1992 Horace S. Manges Lecture - People or Machines: The Berne Convention and the Changing Concept of Authorship' 16 Columbia Journal of Law and the Arts 1, 6.

[329] The general comment 17 from the Committee on ESCR has proposed that in terms of the Human Rights protection scope, the protection of author's moral and material interests is referred to human beings individually or collectively considered and not to moral persons. Committee on Economic Social and Cultural Rights, 'General Comment No. 17 (2005) (Article 15, Paragraph 1 (C), of the Covenant) E/C.12/GC/17' (Committee on Economic, Social and Cultural Rights 2006).

[330] Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (World Intellectual Property Organization 2003) 31.

[331] Rahmatian highlights this paradox: Andreas Rahmatian, *Copyright and Creativity. The Making of Property Rights in Creative Works* (Edward Elgar Publishing 2011).

The concept of 'author' under the umbrella of the Berne Convention has been conceived mainly as the physical person who has created the work. According to Ricketson, the later revisions of the Convention revealed a less general understanding of the concept.[332] However, the concept has been used in its general sense as a rule, and those cases in which authorship might indicate a person other than the physical person has been considered the exception, e.g., in the case of film copyright. Ficsor in this matter highlights that the concept is referred to as those persons 'whose intellectual activity bring such works into existence'. Furthermore, this scholar emphasizes that, for an author to be recognised as such, he should fulfil the requirements the law establishes for copyright protection; this means originality.

Within the UCC-71, the matter of authorship was discussed in relation to the moral right of paternity. The proposal made by the 1970 Ad Hoc Preparatory Committee introduced the right to claim authorship irrespective of the economic rights and even after their transfer.[333] This was not approved and the matter was out of discussion.[334] Nevertheless, article V in the Convention refers to the moral rights of the author regarding the licences for translation rights.[335]

The Argentinian government proposed a similar provision for article IV Bis by introducing a second paragraph recognising the 'very natural' right of claiming authorship and the protection of author's reputation in respect of the integrity of the

[332] Sam Ricketson, 'The 1992 Horace S. Manges Lecture - People or Machines: The Berne Convention and the Changing Concept of Authorship' 16 Columbia Journal of Law and the Arts 1.

[333] UNESCO, 'Draft Texts or Comments Related to the Revision of the Universal Copyright Convention Submitted by the States Parties to That Instrument. IGC/PREPCOM/3' (1970).

[334] This was not the first time. At the Geneva Conference in 1952 Greece proposed something similar an it was also rejected. Adolf Dietz, 'Elements of Moral Right Protection in the Universal Copyright Convention' (1987) XXI Copyright Bulletin 17. See also Arpad Bogsch, *The Law of Copyright under the Universal Convention* (A W Sijthoff 1972). For the Greek proposal see UNESCO, 'Working Documents of the Inter-Governmental Copyright Conference (Geneva, 1952)' (1953) VI Copyright Bulletin 7.

[335] Arpad Bogsch, *The Law of Copyright under the Universal Convention* (A W Sijthoff 1972) 66.

work.[336] Its rejection came under the argument of the risk that mentioning the moral rights would create against the universal purpose of the UCC-71. For instance, the US and Kenya did not have provisions on this matter.[337] However, some of the delegations agreed on the fundamental characteristic of these rights.[338]

In this context, Dietz proposes that the protection of moral rights, although rejected, was part of the UCC-71 due to the small change that the Argentinian delegation obtained in the text of article 1. Instead of describing the moral and economic rights, the article refers to the exclusive rights of copyright. In his interpretation, due to the shift that most of the Common Law countries have shown towards the protection of moral rights,[339] the inclusion of the concept of exclusive rights in the final text could now be considered inclusive of both rights.[340]

Due to the US' influence on the IACS, the concept of 'author' is less significant within this cluster of treaties. The Havana Convention (1928), in revision of the Buenos Aires Convention, introduced two major amendments towards a more authorial approach in which the author tends to be the centre of the protection. First, the Convention changes how the countries would calculate the duration of copyright using the life of the author instead of the year of first publication (article 6). Using the life of the author as a basis mirrors the connection between authors and their work. Secondly, the Convention introduced author's inalienable moral right of integrity (article 13bis) which is consistent

[336] Argentinian Delegation, 'Amendments Proposed by the Delegation of the Argentine Republic to the Proposals for the Revision of the Universal Copyright Convention Submitted by the Intergovernmental Committee. INLA/UCC/7' (1971).

[337] These two countries and the UK rejected the proposal. See UNESCO, 'Summary Records of the Proceedings and Working Documents', *Records of the Conference for Revision of the Universal Copyright Convention* (UNESCO 1971).

[338] Abraham L Kaminstein, 'Report of the General Rapporteur', *Records of the Conference for Revision of the Universal Copyright Convention* (UNESCO 1971).

[339] Adolf Dietz, 'Elements of Moral Right Protection in the Universal Copyright Convention' (1987) XXI Copyright Bulletin 17, 17.

[340] Abraham L Kaminstein, 'Report of the General Rapporteur', *Records of the Conference for Revision of the Universal Copyright Convention* (UNESCO 1971).

with an authorial approach. This is coincident with the changes included in the Berne Convention that same year (in the Rome revision).

Major changes occurred in the last of the instruments conforming the IACS. The Washington Convention of 1946, which was decided in view of the forthcoming Universal Convention to be signed five years later, introduced two declarations commanding the philosophy of the instrument. The first declaration stated the interest in improving a reciprocal Inter-American protection of author's rights. The second stated a desire to promote and facilitate the cultural exchange. Both declarations would be coherent with the international instruments about human rights adopted two years later, the ADRDM and the UDHR. As a consequence, the rights of the author would be the main structure of the subsequent international policies.

Nevertheless, in the case of the Washington Convention the changes towards the author were halted. The more important change was the introduction of the moral rights of integrity and paternity. These rights were recognised separately from the economic rights, and their inalienability was permitted under the following formula: 'The author (…) in disposing of his copyright (…) retains the right to claim…' both moral rights. Although inalienability was permitted, it was not the rule. Article 11 also included the possibility for the author to consent, previously or even after the use of the work, in transferring or waiving those rights according to the law of the State where the contract was signed. Then, if agreed, integrity and paternity would not be author's rights only. This is the result of US' presence in the negotiations of the Convention, but it also shows how this was meant to pave the way for the US towards the Berne Convention.[341]

As mentioned below, the US tried to influence against the recognition of author's moral and material rights within the discussion of the UDHR. The main argument was that there were other international instruments protecting literary and artistic property in the international arena. The problems highlighted here have shown that such argument was not completely accurate. The US was not part of the Berne Convention at that

[341] Delia Lipszyc, *Copyright and Neighbouring Rights* (UNESCO 1999).

moment, and the other existing international system concerning copyright were less strong in protecting author's moral rights.

2. The sphere of international trade

In the arena of international commerce, US influence over the question of first ownership of the copyright was even more evident. Hannu Wager, the coordinator for the Nordic Countries during the negotiations of the TRIPS agreement, mentions the common interest of promoting the convergence between the two main copyright traditions, the continental or civil law tradition and the tradition from the common law countries.[342] On this matter, the US accepted the principle of automatic protection of the work once created. This issue is important as it implies that the existence of copyright has been meant to be initially attached to author's act of creation.[343] The fact that the final document recognises that, for example, rental rights should be protected for authors and their successors in title, would lead to the conclusion that first ownership of the copyright is naturally in the hands of the author. However, no other indication about the author can be found in the instrument.

3. The model laws

The Tunis Model Law recognises the author as the first owner of the copyright. As it will be mentioned in the next subsection, such a principle would have some exceptions in the case of employed or commissioned authors. Authorship, however, is a moral and inalienable right protected in the hands of the author. Even in the case in which a State does not adopt this option, the Model Law opens another possible mechanism in which moral rights 'may' not be transferred and the right of authorship could be exercised in spite of the transfer of the economic rights. Depending on the chosen model, these two options protect authorship with more or less strength.

[342] Hannu Wager, 'Copyright: A Nordic Perspective' in Jayashree Watal and Antony Taubman (eds), *The Making of the TRIPS Agreement. Personal Insights from the Uruguay Round Negotiations* (World Trade Organization 2015).

[343] Secretariat Negotiating Group on TRIPS, 'Compilation of Written Submissions and Oral Statements. MTN.GNG/NGll/W/12/Rev.l' (1988).

The Model Law for Employed Authors deals also with the problem of first ownership of copyright. As in the case of the Tunis Model, the problem was how to create common elements that would respond to the characteristics of the two main copyright legal traditions. In their introductory text to the draft, both the secretariats of UNESCO and WIPO agree on the matter that 'the employed author is the intellectual creator of the work.'[344] Having said that, the document also recalls that in some cases, the investment added by the employer or commissioner makes the work possible. Nevertheless, at least in the framework of the Committee, it was clear that the concept of authorship in terms of the person who has created the work, vests in the author. That copyright ownership might be vested originally in the employer or the commissioner is another matter.

On the matter of author's moral rights, the draft of the Model Law for Employed Authors, proposed by the secretariats, stated two possible options for the countries to follow. In a broader sense, the two options answer to two basic approaches on this matter: either the author is originally vested of the copyright and the employer is deemed to acquire the right, or the employer is originally vested in it.[345] In the first option, the matter of the moral rights enters within the scope of what the Committee has identified as *jus dispositivum*. Therefore, the author can waive the right to be named as such in the work. Although such a waiver must be given in writing, once given, it also implies that the employer is able to modify the work without author's permission. In the second option, the matter flips on the side of the employer, the author has no right to be named as such in his work unless it has been agreed upon in writing. In such a case, though, the employer would not be able to modify the work without author's permission.

[344] UNESCO Secretariat and WIPO Secretariat, 'Draft Annotated Model Provisions for National Laws on Employed Authors. UNESCO/WIPO/CGE/EA/3' (1986). Emphasis in the original.

[345] UNESCO Secretariat and WIPO Secretariat, 'Draft Annotated Model Provisions for National Laws on Employed Authors. UNESCO/WIPO/CGE/EA/3' (1986). This matter will be explained in more detail in the next section.

Nevertheless, under the scrutiny of the Committee of Experts, the proposed optional mechanisms were criticised.[346] Most of the commentators indicated that the proposal should conform to article 6bis of the Berne Convention. For some delegates to the Committee, even in the case in which the author ought not to be mentioned, the integrity of the work it is something that was worth protecting. The final draft accepted the waiver of the paternity right but introduced a protection for author's reputation or honour in the case of modification of the work.

The second alternative was modified in terms of a presumptive waiving of the paternity right. The presumption also creates the possibility to agree otherwise. The protection of author's honour or reputation was also included in this case.

4. Conclusion

The revision of the international instruments, mentioned above in this subsection, shows that there has been a constant interest in protecting authors and their connection with their work. This could be coincident with the prevalence of the physical person in the concept of 'author' within the human rights sphere. The blank slate approach, stressed by some scholars in recent times, opens up an eventual expansion of the meaning of the concept towards other right holders. However, this possibility has not reached a general agreement, and even in the case of works created by employed authors or under commission, the protection of the human connection remains important. Moreover, vesting or transferring moral rights by a legal entity would affect the protection of author's moral interests.

D. Successors in title

Transferability has been part of the characteristic of copyright even in the case of a traditional natural law approach. Seville mentions this in her chapter related to the

[346] David Roy Irving, 'Committee of Governmental Experts on Model Provisions for National Laws on Employed Authors. UNESCO/WIPO/CGE/EA/4' (1986).

previous developments towards the Berne Convention.[347] Copyright transferability can be implied in most of the international treaties, because these instruments often refer to the successor in title or other similar figure.

However, transferability normally implies that some regulations should exist either under general rules of contract law or under specific rules of copyright. In the case of the international instruments on copyright, there has been a tension between whether or not contractual matters should be regulated on the international level. Despite this, the following analysis shows that there is a trend towards regulating such matters in the international arena.

1. Multilateral treaties

The language of the Berne Convention refers to the author in a general sense. Article 2.6, however, clarifies that the protection the Convention provide extends to the author and her successors in title.[348] Given that the Convention protects both the interests of the author and the successors in title, according to Masouyé, copyright should not be considered a personal right but a fully disposable one.[349] The rapporteur of the Brussels Conference differs to such an interpretation by arguing that, according to article 6bis, moral rights are referred to the author 'alone'.[350] According to Ficsor, when the Berne Convention refers to other right holders, it uses the expression 'other owners of the copyright'.[351] Cinematographic works are an exception to the rule than the principle.

[347] Catherine Seville, *The Internationalisation of Copyright Law* (Cambridge University Press 2006) 57.

[348] The concept would correspond to any "individual or legal entity that succeeds the author as owner of copyright". See György Boytha, *WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights* (World Intellectual Property Organization 1980).

[349] Claude Masouyé, *Guide to the Berne Convention for the Protection of Literary and Artistic Works* (William Wallace tr, World Intellectual Property Organization 1978).

[350] BIRPI, 'Records of the Various Diplomatic Conferences', *The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986* (WIPO 1986).

[351] Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (World Intellectual Property Organization 2003) 32.

The UCC recognises that authors and other copyright proprietors are under the protection of the treaty and this implies the transferability of the copyright. Bogsch comments that the use of the two concepts in the Treaty reflects the fact that some national legislations differentiate the creator from the person who has acquired the work, but this was not the general rule.[352]

Transferability was also part of the IACS from the first Treaty onwards. The Montevideo Treaty included the successors in title as beneficiaries of the protection of the law of first publication (article 2), and article 3 mentions the right to dispose of the work as characteristic of author's property right. The other IACS treaties repeat the formula. Still, the Havana revision in 1928 of the 1910 Buenos Aires Convention, introduced a new element stating limitations on the transferability of the copyright. As mentioned above, the Convention recognised author's moral right of integrity, declaring, in addition, its inalienability.[353]

The adoption of the Washington Convention in 1946 transformed the structure in which literary and artistic property was handled. Since this Convention, it was clear that authors were able to transfer their rights in whole or in part. Those transferable rights included certain exclusive prerogatives of use or authorized the use of the work (article 2). The change in the pitch indicated that the work was under the control of the author. Nonetheless, as was indicated above for the analysis of the concept of author, the 1946 Convention also created an easy path for the transferability of moral rights.

The 1946 Convention requires an additional comment on the matter of its treatment of successors in title. As moral rights within the Convention could be transferred or waived (Article 11 of the 1946), the Convention created a rule according to which the respective contracts were governed by the law of the country where the contract was created. This implies that in case of contracts created in one country and executed in another, such a State member of the Convention had to recognise the validity of such

[352] Arpad Bogsch, *The Law of Copyright under the Universal Convention* (A W Sijthoff 1972).

[353] UNESCO, 'Interamerican Conventions on Copyright. RIADA/INF/3' (1966) <unesdoc.unesco.org/images/0015/001554/155495EB.pdf>.

contracts even if their own laws did not permit such a transfer.[354] Clearly, this condition would mostly benefit the US against the authorial tradition that persists on this matter in most of the Latin American countries. So far, this case is the closest example of how an international instrument on copyright regulated contractual relationships.

2. The sphere of international trade

Within the framework of the TRIPS Agreement, the transferability of copyright has not been mentioned directly either, though transferability is implied. For instance, the right holders of rental rights (article 11) would be the authors and their successors in title (the same formula used by the Berne Convention). As moral rights are excluded in the Agreement, any reference to the transferability of author's rights would be related to the economic rights.

Nevertheless, the matter of transferability was discussed. In 1990 the following text was proposed:

> 6.6A Protected rights shall be freely and separately exploitable and transferable. [Assignees and exclusive licensees shall enjoy all rights of their assignors and licensors acquired through voluntary agreements, and shall be entitled to enjoy, exercise and enforce their acquired exclusive rights [in their own names.]][355]

Two principles, discussed in the previous chapter, are immersed in this proposed clause. One is the principle of freedom of contract; the other is the partial transferability of copyright. In addition, it is important to highlight the US interest in guaranteeing an

[354] 'The Inter-American Copyright Convention: Its Place in United States Copyright Law' (1947) 60 Harvard Law Review 1329 http://www.jstor.org/stable/1335299?origin=crossref.

[355] Chairman of the GNG, 'Status of Work in the Negotiating Group. MTN.GNG/NG11/W/76' (1990). Brackets included. This clause would be then found in the bilateral agreements the US have signed after TRIPS.

entitlement for the enforcement of copyright in other countries. The proposed clause introduced this matter that will be reflected in the FTAs the US have negotiated later.[356]

Regarding the moral rights, at that point in the discussion, the draft text of the TRIPS agreement had not excluded the moral rights yet. In this case, the Austrian proposal included both authors and successors in title as beneficiaries of moral and economic rights in the terms of the Berne Convention. The Europeans, as well as the Nordic Countries, included the protection of moral rights in the hands of authors without mentioning successors.[357]

Although not included in the final text, transferability and moral rights were issues considered for the TRIPS. This might initiate an interest in referring to copyright transferability, that would later be seen in some of the bilateral agreements of the fifth phase of internationalisation of copyright.

3. The model laws

Years before this discussion, the relationship between authors and their assignees started to find some space within the international arena in the Tunis Model Law and the Model Law for Employed Authors.

These instruments can show how the concerned countries explored mechanisms of consensus regarding particular matters on the copyright international framework. For instance, the Tunis Model Law proposed that the *droit de suite* should be inalienable. Similarly, the moral right of the author (section 5) could be inalienable, perpetual and imprescriptible (as in most of the Latin American countries), or exercisable by the author's heirs, even in the case in which they do not possess the economic rights.

[356] See Secretariat Negotiating Group on TRIPS, 'Synoptic Tables Setting Out Existing International Standards and Proposed Standards and Principles. MTN.GNG/NG11/W/32' (1989). In this document, the US proposal includes a similar clause in which transferability is referred to the economic rights only. In the second revision of this document, the Swiss proposal about transferability shows similarities with US' but in this case no restriction is mentioned towards moral rights.

[357] Secretariat Negotiating Group on TRIPS, 'Synoptic Tables Setting Out Existing International Standards and Proposed Standards And Principles. MTN.GNG/NG11/W/32/Rev.2' (1990).

In the case of ownership and transfer of copyright, the Tunis Model proposed detailed regulations that correspond (in most cases) to the Latin American laws adopted later. For instance, Colombian and Mexican copyright law introduced similar regulations as those described in the Model Law. This is the case of section 11th which recognised first ownership for authors as a principle, but created exceptions in the case of employed and commissioned authors. Here, two possible conditions of transfer were stated: either the author would be the first owner of the copyright unless he agreed by contract that the employer or commissioner is the owner, or the employer or commissioner would be deemed transferee of the copyright unless it has been agreed to the contrary by contract. In the latter case, the rights transferred were limited to those necessary for the employer or commissioner for their customary activities at the moment of the contract. Both possibilities tend to protect author's rights and autonomy; the examples of Mexico and Colombian legislations are direct references to this.

In the case of the Model Law for Employed Authors, the core aspect of the discussion was the question of the successor in title of the copyright as a consequence of employment. The first draft, proposed by the two secretariats of the host organisations, supports the idea that the employer or the commissioner should be entitled to some rights as a compensation for their investment and efforts. The alternatives proposed (one for the civil law tradition and another for the common law tradition) responded to this. It was also accepted that some requirements, such as a written contract, were needed to protect author's interests.

A closer look at the possible solutions within the second Model Law shows the disparities in the two main legal traditions. While for the civil law tradition only a limited amount of rights would be transferred to the employer, in the common law tradition, all the rights are ought to be owned by the employer. During the discussion of the draft by the Committee of Experts, this matter was brought to attention, but no changes in the common law option were introduced.

Surprisingly, the Committee introduced more changes to the civil law option. The most important was in the expression used for the definition of the scope of rights to be granted (in the original proposal, the word used was 'transferred') to the employer: in

the final draft, the rights to be granted would be limited to 'the sphere of its activity reasonably envisaged by the parties'. Instead, the first proposal limited the rights transferred only to those required 'to the extent necessary in the sphere of the customary activity of the employer'. Although the option envisaged in the final draft was wider, it also implied that the parties in the contract had the power to define the scope of the transfer. This would imply that both parties are in equal bargaining positions and no legal intervention is required. The cases explored in the previous chapter show the opposite. In the case of Spain, Mexico, and Colombia, the scope of the rights transferred are limited by the law and not by the parties.

4. Conclusion

Notwithstanding the mild approach to the matter of successors in title shown in the international laws, this section suggests that a concern about the issue has also been present in the international arena. Part of this concern regards the mere transferability of the copyright; another part refers specifically to the case of employed and commissioned authors and their rights. This has been a key issue in the protection of authors' fundamental interests and it stressed the importance that the sphere of trade gives to the matter of entitlement. The tension, in this case, regards the protection of an author's interests on one side and the pacific exercise of the copyright in the hands of another right holder on the other. Whether to regulate such a tension under international laws or not will be a matter of time; the TRIPS agreement has taken the first step by discussing it.

E. The status of the author

Most of the international agreements on copyright refer to the author in a general sense that would cover both her and other right holders. Two key concepts would help to explore whether the author (as a physical person) receives any special treatment in the international framework. First, author's weak bargain position, and second, author's role in the cultural life of society.

In the first case, the recognition of an author's position in contractual relationships was indicated in the previous chapter as a reason for certain legal measures, such as restrictions on the scope of rights transferred, the creation of certain formalities in the case of contracts, or the imposition of limitations on the extent of rights vested in the employer or commissioner. Such mechanisms are visible in the jurisdictions studied above in chapter 3.

Second, in the case of the role of the author in society, the concept responds directly to the broader concept of dignity mentioned earlier.[358] An author's dignity refers to a two-fold dimension in which her well-being and her freedom of creation are considered. These two elements interact towards protecting an author's right to participate under equal conditions in the life of society.[359]

1. Multilateral treaties

In the Berne Convention, the position of the author can be understood in terms of how moral rights and the *droit de suite* were discussed.

In the case of the *droit de suite*, Ricketson highlights that the reason for supporting the inalienability of this right was a matter of consumer (the author) protection from unfair agreements with agents or other purchasers. This would be for the protection of an author's weaker position in those agreements. Yet it is also clear that this right is meant to protect the author's dignity by guaranteeing a monetary share for the author when his original work of art has been economically successful.[360] The imbalance avoided here refers to the nature of the market for these kind of works which do not produce revenues for sales or communication to the public as musical or literary works do.

[358] See Chapter 3, section IV, 2.

[359] See Chapter 3, section IV, 1.

[360] Sam Ricketson, 'Proposed International Treaty on Droit de Suite/Resale Royalty Right for Visual Artists. SG15-0565' (2015) http://www.cisac.org/Media/Studies-and-Reports/Publications-PDF-files/Resale-Right-Academic-Study 15.

The discussions regarding the moral rights in the Berne Convention also reveal the position of the author. The original version of article 6bis, as proposed by the Italian delegation, was rejected on the basis that an author's right to decide on the first publication (and even over subsequent publications) of the work could affect its exploitation in the hands of the assignee of the copyright. Therefore, the final text erased the pertinent clause.[361] Nonetheless, the right of attribution and its inalienability was accepted and is related to its relevance within the market of knowledge.[362] For Posner, if a copyrighted work is a credence good, this right protects the connection between the product and its origin.[363] Both attribution and integrity are strongly linked to author's interests in the comparative study in Chapter 3. The reference to author's honour or reputation regarding these rights make it clear how the author is central to the Convention.

The ownership of cinematographic works requires special attention from the point of view of the Berne Convention. Ficsor highlights the fact that the Stockholm Conference tried to harmonise the different national approaches regarding ownership of these types of works.[364] He describes three possibilities: the producer is the original owner of the copyright in the cinematographic work, the author is the original owner and the producer has the rights immediately assigned, or the rights are presumed transferred to the producer when the author participated in the cinematographic work. The Convention leaves open these possibilities to the national legislation where the protection is sought. Thus, the interest of the producer is recognised in its vital importance for the very existence of the work, even if this means that by any of the mechanisms described above, the author sees her rights (or part of them) in the hands of another person. As has been highlighted in the previous chapter, some jurisdictions

[361] Edoardo Piola Caselli, 'General Report of the Drafting Committee' (1928) 171. See also Cyrill P Rigamonti, 'The Conceptual Transformation of Moral Rights' (2007) 55 The American Journal of Comparative Law 67.

[362] Cyrill P Rigamonti, 'The Conceptual Transformation of Moral Rights' (2007) 55 The American Journal of Comparative Law 67 121.

[363] See Chapter 2. See also Richard A Posner, *Frontiers of Legal Theory* (Harvard University Press 2001) 41.

[364] Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (World Intellectual Property Organization 2003).

open the possibility for the author to retain their rights through special agreements in the contractual formula. Nevertheless, this is a mechanism that would require leverage beyond the author himself, namely, the support of unions or agents able to negotiate such clauses.

The UCC does not refer to any specific protection regarding the position of the author in contractual relationships. However, it states two aims: ensuring 'the rights of the individual' and encouraging the development of arts, sciences, and literature. in this respect, Bogsch asks: 'How could one encourage creation without protecting the individual who creates?'[365] The 1971 text included another paragraph in the preamble referring directly to the human creation as core element while aimed to promote the dissemination 'of works of the human mind and increase international understanding'. Such texts, though not binding, show that the interpretation of the Convention should be directed to the protection of authors and their role in the construction of democracy.

Within the IACS there were not particular provisions protecting the author as a natural person. It was not until the Havana Convention of 1928 that moral rights were recognised and protected within the IACS (article 13 bis). The correlation between the author and those rights, particularly in respect to their inalienability, has been highlighted above.

The Washington Convention (1946) stated two basic principles. First, the reciprocal national protection for Inter-American authors, which denotes the shift from a work-based protection, as it was the characteristic of the previous IACS treaties, to one directed to the author. Second, it relates such protection with the principle, stated in the second chapter of this thesis, of the improvement of the market of knowledge (Inter-American cultural exchange). The premise is then that the more the authors are protected, the better the cultural exchange would be.

2. The sphere of international trade

[365] Arpad Bogsch, *The Law of Copyright under the Universal Convention* (A W Sijthoff 1972) 4.

The TRIPS Agreement does not specifically refer to the author as a beneficiary of any particular protection. However, even if the TRIPS Agreement is mainly oriented to the protection of economic interests, its preamble links national policies about intellectual property with developmental and technological objectives.

Because public policies are to be developed under the scope of the constitutional framework of a given country, it is possible to consider that the protection of intellectual property within the TRIPS Agreement should be understood within the constitutional framework of each country member, and therefore extend to the protection of author's fundamental rights.

The previous chapter has demonstrated the integration of copyright within the protection of interests surpassing the mere protection of a private right in some cases by giving special weight to author's fundamental rights. As a consequence, the interpretation of copyright in some of the studied jurisdictions shows elements that go beyond the scope of mere economic rights and would be affected by human rights considerations. This has been evidenced in some of the case law of the countries studied in the previous chapter. For instance, Mexican case law acknowledges the relationship between protecting author's rights and its implications on the cultural life of society. The same is found in Colombian case law.

The protection of author's rights could be understood within the TRIPS Agreement through the interpretation of article 7. The article pursues a balance between rights and obligations among the stakeholders in their relationships referred to intellectual property. [366] Under such an objective, the rights in balance should include all the rights involved within intellectual property rights and this would include those rights conferred

[366] The passage reads as follows: 'The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.' For this interpretation see Hannu Wager and Jayashree Watal, 'Human Rights and International Intellectual Property Law' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015) 160.

even beyond the agreement and found in another category (for instance, the human rights of the author).

The reason for such an amplified understanding is that the mentioned article's aims are directed at the promotion of social and economic welfare, not only wealth, and to achieving a balance between rights and obligations. If the scope of the application of the term *producer* within the agreement includes both authors and other owners of the copyright, a balance between these two actors and their intertwined interests should be considered a matter of interest for the Agreement. However, most of the literature regarding this matter is supported in the dichotomy between right holders and users, assuming that the author and other right holders conform to a bundle of unique interests.[367] The position defended in this thesis is that authors and right holders should not be always considered the same, because in some cases their interests can be in opposition.[368]

In addition to the latter, a statement from the CESCR acknowledges that international organizations are responsible to governments in creating normative mechanisms compatible with 'their human rights obligations'.[369] Whether this is possible in practice or not seems to be shifting positively in recent years within the TRIPS framework as shown by the recent amendment in policy towards public health.

3. The model laws

The Tunis Model Law offers an interesting view of how the aim of protecting author's moral and material interests might be achieved. The author's weaker bargaining

[367] See, for example, Henning Grosse Ruse-Khan, 'Proportionality and Balancing within the Objectives for Intellectual Property' in Paul Torremans (ed), *Intellectual Property and Human Rights* (3rd edn, Kluwer Law International 2015) 199-200.

[368] This differentiation has been stated recently by Martin Kretschmer and others, 'The Relationship Between Copyright and Contract Law' (2010) www.sabip.org.uk 3.

[369] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2nd edn, Hart Publishing 2016) 96.

position is uplifted through legal mechanisms.[370] Some of those mechanisms can be seen reflected in the national legislations studied in the previous chapter. For instance, the limitations on the scope of the transfer deemed for commissioned works, and works created under employment are evidenced in Colombian, Mexican, and Spanish laws. Also, the possibility of inverting the effects of such transfers under the clause of 'otherwise stipulated' is a good example of such an approach.[371]

Other examples are the formal requirements for contracts, such as written documents, which is one of the most common rules for the protection of the author's weaker bargain position, or even the mandatory registration of contracts, and the principle of restricted interpretation of the contract by which those rights not mentioned in the contract are considered excluded from the assignment (also proposed in the Tunis Model).[372]

This view is even clearer in the Model Law for Employed Authors. At first, arguing the principle of freedom of contract, some of the participating countries did not agree on provisions purported to improve author's position in the contractual relationship. Nevertheless, other countries supported it, '[w]ithout such legislative guidance, freedom of negotiation could easily become meaningless to the party with less experience or in a weaker bargaining position. The author, who is often in a weaker position, should enjoy legislative protection.'[373] According to Irving, one of the countries discussing the Model Law manifested that those authors who are members of powerful trade unions would not require such a protection. Although that might be true, the problem on the international level is twofold: on one hand, not all the countries have such strong organizations, and on the other, the international nature of the use of works, given such a circumstance, creates an unbalanced situation between unionised

[370] See comments to section 12 of the Model Law, UNESCO, 'Tunis Model Law for Developing Countries. A Paper. CPY-85/WS/32' (1985).

[371] WIPO and UNESCO, 'Tunis Model Law on Copyright for Developing Countries' (1976).; UNESCO, 'Tunis Model Law for Developing Countries. A Paper. CPY-85/WS/32'.

[372] WIPO and UNESCO, 'Tunis Model Law on Copyright for Developing Countries' (1976).

[373] David Roy Irving, 'Committee of Governmental Experts on Model Provisions for National Laws on Employed Authors. UNESCO/WIPO/CGE/EA/4' (1986).

authors from one country and non-unionised authors from another country who would expect to negotiate their works in the former country.

One of the most interesting proposals in the Model Law was the introduction of article A4. It establishes that if the work produces a considerable excess in the economic results, author would obtain a reward in addition to his salary. The considerable excess should go beyond what was reasonably expected at the moment of the creation of the work.[374] According to the rapporteur, such a proposal was rejected because it was considered a matter for contract law of each country.[375] The proposal even included the possibility for the author to pursue judicial remedies or arbitration in case the reward was considered inadequate. As will be indicated below, such a proposal is close to the recent EU copyright reform for the digital single market.

4. Conclusion

As a result of the previous analysis, it is possible to say that the above-mentioned discussions make clear the existence within the international copyright framework of a tendency towards improving authors' positions in contractual relationships and also guaranteeing a balanced distribution of rights among stakeholders even beyond freedom of contract. The reasons for such a tendency may be based on protecting the author as core element of copyright policies, including the constitutional mandates of the countries, or they may be based on the importance that identifying the source of a resource within the market of knowledge might have. Either way, it is coherent that such mechanisms should evolve towards effective protections in which no disparities would be promoted among players in the international landscape of copyright.

Nevertheless, the agenda in the international forums of intellectual property discussion seems to be moving away from such tendencies. This is probably due to the shift that these forums have experienced in recent years in which developing countries have

[374] UNESCO Secretariat and WIPO Secretariat, 'Draft Annotated Model Provisions for National Laws on Employed Authors. UNESCO/WIPO/CGE/EA/3' (1986).

[375] David Roy Irving, 'Committee of Governmental Experts on Model Provisions for National Laws on Employed Authors. UNESCO/WIPO/CGE/EA/4' (1986).

gained more weight in counterbalancing the agenda towards discussions such as health policies within the WTO or the extension of limitations and exceptions within WIPO. The place for the above-mentioned discussions has now started to move to the bilateral agenda of trade.

F. Towards other international rules related to copyright contractual law

An additional fifth stage of the international copyright framework has been proposed here. This stage would consist of the IP-Copyright component found in some free trade agreements negotiated in the post-WTO. In most of the cases, the initial basis for such a copyright component has been the Berne Convention, accepted as conventional minimum for the parties. At this stage, the possibility of regulating the contractual relationship between the author and other right holders has started to grow. The direct precedent of this tendency is the proposed–yet not approved–mention of copyright transferability within the TRIPS Agreement.[376]

The framework in this stage starts with the Free Trade Area of the Americas (FTAA), initiated in 1994 and dropped in 2004; it continues with NAFTA and ends at the end of 2016 with the Trans-Pacific Partnership (TPP) and the eventual European Directive for the Digital Single Market. Some recent political changes in the last two years will probably affect and reshuffle this framework.[377] Nonetheless, those changes have not yet had an impact on the sources for this part of the study.

In this subsection, the methodology will not extend to the preparatory works of the international instruments as most of these are restricted documents. The study will focus only on the text of the relevant agreement and what it is related to the theme of this thesis.

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[376] See in this Chapter, Section 2.c.ii. about successors in title.

[377] Indeed, the Trump administration has submitted a letter to the signatories of the TPP by which the US withdrawn of such Agreement. Ministry of Foreign Affairs and Trade, 'Text of the Trans-Pacific Partnership' (New Zealand Foreign Affairs and Trade, 2018) https://www.tpp.mfat.govt.nz/text accessed 4 May 2018.

In some cases, despite the component of intellectual property that an FTA might have, if it is not relevant for the purpose of this thesis it will not be considered. For this reason, the Mexico–EU, the Chile–EU, the Chile–Mercosur, the Chile–Colombia, the Argentina–EU and the Argentina–Mercosur instruments will not be studied in this document.

In the case of the G3 (Colombia, Mexico and Venezuela)[378] and the FTA Mexico–Chile,[379] suffice to say that both accepted the Berne Convention as a minimum standard and introduced the clause of freedom of contract that was adopted first for NAFTA, as will be mentioned below. The only particularity to highlight is that in the case of the Mexico–Chile agreement, the clause does not mention the conditions of employment. Similarly, the Colombia–US agreement shows that the general basic elements mentioned in previous FTAs on this matter have been also introduced in this one as well. However, the improvements that the Chilean FTA shown were not included in this instrument.

1. FTAA

As a general objective, the FTAA's Chapter XX (IP Rights)[380] proposed a similar text as the one found in article 7 of the TRIPS Agreement commented above. In this case, fostering both socio-economic welfare and the balance of rights and obligations (article 2) was considered part of the aims of the instrument. In addition, it was stated that the abuse of intellectual property rights should be prevented, especially if it affects (among

[378] Venezuela denounced the agreement in 2006. Spanish version here: Ministerio de Comercio Industria y Turismo, 'Tratado de Libre Comercio Entre Los Estados Unidos Mexicanos Y La Republica de Colombia' (*Acuerdos Comerciales y de Inversion*, 2017) <http://www.tlc.gov.co> accessed 4 March 2017.

[379] Spanish version here: Secretaria de Economia, 'Países Con Tratados Y Acuerdos Firmados Con México/América Latina/Chile' (*Comercio Exterior*, 2015) <http://www.gob.mx/se/documentos/comercio-exterior-paises-con-tratados-y-acuerdos-firmados-con-mexico-america-latina-chile?state=published> accessed 4 March 2017.

[380] The analysis and comments proposed in this section will be based in the last draft published in the official site of the FTAA. 'Draft FTAA Agreement. FTAA.TNC/w/133/Rev.3' (*Free Trade Area of the Americas*, 2003) 108 <http://www.ftaa-alca.org/ftaadrafts_e.asp> accessed 3 March 2017.

other things) employment (Section A, article 3.2).[381] According to the general principles proposed in Chapter XX, each country would have been able to adopt measures protecting particular sectors of 'vital importance to their socio-economic and technological development' (A.3.1).

Regarding the problem of attempting a definition of 'author', an agreement was not reached. There were opposed positions on the idea of authorship based either on the production of the work or the creation of the work (B.2.c.1). In connection to this, another matter of disagreement was the introduction of originality as a characteristic of the work within the principle of no protection of ideas (B.2.c.2.1).

Nevertheless, moral rights were accepted to the conventional minimum of Berne article 6bis (Sec.B.2.c.3). Therefore, is possible to assert that authorship would have been protected under the considerations above mentioned for the Berne Convention.

On the matter of initial ownership and transferability of the economic rights, the two possible approaches for the definition of the author, as creator or as a producer, resulted in two options to be decided in the negotiations. One possibility was that the person who has either acquired or holds the copyright should be able to freely transfer it. Under this possibility, it was considered that such person, even in the case in which it has acquired the copyright by virtue of an employment contract, should be able to exercise those rights 'in its own name'. The second possibility, held probably by most of the Latin American countries, was that the copyright might be transferred on a contractual basis under the copyright law of each country. In this option, the work created under employment would remain owned by the author, but some rights would have been transferred to the employer 'to the extent justified by the normal activities of the person acquiring the right at the time of the request, unless expressly stated otherwise' (Sec.B.2.c.12.1.a).

The second option mentioned above also introduces some rules referred to formalities and limitations of the contract for the protection of author's interests. These were the

[381] Hereafter, the references to the sections, subsections and articles in the FTAA will me mentioned with numbers only, in this case (A.3.2).

requirement of written contracts, the restricted interpretation of the scope of rights transferred by contract, and two new limitations, one reducing the time for the transfer to five years, and the second limiting the extension of the rights to the territory of the country where the transfer was made. These two limitations would operate in case those conditions were not agreed. Such proposal was similar to the introduced for the Tunis Model Law.

The FTAA shows the tensions in the approaches between the Latin American perspective and the US'. The most important point was the mechanisms of transfer of the rights. Within the initiative, regulating to some extent contractual relationships in copyright was probably unique, though it had risen the discussions of different legal traditions towards freedom of contract. Some of those issues were solved in the treaties signed in the following years, particularly stating freedom of contract as a principle.

2. NAFTA

NAFTA[382] was one of the first FTAs signed by the US. Its chapter XVII relates to intellectual property. The conventional minimum the agreement recognises includes the Berne Convention without exceptions, including moral rights.

In the copyright section of the agreement, originality was accepted as a characteristic of protection, in connection with article 2 from the Berne Convention (article 1705.1). Ownership is stated in terms of the author or her successors in interest, and as such, the economic rights can be transferred freely (article 1705.3.a). Accordingly, article 1705.3.b states that the person who has acquired or holds the economic rights by virtue of a contract, even an employment contract, can exercise the copyright in her own name. This clause is similar to the one that would have been adopted in the case of the FTAA (first option in B.2.c.12.1.a). However, a slight change was introduced in NAFTA: what is exercised is not the copyright but the economic rights. This imposes

[382] USTR, 'North American Free Trade Agreement' (*NAFTA Secretariat*, 2017) <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement> accessed 3 March 2017.

certain limitations regarding the exercise of moral rights which are outside of such a possibility.

3. US-Chile FTA

On the matter of freedom of contract for copyright, a new era of negotiations began with the US-Chile agreement. The complexity of the issues discussed and agreed on in this Treaty increased to the extent that a preamble commanding the interpretation of Chapter Seventeen on intellectual property rights was required.[383] For this reason this agreement will be analysed, even though Chile was not part of the countries studied in the previous chapter.

The preamble emphasizes similar objectives defined in article 7 of TRIPS. It gives attention to the development of users and producers and the encouragement of socioeconomic welfare. However, an additional principle was introduced, recognising that a balance between right holders and the legitimate interests of users and of the community needs to be achieved. The introduction of such a balance as an aim could produce a shift in the interpretation of the agreement towards the achievement of such a balance. As mentioned earlier, if the differentiation between the author and other right holders is accepted, the indicated balance could have an effect in the contractual relationships between these two actors.

The full incorporation of the Berne Convention is accepted under a general clause that covers all the treaties under WIPO administration.

Within article 17.5 of the Treaty, the use of the language referring to copyright highlights some changes. First, the concept of author is used without directly mentioning the successor in title, but includes it as a footnote so that the mention of one would include the other.

[383] USTR, 'Chile FTA Final Text' (*Office of the United States Trade Representative*, 2015) <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta> accessed 4 March 2017.

The Treaty also incorporates a major variation in the rule regarding freedom of contract and the ownership of copyright (article 17.7.2). The first part of the section keeps freedom of transfer and the guarantee to exercise the economic rights in its own name acquired as a consequence of contract of transfer or employment. However, the second part (17.2.b) creates the possibility of the contracting parties defining the cases in which the contracts of employment may transfer the copyright to the employer. Such a change is not a mandatory obligation, but it creates the possibility for the country to implement regulations on this aspect. The possibilities this section creates are related to eventual restrictions in the scope of rights transferred in certain cases, and to accept eventual agreements in contrary that would revert the effect of the deemed transfer in favour of the employer. These two elements move the balance to favouring authors' interests and is coincident with the legislation of the Latin American countries studied in the previous chapter.

This was not the only variation in the section. The second part of article 17.2.b.ii recognises the possibility for States to create reasonable limits of the free transfer of the rights in the hands of right holders that are different than the original right holder (the author). Those limits should consider the interests of the transferees.

This is an interesting turn in the intention of regulating contractual copyright matters within the FTAs with the US. It is possible to say that moral rights were the first part of this shift since their accession to the Berne Convention. With the Chilean FTA, the US accepted the possibility for the States parties of limiting freedom of contract to benefit an author's interests.

4. EU-CAN FTA

Alongside the negotiations with Europe, this Treaty was adopted between two free trade areas (EU and CAN).[384] Title VII of the Treaty deals with intellectual property rights. The first chapter introduces three general objectives: the promotion of

[384] European Commission, 'Andean Community' (*European Commission/Trade*, 2017) <http://ec.europa.eu/trade/policy/countries-and-regions/regions/andean-community/> accessed 4 March 2017.

innovation and creativity, its production and commercialisation, and the promotion of intellectual property in similar terms as the clauses adopted in article 7 of TRIPS and the subsequent FTAs. The Berne Convention is also introduced as a conventional minimum, using the concept of author in the general sense explained above.

In contrast with the previous FTAs studied, the EU-CAN FTA introduces the concept of moral rights in similar terms as the Berne Convention. Those rights are considered independent from the economic rights and the author would be entitled to them 'even after the transfer' of the economic rights.

There is no mention of the matter of ownership, transfers, and works created under employment in the Treaty. It does introduce, however, the obligation of protecting the resale right in similar terms as mentioned in the previous chapter in the case of the European Union. Here, it would be an inalienable and non-waivable right.

5. TPP

In the last segment of analysis of this section, two projects in the course of adoption are worth mentioning. The Trans-Pacific Partnership is one of these. Although the Trump administration gave notice of withdrawing from this agreement, the other countries at play are probably willing to keep it alive. Two of those parties have been mentioned in this section (Mexico and Chile). The TPP shows interesting connections between several jurisdictions with interesting differences.[385]

Chapter 18 of the agreement has a similar enunciation of objectives found in previous agreements and taken from article 7 of the TRIPS agreement. As principles, the agreement states two. First, it establishes the possibility for members to adopt measures to protect the public interest in sectors such as health or others of 'vital importance to their socio-economic and technological development' (article 18.3). Second, it foresees measures that the members might need to adopt to prevent

[385] Ministry of Foreign Affairs and Trade, 'Text of the Trans-Pacific Partnership' (New Zealand Foreign Affairs and Trade, 2018) https://www.tpp.mfat.govt.nz/text accessed 4 May 2018.

abuses of the intellectual property rights by right holders, or the use of practices that could restrain trade or affect the transfer of technology.

The contracting parties also agreed on recognising three objectives regarding intellectual property: 1) the promotion of innovation and creativity, 2) the facilitation of the diffusion of information, knowledge, technology, culture, and the arts, and 3) fostering competition and open and efficient markets. Such aims would operate within the national internal public policies and respect the principles of transparency, due process, and the consideration of the interests of 'relevant stakeholders'.

The precedent declaration of principles and objectives, although not new in the language of the FTAs, creates a threefold bundle of guides for the development of the treaty. As such, they give room for more open interpretations in matters of interest for this thesis. For instance, the definition of authorship, originality, the first ownership of the copyright, and the possible limitations on contractual relationships in favour of authors, are legal mechanisms to be considered and understood within such a framework.

The Treaty also creates a connection between the market of knowledge and the protection of public interests in fostering access and dissemination of contents without disregarding the interests of right holders. This is also an element to take into account for the interpretation of the rules it introduces, as the protection of the market of knowledge might not be reduced to the mere proprietary interests of the copyright, as it has been argued in this thesis.

For the purpose of this work, the copyright component in the Treaty is, in general, no different from what it has been highlighted in the previous treaties studied.

The matter of freedom of contract and the free exercise of copyright by its right holder (article 18.67) is no different from the similar provisions commented on the other FTAs (excluding the EU-CAN FTA). Two footnotes to the article are important, though. First, footnote 80 clarifies that such a free exercise does not affect the exercise of moral rights. As the only possible reference to moral rights is the application of the Berne Convention, it would be understood that such a footnote refers directly to the

inalienability of these rights and their prevalence. Second, footnote 81 states two figures, the first one creates, for a given country, the possibility of restricting the cases of deemed transfer of rights under unwritten contracts by which the work has been created. The second refers to the possibility of create, by the States parties, limitations on the scope of the rights transferred in protection of author's interests, taking also into consideration the interest of the transferee.

These two footnotes can be linked with the Chilean and possibly the Mexican influence. There is a clear connection with the similar clause stated in the US-Chile FTA. However, Weatherall, in her comments about this article,[386] disagrees on the matter of the separation between moral rights and economic rights and also the possible restrictions to the freedom of contract within the copyright laws. This scholar gives more weight to the component found in the similar provisions from the previous FTAs in which the principle of freedom of contract in copyright law is stated. Nevertheless, the principles and objectives commanding the TPP and the development of the national legislations of at least two of the countries negotiating the instrument show the rationality of such restrictions. That is the case of Mexico as it was described in the previous chapter. The Australian scholar concedes the possible effects of footnote 81 (80 in Weatherall's text), but criticises the ability of the countries to create such restrictions to the freedom of contract.

That is not the view of this thesis. Although it agrees on the matter of the importance of protecting an author's human rights, as Weatherall points out, this thesis has analysed the evolution of the international treatment to this matter and found that the FTAs analysed so far demonstrate a positive tilt towards such protection. Connecting constitutional principles, certain public policies, case law, and the existence of strong elements in the sphere of human rights, might be strong arguments to assert that those mechanisms of protection for an author's moral and material interests are viable. It is also clear that stronger international instruments in this matter are desirable, and perhaps the evolution of international copyright will walk such a path. Though it is a difficult path to follow, as in many cases, the influence of author's interests is weak in

[386] Kimberlee G Weatherall, 'Section by Section Commentary on the TPP Final IP Chapter Published 5 November 2015 – Part 2 – Copyright' (2015) <https://works.bepress.com/kimweatherall/>.

comparison to the power of other interests. An ethical question remains. How can the interests of the author and the interests of right holders be in opposition?

6. The proposed EU Directive for Copyright in the Single Market

Although an EU Directive is an instrument that is not situated at the same level as an FTA, it is important to consider articles 14 through 16 of the proposal presented by the EU Commission in September 2016.[387] The basic aim of these articles is to protect authors' fair remuneration regarding the exploitation of their works where their rights have been transferred. It is possible that, if successful, the EU proposal would lead to the path mentioned above towards an international instrument on this matter.[388]

The proposal creates a three-folding mechanism. Aimed at the problem of transparency between contractual parties in the transfer of copyright, article 14 creates a duty to providing information to authors about the use and revenues their works produce. The second mechanism is related to the first. It gives authors the power to claim additional remuneration in case they find that, according to the information accessed through the first mechanism, the originally agreed-upon remuneration is disproportionately low in comparison with the revenues the work produces (article 15). The third mechanism recognises that in case there is no agreement between authors and right holders, authors can resort to an alternative dispute resolution procedure to define the remuneration (article 16).

Some connections can be highlighted from these three articles. The first mechanism recalls the duty of transparency stated by the Colombian Constitutional Court in the *Escalona* case commented on in the previous chapter. The second mechanism is close to the Model Law for Employed Authors which envisaged the creation of a remuneration for authors according to the use of their work by their employers. In the Anglo-Saxon tradition such a possibility might seem impossible. However, as has been demonstrated in the study of US copyright law, the possibility of revising the

[387] European Commission, 'Digital Single Market, Copyright' (*Digital Single Market*, 2016) <https://ec.europa.eu/digital-single-market/copyright> accessed 4 March 2017.

[388] Recent political changes in the global arena might put some distance between it, though.

contractual assignment of rights after 35 years of execution is a mechanism not too different from the EU proposal in respects to the protection of an author's interests.

The third mechanism improves these clauses' effectiveness. An alternative dispute resolution mechanism would give at least some authors a possible way for solving eventual disagreements on the matter. Nevertheless, if there is no will from one of the parties to engage in the alternative mechanism, is not clear if the other party could turn to claim judicial protection.

Various reasons have been argued in support of the EU proposal.[389] One is the possible fragmentation of the single market due to the different national approaches about how to protect author's contractual interests. This could create disparities in the contractual conditions of creators, affecting their overall conditions and also affecting the promotion of cultural diversity. The duty of transparency is aimed at improving the bargaining position of the author to benefit from the digital single market in general.

Finally, the mechanisms in the proposed Directive are aimed at the protection of author's fundamental rights. The impact assessment of the proposal, presented by the EU Commission, also supports the argument that such measures would not have a negative impact on other fundamental rights such as freedom of conducting a business, freedom of expression, and freedom of information. This thesis also adds that such measures can improve authors' moral and material interests, and consequently an author would find a protected environment for active participation in the market of knowledge.

There are, however, some drawbacks to consider in the proposal. Though a commendable initiative, the first one of its kind in the international arena, it is aimed to assignment or license contracts, other situations as the case of WMH or employee-

[389] European Commission, 'Digital Single Market, Copyright' (*Digital Single Market*, 2016) <https://ec.europa.eu/digital-single-market/copyright> accessed 4 March 2017. See also European Commission, 'Executive Summary of the Impact Assessment on the Modernisation of EU Copyright Rules' (2016) <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016SC0302&from=EN>.

created works have not been considered. This would leave in a different position a large sector of authors whose contractual conditions can be considered even more stringent, as described in chapter 3, section IV.1.b). In addition, some scholars have highlighted other issues to take into account regarding the main problem, which is improving authors' bargain position in their contractual relationships.

For instance, Hilty and Moscon[390] have indicated some issues to consider regarding the EU proposal. First it is the matter of the Commission's competence on copyright contract law. As it has been indicated earlier, the connection point on this matter is Article 167 TEU (former Article 151).[391] Hilty and Moscon highlight that whilst there is not a general competence for the Commission to regulate copyright contract law, there is a horizontal connection between the interest in supporting and supplementing Member States' action towards artistic and literary creation (Article 167.2 TEU), and the effectiveness of protecting authors and performers in the benefit they should enjoy from the rights regarding this matter. Such effectiveness would be only possible if contractual matters are taken into account.[392]

Second, it is the substance of the proposal. The duty of transparency on Article 14 of the proposal should apply for all authors and performers. Disparities in the treatment of authors whose contribution is not enough regarding the overall of the work in which they have contributed or those whose revenues are not big enough to justify the administrative effort of providing information, are not beneficial for improving the bargaining position of authors.[393]

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[390] Reto M Hilty and Valentina Moscon, 'Copyright Contract Law' in Reto M Hilty and Valentina Moscon (eds), *Modernisation of the EU Copyright Rules Position Statement of the Max Planck Institute for Innovation and Competition* (1st edn, Max Planck Institute for Innovation and Competition 2017).

[391] See Chapter 3, Section III.B.3.

[392] Reto M Hilty and Valentina Moscon, 'Copyright Contract Law' in Reto M Hilty and Valentina Moscon (eds), *Modernisation of the EU Copyright Rules Position Statement of the Max Planck Institute for Innovation and Competition* (1st edn, Max Planck Institute for Innovation and Competition 2017) paras 5-8.

[393] Reto M Hilty and Valentina Moscon, 'Copyright Contract Law' in Reto M Hilty and Valentina Moscon (eds), *Modernisation of the EU Copyright Rules Position Statement of the Max Planck Institute for Innovation and Competition* (1st edn, Max Planck Institute for Innovation and Competition 2017) paras 10-11.

Third, the proposal lacks in clarification of what would be considered 'fair remuneration' and does not address the problem of improving the bargaining position of the author. In a given possibility of revision of the contract (article 15), author's position would not be seen improved, even less as article 16 proposes a voluntary mechanism of conflict resolution.

In sum, with Hilty and Moscon, it is highlighted that the proposal should take the opportunity and go further in creating a mechanism of reversionary rights in which the assignment contract would be terminated in case of not good enough exploitation of the work, or not enough remuneration produced, or not information provided.[394] Other scholars such as Lucas-Schlotter highlighted the same consideration. Either contracts should be limited in time, giving the opportunity for the author to recall his rights and eventually renegotiate the dissemination of her work, or due to underperformance of the assignee, it should be possible to terminate the contract as it would be considered breached.[395]

G. Partial conclusion

One of the common elements that require attention in this section is that most of the bilateral FTA agreements studied here include a clause of free contractual relationships for the disposition of copyright for both authors and other right holders. However, the previous chapter has shown that the States parties to these agreements do not understand that such freedom cannot be limited under their national legislation. In fact, examples of limitations to contractual freedom are present in most of the copyright laws of the countries studied here.

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[394] Reto M Hilty and Valentina Moscon, 'Copyright Contract Law' in Reto M Hilty and Valentina Moscon (eds), *Modernisation of the EU Copyright Rules Position Statement of the Max Planck Institute for Innovation and Competition* (1st edn, Max Planck Institute for Innovation and Competition 2017) para 19.

[395] Agnès Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' in Paul Torremans (ed), *Research Handbook on Copyright Law* (2nd edn, Edward Elgar Publishing 2017) 264-267.

The tension between freedom of contract and the protection of author's moral and material interests seems to be the prime problem at the moment. The trend for improving authors' bargaining position was initiated with the model laws studied, even if these are considered mere soft law and not binding. Both proposed model laws responded to the characteristics that the comparative law offered. Therefore, even for those legal traditions not so keen to regulate contractual relationships under copyright international law, the idea remains sound. Weatherall's remarks on the TPP and the elements considered in support and against the proposal for a Directive on Copyright in the Digital Single Market are examples of such a tension.

Other issues such as the problematics regarding moral rights and originality seems settled, although not completely. Authorship and original (or initial) ownership are still a matter of differing approaches. In some cases, the concept of author has been used with a wider meaning than the obvious one, including legal entities or producers rather than creators. The next question to consider is this: given the national evolution of the problem and its international development in the spheres of international copyright laws, international laws on trade, and eventual soft laws, what is the role of the human rights of an author in this legal environment?

III. The concept of author within the sphere of human rights

The increasing attention given to the interface human rights–IP has several branches. In the case of copyright, these branches are related to issues such as freedom of expression in the case of technologies developed to improve a right holder's control over the use of works through the internet, as well as other issues such as access to information, education, parody and freedom of creativity.

Often the attention to the interface copyright-human rights has been directed to something that it could be called the 'user–owner dichotomy'. The concept 'owner' has been used to encompass both authors and subsequent right holders of the copyright and this could create a reduced understanding of the interface. The copyright laws studied in the previous chapter and the international copyright instruments studied in

the previous section have given an account of this misconception. Rules for the protection of authors' interests detached from the interests of other right holders have been elaborated or are under study.

However, the position of the author as a separated person from the right holder has not been given enough attention. On this matter, the interaction between copyright legal systems and the human rights legal systems should give more weight to such a distinction. The role of the author in the international instruments of human rights will give a view of such a weight, and it will also give a view of how another paradigm, the paradigm of the protection of author's moral and material interests, which should be recognised in the scholarly analysis regarding the interface between intellectual property and human rights.

In the comparative perspective addressed in the previous chapter, the role of the Latin American countries in the protection of author's rights was highlighted. Those copyright policies differ in the protection of authors by giving more weight to their moral rights, and creating some mechanisms in which they can find some protection for their weaker contractual position. In the previous section, it was shown how some of these countries influenced, to some extent, the adoption of agreements on trade in which author's protection has been envisaged. This section will show the role of these countries in defining and structuring the cultural rights within the human rights system and especially regarding the definition of the protection of author's interests.

Once the sources have been established, the analysis will focus on the connections between copyright and human rights through four analytical elements already studied in previous sections: the connection between originality and authorship, the concept of author, the role played by successors in title (regarding the protection of authors' moral and material interests), and finally, how the human rights system has recognised the status of the author.

A. Sources for this study

Often the protection of an author's moral and material interests is situated in the economic and social rights setting within the human rights international instruments. An integral and systematic understanding of the instruments protecting human rights demands that there should not be a difference between these rights and the civil and political rights.[396] In addition, it has been also argued here that protecting an author's rights would have an impact on the civil and political rights, due to the role that cultural expressions have in the construction of the system of rights, particularly in relation with the democratic principle.

The legal framework for this section comprehends the Universal Declaration of Human Rights (UDHR), the International Covenant of Economic, Social and Cultural Rights (ICESCR), the American Declaration of the Rights and Duties of Man (ADRDM), and the Protocol of San Salvador for the American Convention of Human Rights (Protocol of San Salvador). The EU Charter and the European Convention of Human Rights are also sources to be analysed. Some of the cases related to this matter have been mentioned in the previous chapter due to the particularities of the instruments and also because of its direct connection with the EU Law.

In chronological order, the ADRDM precedes the UDHR for some months. The first one created a stance that would be followed by the Universal Declaration (after some reluctance).

The ADRDM, article XIII states:

> *Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries. He likewise has the right to the protection of his moral and material interests as*

[396] Paragraph 8th of the Vienna Declaration states: 'Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.' Paragraph 5th states that all human rights are 'universal, indivisible and interdependent and interrelated.' Secretariat of the World Conference on Human Rights, 'Vienna Declaration and Programme of Action. A/CONF.157/23' (1993).

regards his inventions or any literary, scientific or artistic works of which he is the author.

The UDHR, article 27 reads:

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The ICESCR, article 15 states:

1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 14 of the Protocol of San Salvador reads:

1. The States Parties to this Protocol recognize the right of everyone: a. To take part in the cultural and artistic life of the community; b. To enjoy the benefits of scientific and technological progress; c. To benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author.

These four instruments show similar structure and characteristics and deal with two sides of the rights related with intellectual property: private and public interests. In contrast, the European instruments, the EU Charter, and the ECHR, refer to the intellectual property as a part of the right to property, in the first case with a direct

reference to these rights and, in the second case, inferred from the general right to property.[397]

The role of the Universal and the American declarations, despite their not-binding nature, is important as they initiate the framework that then would be developed by the ICESCR and the Protocol of San Salvador, respectively.

In the case of the ADRDM, the Inter-American Court of Human Rights (IACtHR) has recognised through an Advisory Opinion that the Declaration is part of the Inter-American legal system of human rights.[398] The Court has concluded that the ADRM defines and contains fundamental rights that the Member States have signalled in other instruments as relevant for the System.[399] Therefore, this Declaration should be considered in the interpretation of the Inter-American System of Human Rights as 'an indirectly binding text.'[400] Even more, the American Convention itself includes, as

[397] For a recounting of the characteristics and limitations that both the ECHR and the EU Charter present on the matter see Christophe Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015).

[398] *Advisory Opinion OC-10/89* 14. Here, the Colombian Government requested the Court for advice regarding their competence in interpreting the American Declaration. The Court found admissible that the ADRDM should be part of its scope of interpretation based on various reasons; mainly, the reference to the Declaration within the Inter-American Convention of Human Rights and the duty of both the Court and the Inter-American Commission to protect the human rights system which include the Declaration.

[399] Such an instrument is the OAS Charter, ratified by the US in 1951. As Craven explains, the OAS Charter does not define or list the fundamental rights to which it refers, but it states the duty of the Inter-American Commission to keep vigilant over the observance of human rights. The Statute of the Commission defines the human rights over which it has competence, and these include the rights defined by the Inter-American Convention in relation to its States parties and the rights defined in the ADRDM 'in relation to the other Member States.' (Article 1.2., Resolution 447, OAS General Assembly 1979) (see note 402).

[400] Matthew Craven, 'The Protection of Economic, Social and Cultural Rights in the Inter-American System of Human Rights' in David Harris and Stephen Livingstone (eds), *The Inter-American System of Human Rights* (Oxford University Press 1998) 293-295. Particular attention should be given to article 29 (d) of the Inter-American Convention in which it has been established that 'No provision of this Convention shall be interpreted as: (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have'. 302. See also,

Harris has pointed out, the ADRDM as source of interpretation of the human rights system (article 29.d of the Pact of San Jose).[401]

The problem of the sources is important for this study because of the impact of the normative content these instruments have in the countries under study, which might affect their internal copyright laws. In the case of the US this is problematic because the country has not ratified the ICESCR, or the Inter-American Convention and have not acceded to the Protocol of San Salvador.[402] Nevertheless, given the *Advisory Opinion OC-10/89*, mentioned above, it has been the opinion of some authors that the US would be bound by the ADRDM in reference to the competence of the Inter-American Commission by the effect of the application of its Statute and the definition of its competence by the OAS Charter. This, however, this creates disagreement with the US.[403]

In the case of the UK, the country has ratified the ICESCR and as member of the EU, the EU Charter would be applicable as well. In respects to the ECHR, the UK has adopted the Human Rights Act which incorporates the ECHR into their domestic law.

As mentioned in the previous chapter, this is not the case with the other countries under study as even in some of them, such as in Colombia, Argentina and Mexico, their constitutions introduced the text of the Covenant as part of their chart of fundamental rights.

David Harris, 'Regional Protection of Human Rights: The Inter-American Achievement' in David Harris and Stephen Livingstone (eds), *The Inter-American System of Human Rights* (Oxford University Press 1998) 6.

[401] David Harris, 'Regional Protection of Human Rights: The Inter-American Achievement' in David Harris and Stephen Livingstone (eds), *The Inter-American System of Human Rights* (Oxford University Press 1998).

[402] Philip Alston and Ryan Goodman, *International Human Rights. Text and Materials* (Oxford University Press 2013) 292-293.

[403] See also David Harris, 'Regional Protection of Human Rights: The Inter-American Achievement' in David Harris and Stephen Livingstone (eds), *The Inter-American System of Human Rights* (Oxford University Press 1998) 6.

In the European sphere, the basic instruments are, first, Article 1 of the Protocol 1 of the ECHR which states the protection to the right of property which would include intellectual property. In this case is important to understand, as mentioned by Krause,[404] that the right of property is not absolute in the European construction. This author mentions some cases as an example of the extent to which this right might be limited. The second instrument to consider is the second paragraph of article 17 of the EU Charter of Fundamental Rights, which includes intellectual property as a right that is protected under the umbrella of property.[405]

Additional sources are the decisions from the ECtHR and one from the IACtHR. In the European case, the decisions from the Court of Justice of the European Union (CJEU), which apply either the ECHR or the EU Charter, have been mentioned in the respective section in chapter 3 regarding the protection of author's fundamental rights.

In the previous chapter it was highlighted how the CJEU has also recognised the status of the protection of copyright through a complex construction in which the mere proprietary interest has been set aside. This is based on the *Luksan*, *Laserdisken,* and *Telefis* cases.[406] From the comparative perspective, these decisions have been analysed at chapter 3 in comparison to the Constitutional decisions of the relevant countries under study.

Another important source for this section is the General Comment No.17 on 'The right of everyone to benefit from the protection of the moral and material interests resulting

[404] Catarina Krause, 'The Right to Property' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (Kluwer Law International 2001).

[405] Interestingly, for the CESCR the protection as stated in the ICESCR can be mirrored in other instruments, including article 1 of Protocol 1 of the ECHR. In this case, most of the literature would not agree with such a statement because this article is referred to as the protection of property. However, it has also been stated that the protection under the ECHR for IP should consider not only the property right as in protocol 1, but other related rights. Committee on Economic Social and Cultural Rights, 'General Comment No. 17 (2005) (Article 15, Paragraph 1 (C), of the Covenant) E/C.12/GC/17' (Committee on Economic, Social and Cultural Rights 2006).

[406] Case C-277/10 *Luksan v van der Let* [2012] ECR; Case C-479/04 *Laserdisken ApS v Kulturministeriet* [2006] ECR I-8089; Joined Cases C-241/91 and C-242/91 *Radio Telefis Eireann and another v European Commission* [1995] ECR I-743. See Chapter 3, section III.

from any scientific, literary or artistic production of which he or she is the author' adopted by the Committee on Economic, Social and Cultural Rights (CESCR).[407] This is especially important, because this is one of the few available legal interpretations of article 15.1.c of the ICESCR available at the international level.[408] It is also important to consider, as source of analysis, the Report from the Special Rapporteur of Cultural Rights published in 2014, which also serves as an interpretative source of the Covenant.[409] This report comprehensively studies the interaction between the right to science and culture and copyright.

B. The historical Latin American connection

In 1948, the United Nations adopted the Universal Declaration of Human Rights. Article 27 recognizes a set of complex rights related to the access and benefits of culture and scientific progress, and the protection of authors' material and moral interests resulting from their scientific, literary or artistic production. By that time, the international copyright was about to integrate a global system of protection through one of its most important tools, the UCC, signed in 1952. This process was finalised with the accession to the Berne Convention by most of the countries in the world during a pre- and post-TRIPS period of twenty years.

Almost in parallel with the UDHR, the adoption of the ADRDM took place as part of the IX Inter-American Conference in Bogota in 1948.[410]

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[407] Committee on Economic Social and Cultural Rights, 'General Comment No. 17 (2005) (Article 15, Paragraph 1 (C), of the Covenant) E/C.12/GC/17' (Committee on Economic, Social and Cultural Rights 2006).

[408] For an analysis of the sources of international human rights law and in particular about the status of the General Comments see Christine Chinkin, 'Sources' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press 2010).

[409] Farida Shaheed, 'Copyright Policy and the Right to Science and Culture. A/HRC/28/57' (2014).

[410] Inter-American Institute of International Legal Studies, *The Inter-American System. Its Development and Strengthening* (Oceana Publications 1966) XXXII.

In the language of human rights, the protection of an authors' moral and material interests was not introduced until the ADRDM.[411] This was not a coincidence. In the ADRDM's background, there was the International Conferences for the Americas, a program that began at the end of the 19th century which evolved into the Organisation of American States (OAS). One of the pre-OAS' branches covered the evolution of the IACS as was studied in Section II, A of this chapter above.

A brief account of how the UDHR was discussed gives an idea of the Latin American participation in the definition of the final text of article 27.[412] By 1948, when the UDHR was adopted, 39 countries had accessed to the Berne Convention,[413] and another group of countries have created the IACS. Except for Brazil, the Latin American Countries were not members of the Berne Convention at that time. It should be noted that there was a limited participation of European countries in the IACS.[414] This is

[411] Audrey R Chapman, 'Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (I) (c)' (2001) XXXV Copyright Bulletin 4, 11. See also Richar Pierre Claude, 'Scientists' Rights and the Human Right to the Benefits of Science' in Audrey R Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002).

[412] For a detailed account of these discussions see Johannes Morsink, *The Universal Declaration of Human Rights. Origins, Drafting, and Intent.* (University of Pennsylvania Press 1999); Mary Ann Glendon, *A World Made New. Eleanor Roosvelt and the Universal Declaration of Human Rights* (Random House 2001); Audrey R Chapman, 'Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (I) (c)' (2001) XXXV Copyright Bulletin 4.

[413] Those countries were: Armenia, Austria, Belgium, Brazil, Bulgaria, Canada, Denmark, Finland, France, Germany, Greece, Holy See, Hungary, Iceland, India, Ireland, Israel, Italy, Japan, Lebanon, Liechtenstein, Luxembourg, Monaco, Morocco, Netherlands, New Zealand, Norway, Pakistan, Poland, Portugal, Romania, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, and the UK.

[414] Only Austria, Belgium, France, Germany, Hungary, and Italy adhered to the Additional Protocol for the Montevideo Treaty (1889). See Delia Lipszyc, 'Esquema de La Protección Internacional Del Derecho de Autor Por Las Convenciones Del Sistema Interamericano' in Delia Lipszyc (ed), *La protección del derecho de autor en el sistema interamericano* (Universidad Externado de Colombia 1998). Nevertheless, the participation of some Latin American countries in the previous works preparing the Berne Convention has been documented. See Pabon (n 61); Jose Bellido, 'Latin American and Spanish Copyright Relations (1880–1904)' (2009) 12 The Journal of World Intellectual Property 1 <http://onlinelibrary.wiley.com/doi/10.1111/j.1747-1796.2008.00348.x/full> accessed 30 December 2014.

important, as will be shown below, considering the role that the American countries played in the negotiations of the final wording of article 27 of the UDHR.

The initiative for article 27 in the UDHR was started by France, whose delegation proposed an article close to their authorial approach characteristic in their copyright system (the Cassin text). Although the first part of article 27 was passed with almost no discussion, the second part had plenty of opposition. Nevertheless, one of its strongest supporters was Chile.

The main arguments against the proposal can be summarised as follows.[415] The US argued, in respect to the first French proposal, that 1) the authors were protected by other conventions;[416] 2) those rights as proposed were not general enough as they present the interest of a small proportion of society; 3) the moral interests of the authors have not been well developed in many countries and it is not of the interest of the general public. These three arguments reflect contradictions. First, the US was reluctant to adhere to the Berne Convention and only partially part of the IACS. It also reveals an understanding of copyright under a conception of a romantic author, an elite member of society.[417] Such a conception of the author was not consistent within the context of cultural industries in the US, which was very real already in the post-war cultural industries of publishing, films, and music.[418]

[415] 'Copyright and the Declaration of Human Rights' (1949) II Copyright Bulletin 42.

[416] See Mary Ann Glendon, *A World Made New. Eleanor Roosvelt and the Universal Declaration of Human Rights* (Random House 2001); Johannes Morsink, *The Universal Declaration of Human Rights. Origins, Drafting, and Intent.* (University of Pennsylvania Press 1999).

[417] Ssenyonjo mentions this fact with respect to the plausible mentalities surrounding the adoption of article 27 in 1948. Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2nd edn, Hart Publishing 2016) 626.

[418] Beth Luey, 'The Organization of the Book Publishing Industry' in David Paul Nord, Joan Shelley Rubin and Michael Schudson (eds), *A History of the Book in America. Volume 5: The Enduring Book: Print Culture in Postwar America* (The University of North Carolina Press 2009). The author gives account of how the US developed a wide expansion of their publishing industries in the post-war era. As a result, in the first decade after the end of the conflict the exports jumped from 5% of the product to 20%.

The final text proposed later also found opposition from the US and the UK. In the case of the US, the main argument was that such a right was part of the right of property already included in article 17 of the Declaration.

The UK delegation added that such a principle of protecting an author's interests would not be accepted, as it will state a protection of a type of property together with a right of participation in the intellectual life of a community. The UK's opinion was also that an author's rights were the subject matter for international treaties and, because those rights lack universality, they should not be fundamental rights.

Those defending the proposed second part of article 27 (France, Cuba and Mexico)[419] argued that authors require special protection as they typically manage their rights poorly.[420] This is basically the idea of a weaker bargaining position of the author. The fact that the article was finally approved shows how the opposition was solved in favour of author's interests.

While deciding article 15.1(c) of the ICESCR similar debates were found. Claude summarises these, highlighting that, at that time, the cold war tensions influenced the discussion. The Soviet opposition to the property rights was extended to this matter, but the Israeli delegation and then the Costa Rican and Uruguayan delegations supported the necessity of giving space to these rights in the Covenant. Claude also highlights the important role that the Latin American countries played as a block in the discussion of the final draft.[421] It was the Chilean and the Uruguayan delegations who argued that the possible clash between proprietary interests and the right to benefit of

[419] Audrey R Chapman, 'Approaching Intellectual Property as a Human Right: Obligations Related to Article 15 (I) (c)' (2001) XXXV Copyright Bulletin 4, 11; Johannes Morsink, *The Universal Declaration of Human Rights. Origins, Drafting, and Intent.* (University of Pennsylvania Press 1999); Richar Pierre Claude, 'Scientists' Rights and the Human Right to the Benefits of Science' in Audrey R Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002).

[420] Copyright and the Declaration of Human Rights' (1949) II Copyright Bulletin 42, 46.

[421] Richar Pierre Claude, 'Scientists' Rights and the Human Right to the Benefits of Science' in Audrey R Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002).

culture and science should not exist, and that such rights should complement each other. In their view, protecting authors' rights would give certainty and credibility to the advancement of science.[422] This vision is consistent with the authorial paradigm stated in the second chapter of this thesis in which it has been acknowledged that the author plays a substantial role in the knowledge market. Given the participation of these countries in the discussion, it is not a coincidence that Mexico, Chile, Argentina, Costa Rica, and Uruguay adhered to the Berne Convention in the aftermath of the adoption of the ICESCR.

Two issues should be noted about this recount, though. First, within the UDHR, author's rights were under discussion and this included both moral and economic rights under a construction consistent with the international copyright law under development by the same time. Moral rights were already included, though not identically, in the Berne and the Havana conventions (1928). For some authors, UDHR's article 27 was considered consequent rather than redundant with the universalisation of international copyright law under development since 1928. The point here is that, at least when the UDHR was drafted, the delegations considered the inclusion of copyright as the 'rights of the individual as an 'intellectual worker, artist, scientist or writer''.[423] This would put aside the arguments that tend to disconnect copyright from the UDHR.

The second issue to note is that given the Latin American experience with the international protection of copyright through the IACS and their joint work with the French delegation towards article 27 (UDHR) and then towards article 15 (ICESCR), there are clear routes connecting the American countries with the protection of author's fundamental rights.

[422] Richar Pierre Claude, 'Scientists' Rights and the Human Right to the Benefits of Science' in Audrey R Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002) 57.

[423] Johannes Morsink, *The Universal Declaration of Human Rights. Origins, Drafting, and Intent.* (University of Pennsylvania Press 1999) 221.

C. Connecting author's rights with key copyright concepts in the international arena

This thesis has highlighted that protecting author's fundamental rights is relevant because cultural expressions are considered vehicles of knowledge that allow the author to exercise her communicative power towards the free participation in the decisions of society.

The preambles and recitals of some of the human rights instruments studied here give weight to the importance of culture within societies and its connection with the democratic principle. The ADRDM is an example of this, as it asserts that '[i]nasmuch as spiritual development is the supreme end of human existence and the highest expression thereof, it is the duty of man to serve that end with all his strength and resources. Since culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power.'

The preambles of the ICESCR, the ICCPR, the Pact of San Jose and the Protocol of San Salvador, reiterate this principle. These instruments also emphasise that the enjoyment of social, economic, and cultural rights is the precondition of human freedom, which is a principle stated by the UDHR.

In fact, according to Claude, in discussing the ICESCR, the Uruguayan delegation acknowledged that the purpose of including the protection of author's rights was their progressive development through the international instruments on the matter (for example, the Berne Convention).[424] For Chapman, this connection reflects the necessary interaction between the following instances covered by article 15: author's rights, cultural and scientific freedom, participation, and progress.[425]

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[424] See Richar Pierre Claude, 'Scientists' Rights and the Human Right to the Benefits of Science' in Audrey R Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002). Nevertheless, it was not until the final years of the 60's that the American countries started their accession to the Berne Convention (see Table 1 above).

[425] Audrey R Chapman, 'Core Obligations Related to ICESCR Article 15(1)(c)' in Audrey R Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural*

From the point of view of the international copyright law, its interface with human rights is not a new idea. Various scholars agree on the presence of such an interface since the discussions of article 27 UDHR.[426] In addition, UNESCO and WIPO have recognised this connection in their history. For example, the solemn declaration issued by WIPO celebrating the centenary of the Berne Convention states that copyright is based on human rights, as authors deserve their rights recognised and protected effectively.[427] By the same token, the 1971 revision of the UCC acknowledged as a principle that the 'spirit' of the Convention is in line with article 27 of the UDHR.[428] More recently, the recitals of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions state the linkage between cultural diversity, democracy, the fundamental freedoms and the role of intellectual property in sustaining those rights involved in cultural creativity.[429]

Although these are reasonably important samples of how the protection of cultural rights relates to intellectual property and especially with copyright, only recently[430] the

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Rights (Intersentia 2002). In similar terms Committee on Economic Social and Cultural Rights, 'General Comment No. 21 (2009) (Art. 15, Para. 1 (A), of the Covenant)' (2009).

[426] See Johannes Morsink, *The Universal Declaration of Human Rights. Origins, Drafting, and Intent.* (University of Pennsylvania Press 1999); Mary Ann Glendon, *A World Made New. Eleanor Roosvelt and the Universal Declaration of Human Rights* (Random House 2001); Peter K Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' in Laurence R Helfer (ed), *Intellectual Property and Human Rights* (Edward Elgar Publishing 2013). See also Copyright and the Declaration of Human Rights' (1949) II Copyright Bulletin 42.

[427] 'Celebration of the Hundredth Anniversary of the Berne Convention. Part I. Celebration in Berne' (1986) 22 Copyright 367.

[428] UNESCO, 'Summary Records of the Proceedings and Working Documents' (n 226). The Conference for the Revision of the UCC accepted as a principle of interpretation for the limitations and exceptions that, in addition to the requirement of an 'adequate and effective protection' from its Article I, the 'spirit' of the Convention also comprehended the convictions expressed in paragraphs 1 and 2 of the Universal Declaration of Human Rights. See Abraham L Kaminstein, 'Report of the General Rapporteur', *Records of the Conference for Revision of the Universal Copyright Convention* (UNESCO 1971) 67.

[429] UNESCO, *Basic Texts of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (UNESCO 2015) <http://en.unesco.org/creativity/convention/about/text>.

[430] See for example Julie Ringelheim, 'Cultural Rights' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (2nd edn, Oxford University Press 2014).

cultural rights have gained some attention in their interface with copyright. The complexities of this relationship have been analysed by authors such as Helfer and others from the point of view of the intellectual property systems and from the point of view of the human rights system.[431] However, the role of the author in this relation or interface has not received sufficient attention. It has been indicated above that one of the reasons for this is that often the author and other right holders are identified as an undifferentiated subject.

This subsection is aimed at identifying connections between the human rights instruments and the elements described above for the protection of author's rights.

1. The case law on protecting author's rights

Regarding the interface between copyright and human rights, few cases have been developed in the relevant jurisdictions for the international instruments under study

[431] Lawrence R Helfer and Graeme W Austin, *Human Rights and Intellectual Property. Mapping the Global Interface* (Cambridge University Press 2011); Christophe Geiger, *Research Handbook on Human Rights and Intellectual Property* (Christophe Geiger ed, Edward Elgar Publishing 2015) <http://www.elgaronline.com/view/9781783472413.xml>. See also Lawrence R Helfer, 'The New Innovation Frontier? Intellectual Property and the European Court of Human Rights' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (3rd edn, Kluwer Law International 2015); Uma Suthersanen, 'Towards an International Public Interest Rule? Human Rights and International Copyright Law' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Freedom of Speech. Comparative and International Analyses* (Oxford University Press 2005); Asbjørn Eide, 'Cultural Rights as Individual Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (Kluwer Law International 2001); Hannu Wager and Jayashree Watal, 'Human Rights and International Intellectual Property Law' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015) 160; Torremans, 'Copyright as a Human Right' (n 255); Peter K Yu, 'Challenges to the Development of a Human Rights Framework for Intellectual Property' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (3rd edn, Kluwer Law International 2015); Peter K Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' in Laurence R Helfer (ed), *Intellectual Property and Human Rights* (Edward Elgar Publishing 2013); Henning Grosse Ruse-Khan, 'Proportionality and Balancing within the Objectives for Intellectual Property' in Paul Torremans (ed), *Intellectual Property and Human Rights* (3rd edn, Kluwer Law International 2015); Lawrence R Helfer and Graeme W Austin, *Human Rights and Intellectual Property. Mapping the Global Interface* (Cambridge University Press 2011).

here. The ECtHR and the IACtHR have jurisdiction respectively over the ECHR and the Pact of San Jose on this matter.

a) The ECtHR

The ECHR is one of the instruments that has not followed the trend initiated by the ADRDM and the UDHR in which the twofold dimension of cultural rights has been developed. In this case, the first instrument, the ECHR from 1952 and its Protocol 1, article 1, states the protection of property without any mention to the protection of intellectual property or copyright or author's rights.

The implications of the case law of the ECtHR are important regarding the effects that they may have for the countries under its jurisdiction. However, the cases from this court have mainly analysed the scope of article 1 of the Protocol 1 by including intellectual property. Even so, Helfer highlights something important regarding the question of who should benefit from the human rights protection of intellectual property: the property clause includes under its scope of protection both legal and natural persons.[432] This means that the ECHR does not distinguish between the physical author and any other persons who could possess the copyright. For this reason, Helfer foresees a flood of intellectual property right holders that would overwhelm the ECtHR with claims based on human rights for the protection of their property rights.

If Helfer's forecast is right, sooner or later the ECtHR will face cases in which the protection of author's interests will produce horizontal effects.[433] Consequently, the justification of these rights will play an important role in the framework assessing whether the author or a third party is entitled to such rights.

[432] Article 1, Protocol 1 ECHR: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions" See: Lawrence R Helfer, 'The New Innovation Frontier? Intellectual Property and the European Court of Human Rights' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (3rd edn, Kluwer Law International 2015) 30.

[433] See, for example, Lorenz Fastrich, 'Human Rights and Private Law' in Katja S Ziegler (ed), *Human Rights and Private Law. Privacy as Autonomy* (Hart Publishing 2007).

Helfer highlights three recent decisions regarding the protection of intellectual property within the ECtHR*: Melnychuk v Ukraine*, *Anheuser-Busch Inc. v Portugal* and *Dima v Romania*. The first two do not address the question of a possible clash between alleged owners of a copyright, and for this reason they will not be studied here.

Dima v Romania,[434] however, creates an interesting paradigm. In this case the plaintiff claimed, among other things, the infringement of article 1 of the Protocol 1 of the ECHR protecting his copyright over an emblem he designed. The ECtHR did not accept this claim based on the fact that the very existence of a copyrighted work was assessed and denied by the national courts.

The case refers to the possible unlawful use and exploitation of Mr. Dima's design of the Rumanian national emblem. Mr. Dima's design was selected by a Rumanian government commission through a public competition where other proposals were presented. The plaintiff's proposal was amended based on observations the commission gave. Once made, the newly designed emblem was adopted through a statute adopted by the Parliament. The statute mentions Mr. Dima as the graphic designer of the emblem. However, he did not receive any payment for his work and had not signed any contract. Dima initiated copyright infringement actions for the unlawful use of his design. The national courts, however, rejected Dima's petitions on the basis of three arguments. First, that national emblems cannot be subjected to copyright protection according to the law (Rumanian Law No. 8/1996, which was enacted six years after the plaintiff's first proposed design was created, and two years after he initiated his first legal action). Second, that the national courts have asserted that the only author of the emblem would eventually be the Parliament as it commanded some modifications to Dima's design. Finally, the courts ruled in favour of the public interest and against author's interests.

The ECtHR decided to dismiss the case as to the infringement of article 1 of the Protocol 1. It accepted the lack of exhaustion of domestic remedies (Art. 35.1 ECHR) regarding the existence of a contract between the State and the plaintiff. The ECtHR

[434] *Dima v Romania [2005] ECHR 58472/00 (admissibility decision)*.

found that such alleged contract was recognised by the Supreme Court of Bucharest, therefore, an action based on such a contract was possible.

On the matter of the protection of plaintiff's possessions, the ECtHR discussed the most important element of the interest for this chapter, which is the existence (or not) of copyright in the case of the emblem designed by the plaintiff. The Court began by asserting that, under the article 1 of the Protocol 1, the protection of property is extended to any possession, including physical or immaterial rights (which also includes intellectual property). The important issue was whether such a property right existed in the hands of the plaintiff or whether at least a mere expectation of such a right was valid. For the ECtHR, this was not the case, because, even if the principle of automatic protection for the tangible expression of the work, recognised by the Rumanian Copyright Law, could apply, the Supreme Court of that country assessed the case and found that the emblem could not be considered a copyrighted work. For the ECtHR, the rejection of the plaintiff's case by the national courts gives no room for the application of article 1 of the Protocol 1 of the ECHR. There was no right or legitimate expectation for a right to be recognised, and, in the national jurisdiction, there was no jurisprudence or rule that could favour the applicant's claims at the time when the Law No. 8/1996, which excludes national emblems of copyright protection, was enacted.

Moreover, the ECtHR found nothing that would allow consideration that the Rumanian Supreme Court decision had committed any arbitrary action against the plaintiff. This means that the ECtHR did not contest the Rumanian Supreme Court in both asserting that the emblem in question was a collective creation in which the parliament has played a key role and arguing the absence of copyright protection for such emblem. The Supreme Court avoided the question about the retroactive application of the law declaring that there was no copyright protection of the national emblems. Instead, they simply applied the previous law denying the plaintiff's copyright protection based on a collective creation and the absence of the emblems in the list of protected works enacted by the Decree of 1956, which should be the normativity applied in the moment of creation.[435]

[435] *Dima v Romania [2005] ECHR 58472/00 (admissibility decision)* 5.

Why did the ECtHR refuse to analyse such an important element in the Rumanian Court decision? Helfer mentions a *deferential standard* applied by the ECtHR, according to which, due to their limited powers, the Court cannot go further if the national courts rejected the plaintiff's case.[436]

However, Helfer finds four concerns to highlight in this case regarding the application of the ECHR in protecting copyright and intellectual property. First, the possibility of considering the protection of moral rights through the ECHR as a stronger argument in other cases.[437] Second, the ECtHR sensitivity about not mixing different subject matters of protection for intellectual property (industrial property and copyright) within the scope of the concept of property and possession. In the comparative perspective, such a sensitiveness would be understandable in relation to the US' *Trademark Cases* mentioned in the previous chapter. Third, the role of national precedents in further decisions of the ECtHR. According to Helfer, if a precedent were found recognising the protection of those emblems, the ECtHR might rely on that authority regarding the decision it took. Finally, an existing possession or a legitimate expectation might be enough reason for the ECtHR to consider a case in which such copyrights are in discussion, if there is evidence of arbitrariness in the decisions from the national courts.

Helfer's first concern, the protection of author's moral rights within the ECHR, is a matter yet to be developed by the ECtHR case law. However, the case law from countries outside the ECtHR jurisdiction have recognised the protection of moral rights as part of the fundamental rights protected constitutionally. An example is the case law from Colombia, Mexico and Argentina, as discussed in the previous chapter.[438]

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[436] Lawrence R Helfer, 'The New Innovation Frontier? Intellectual Property and the European Court of Human Rights' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (3rd edn, Kluwer Law International 2015) 44-45.

[437] For the protection of moral rights within the ECHR, see Josef Drexl, 'Constitutional Protection of Author's Moral Rights in the European Union - Between Privacy, Property and the Regulation of the Economy' in Katja S Ziegler (ed), *Human Rights and Private Law. Privacy as Autonomy* (Hart Publishing 2007).

[438] See Chapter 3.III.5, 6 and 7.

The second concern about the lack of precedents in the Romanian jurisdiction points to the possibility of finding such precedents in other EU jurisdictions, particularly considering that the case law of the CJEU points to that direction.[439]

Another decision Helfer incorporates in his study is *Balan v Moldova*.[440] In this case the ECtHR found that the protection of author's copyright within the protection of the right to property implies the peaceful exercise of the claimant's rights and the right to receive compensation in case of unlawful use of his property. The central element in this case was the absence of a contract between the author and the Moldovan government, who used author's photography for the background of the identification cards for all its nationals. Such a use was not approved by the author and therefore became unlawful. It is important to stress that, since the State had the opportunity to use any other image and more, it had the opportunity to pay for it. The Court found that the alleged clash between the State's public interest regarding the use of such an image and the private interest of the author on his property did exist. The ECtHR decided that Balan's property was unlawfully affected and that the Moldovan government should pay damages and other expenses to the claimant.

In contrast with the *Dima* case, Balan's property was not in discussion. Nevertheless, the possible inclusion of copyright within the protection of fundamental rights in application of the ECHR should be highlighted here. Even against allegations of public interest prevalence, the protection of an author's willingness to transfer (or not) his right, and the importance of right holder's control over his property, (the peaceful possession of his property) has prevailed under human rights rationales as the unlawful use of his work created for the author an 'individual and excessive burden.'

These two decisions show the protection of copyright under the ECHR framework. However, the cases do not specify differences regarding who would be entitled to human rights protection regarding copyright. Whether the action could be against another private party as non-state actors is a matter yet to be discussed by the ECtHR. If such a case is proposed, it could be on the grounds of protecting author's rights

[439] See Chapter 3, Section III.A.4.

[440] *Balan v Moldova (App no 19247/03) [2008] ECHR 19247/03*.

against unlawful appropriation of rights through unfair contracts. This might be seen as unlikely under the jurisdiction of the ECtHR, but it has happened in other jurisdictions as indicated in the previous chapter.

b) The Inter-American Court of Human Rights decision

The only case so far in relation to the protection of author's rights within the jurisdiction of the IACtHR is *Palamara Iribarne v. Chile*. In this case, an author was the subject of censorship by the Chilean army, who undertook actions to impede the publication of a book about military intelligence that the plaintiff had written.[441]

In protection of author's copyright, the IACtHR applied article 21 (right to property) of the American Convention on Human Rights (Pact of San Jose).[442] It is important to note that Chile has signed but not yet ratified the Protocol of San Salvador, which refers directly to the protection of author's rights. Therefore, the sources for the case were the ADRDM and the Pact of San Jose. Although the sources applicable for the Inter-American Human Rights system mentioned above explicitly refer to the rights in question, surprisingly, the IACtHR refers to the international legislation about copyright and human rights and, without distinction, mentions the UDHR, the ICESCR, the Berne Convention, and the TRIPS agreement.

This, however, does not alter the effect of the IACtHR's decision in terms of recognising elements of protection linking the author's rights with other elements of protection superseding property interests.

The most important element of this decision is the link that the IACtHR recognises between the protection of author's copyright and his exercise of the right of freedom

[441] *Caso Palamara Iribarne v Chile* 118 [2005] www.corteidh.or.cr 118.

[442] Article 21 of the Pact of San Jose reads as follows: Right to Property: 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.

of expression. For the Court, the fact that the Navy seized author's copies of the book and the drafts and had eliminated all digital copies available, clearly affects the author's right to freedom of expression in its double dimension, freedom of thought and freedom to communicate thoughts. These two rights are connected directly with the protection of copyright, as this is the mechanism created by the law for those rights to be exercised.[443]

The IACtHR considered both the economic and the moral aspects of the copyright and recognised the link between the author and the work through the latter. It also stated the principle of first ownership of the copyright in the hands of the author. In addition, based on the structure of the protection of the right of property, the IACtHR also recognised that the privation of author's property was not justified, as it was not sufficiently proved that any public or social interest were under threat.

As it has been noted, the IACtHR elaborated the connection between freedom of expression and copyright with separate legal tools extending the right of property to cover its positive dimension in favour of freedom of expression in terms of copyright. This means that the free exercise of author's copyright property reflects on the exercise of author's freedom of expression. In any case, the elements are present there. Freedom of expression, freedom of creativity, dissemination of knowledge, and legitimate property and public interest are all at play in this case, and the author is at the centre.

To what extent the normative content in the concepts underpinning those elements has been developed? In the next sections, the normative content of the relationship between authorship and originality, the concept of author, its relation to the successor in title, and the status of the author will be analysed from the sources mentioned above.

2. Connecting the author and originality

In its General Comment, the CESCR stated some elements of normative interpretation for article 15.1.c of the ICESCR. One of those elements is the definition of the meaning

[443] *Caso Palamara Iribarne v Chile* 118 [2005] www.corteidh.or.cr 118 para 107.

of what a scientific, literary, or artistic production is. In this case, the interpretation of the Committee has widened the original concept. In the language of the pre- and post-war era, the wording of copyright treaties included both scientific, literary and artistic productions. It was understood that these three could be the result of original works. Inventions were not. The CESCR opened the meaning to understand that any creation of the human mind is considered within the scope of the human rights protection.

Although the General Comment does not refer to the concept of originality, the support for moral rights uses a similar narrative as the one found in the case law examined in chapter three regarding the unbreakable connection between the author and her work. Moreover, the previous section has shown how the concept of moral rights was introduced in 1928 through the Italian delegation to the Berne Convention. In both cases it has been asserted that the protection of the moral interests of the author refers to the link between her and her work. The General Comment also proclaims 'the intrinsically personal character of every creation of the human mind…[444] Here is not the place to discuss if the personal character can be claimed on an invention or a trademark, but certainly, as such, it is a reiterated characteristic of the copyright protection in all the legislations studied in this thesis.[445] In the previous chapter, the discussion about the connection between authorship and originality has demonstrated that, even in those jurisdictions in which utilitarian rationales tend to lead the copyright discourse, the concept of originality as a consequence of an author's personal contribution has been also used.

[444] Committee on Economic Social and Cultural Rights, 'General Comment No. 17 (2005) (Article 15, Paragraph 1 (C), of the Covenant) E/C.12/GC/17' (Committee on Economic, Social and Cultural Rights 2006) para 12. See also Edoardo Piola Caselli, 'General Report of the Drafting Committee' (1928).

[445] Chapman comments on this matter as it was accepted that originality and the connection with the physical person was consequential. However, in the case of other branches of IP such as trademarks or patents, such a connection is not so evident. See Audrey R Chapman, 'Core Obligations Related to ICESCR Article 15(1)(c)' in Audrey R Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002) 316. On the opposite the Trademark Cases in the US might be useful to understand the different sources of protection. *Trademark Cases* 1879 US Lexis 1808.

Nevertheless, a problem in the interpretation of the Committee arises at this point. In this thesis, the concept of originality has been considered in connection with the status of the author in a similar manner. Here it has been asserted that, in terms of copyright protection and in connection with the protection of author's moral and material interests, the concept of originality based on the personal contribution of the author consists in the hitch connecting authorship with the work. Therefore, in the absence of such link between author and the work, the elements of protection that could be supported in human rights rationales should not apply. The problem is that this would limit the application of human rights to those creations with originality. Those creations that could not reach the originality threshold would seem to have their protection reduced to a mere right of property. No link between that creation and the creator would be relevant.

The purpose of this thesis is not to undermine those other creators or position them at a lower level than authors. Here it has been demonstrated that a systematic interaction in the theoretical, constitutional, legal, jurisprudential, and international law levels the playing field for the protection of the author. Therefore, the problem above is not for the discussion of this document. In this thesis, the aim has been reaffirming the role that human rights rationales have on the protection of the author and its consistency with the copyright system. The protection of other persons within the intellectual property system and their connection with the protection enshrined by the human rights instruments is a matter for other research in the particular branches of the discipline.[446]

[446] See, for example, Mathilde Pavis, 'Is There Any -Body on Stage? A Legal (Mis)understanding of Performances' (2016) 19 The Journal of World Intellectual Property 99 <http://doi.wiley.com/10.1111/jwip.12056>. In fact, Cassin's original draft acknowledges both authors and inventors as different individuals to be protected under the UDHR. See Johannes Morsink, *The Universal Declaration of Human Rights. Origins, Drafting, and Intent.* (University of Pennsylvania Press 1999).

It is possible to assert that the link between originality and authorship is considered somehow in the context of international human rights? According to Chapman,[447] the discussion on the scope of the article 15.1.c of the ICESCR during the 24th Session of the CESCR reached the matter of originality in which most of the countries agreed on its necessary connection with the protection of author's interests in the human rights framework. In the words of the UNESCO representative during the discussions, the risk of diminishing such a connection for the benefit of an investment-oriented approach is that it would 'undermine the respect for author's rights, and run counter to the provisions of the Universal Declaration and the Covenant.'[448]

Nevertheless, the stronger string that connects the protection of author's fundamental interests and originality is freedom of creativity and therefore, freedom of creation. This has been asserted in the previous chapter in the comparative study of the case law. Often, freedom of creation means directly originality, and lack of freedom of creation means less originality and therefore probably no copyright.

3. The concept of author

The scope of the concepts to be studied regarding the protection of an author's moral and material interests seems to be critical in terms of the interpretation of the international law. This is particularly important in the cases of the three international instruments in which author's interests have been enacted as human rights. Indeed, the UDHR article 27 adopts the same language of the copyright treaties in place at the moment. Ricketson highlighted these circumstances in the view of the Berne Convention. According to him, the Convention stipulates the rights of authors as a human right.[449] However, by 1991 Ricketson also indicated that such an approach is

[447] Audrey R Chapman, 'Core Obligations Related to ICESCR Article 15(1)(c)' in Audrey R Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002).

[448] Committee on Economic Social and Cultural Rights, 'Report on the Twenty-Second, Twenty-Third and Twenty-Fourth Sessions. E/2001/22 E/C.12/2000/21' (2001) para 599-601.

[449] Sam Ricketson, 'The 1992 Horace S. Manges Lecture - People or Machines: The Berne Convention and the Changing Concept of Authorship' 16 Columbia Journal of Law and the Arts 1.

not the only one and that the concept of author has transformed into a complex concept that includes different kind of persons other than just the creator of the work.

Ricketson's position is that the Berne Convention responds to a philosophical principle according to which the author (as a physical person) is a central element in the protection that copyright provides. Such an author should therefore receive special legislative attention in terms of how her moral and material interests are to be protected.[450] That principle, as Ricketson indicates in his article, was clearly supported in 1986 with the Solemn Declaration of the Berne Union Assembly in commemoration of the centenary of the Convention:

> *[The States Members of the Assembly] Solemnly declare that copyright is based on human rights and justice and that authors, as creators of beauty, entertainment and learning, deserve that their rights in their creations be recognized and effectively protected both in their own country and in all other countries of the world.*[451]

The impact that such a declaration might have is supported in its own aim of reaffirming, after a hundred years, the main objectives and principles commanding the Berne Convention. The discussion of the drafted declaration denotes the agreement of most of the countries' delegations in the connection between the Convention and the protection of the interests of the authors in terms of human rights.[452]

In spite of that, the claims about the protection of intellectual property as human right have been used also by multinationals as a rhetorical device to protect their own interests. Geiger highlights this problem that somehow minimises the presence of the

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[450] Sam Ricketson, 'The 1992 Horace S. Manges Lecture - People or Machines: The Berne Convention and the Changing Concept of Authorship' 16 Columbia Journal of Law and the Arts 1.

[451] ''Celebration of the Hundredth Anniversary of the Berne Convention. Part I. Celebration in Berne' (1986) 22 Copyright 367.

[452] WIPO Secretariat, 'Executive Committee. Twenty-Fourth Session (9th Extraordinary). Draft Report. B/EC/XXIV/18 Prov. (Part I)' (1985).

author in the equation under an investment-based protection.[453] In response to this matter, the General Comment No. 17, published by the CESCR in 2005, clarifies that the human rights system protects human beings as individuals or collective persons, but would not apply to corporations or other legal persons.[454]

The Committee also provides a normative interpretation of the concepts used in the Covenant. For instance, the concept of the author is one of the most important for the interest of this thesis. In this case, it has been indicated that, for the purposes of the human rights, the author should be considered only as a natural person or, eventually, it could also refer to groups of individuals. The interests of other right holders such as legal entities are not protected at the level of human rights 'because of their different nature'.[455] This, along with the concept of the inalienability of human rights, creates a problem in terms of how the copyright laws can deal with this principle.

The definition of the author in terms of human rights instruments is important as it would exclude the protection for other entities. For instance, such an approach is problematic for the interpretation of article 1, Protocol 1 of the ECHR. In this case, the ECtHR has recognised the protection of intellectual property under the scope of the protection to property without distinction regarding who owns such a property.[456] As mentioned earlier, the approach of the ECtHR to the protection of intellectual property through the ECHR can be found in *Melnychuk v Ukraine*, *Anheuser-Busch Inc. v*

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[453] Christophe Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015).

[454] Committee on Economic Social and Cultural Rights, 'General Comment No. 17 (2005) (Article 15, Paragraph 1 (C), of the Covenant) E/C.12/GC/17' (Committee on Economic, Social and Cultural Rights 2006); Audrey R Chapman, 'Core Obligations Related to ICESCR Article 15(1)(c)' in Audrey R Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002).

[455] Committee on Economic Social and Cultural Rights, 'General Comment No. 17 (2005) (Article 15, Paragraph 1 (C), of the Covenant) E/C.12/GC/17' (Committee on Economic, Social and Cultural Rights 2006) para 7. See also Peter K Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' in Laurence R Helfer (ed), *Intellectual Property and Human Rights* (Edward Elgar Publishing 2013) 94.

[456] See above, Section III.C.1.a) from this chapter.

Portugal, *Dima v Romania* and *Balan v Moldova*. The last two have a direct relation to copyright. In the *Dima* case it was clear that author's entitlement would have been an important turn point for the decision: in the *Balan* decision, once author's property was recognised, the duty of protection by the State was fully applied by the ECtHR.

In the case law from the IACtHR, the conclusion would be also the same. However, neither of the two courts have addressed cases in which the copyright of the author and the eventual copyright of a successor in title might clash. For that purpose, the route available has been national case law. There, in some cases, the author's fundamental rights have prevailed.

The principle stated by the CESCR that the human rights system protects human beings as individuals or collective persons, and reaffirmed by the Rapporteur on the matter,[457] reflects a complex approach to the concept of author. It was constructed in its origin in direct connection to the language of the Berne Convention, but it has evolved in recent years. Although intellectual property systems tend to widen the concept of the author to other entities, in the case of human rights the concept seems to have been narrowed.[458]

The reasons for narrowing the concept can be explored in the complex approach to the right to culture in its three-dimensional conception. The right to benefit from the protection of moral and material interests resulting from author's creations is connected to the right to benefit from scientific progress and the right to take part in the cultural life. Those three rights benefit individuals and are associated in the value chain of reception, benefit, and the production of knowledge.[459]

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[457] Farida Shaheed, 'Copyright Policy and the Right to Science and Culture. A/HRC/28/57' (2014) para 27.

[458] See comments by Caterina Sganga, 'Right to Culture and Copyright: Participation and Access' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015) 569.

[459] Audrey R Chapman, 'Core Obligations Related to ICESCR Article 15(1)(c)' in Audrey R Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002).

For the purpose of understanding this primacy of the individual or even collective of individuals within the human right system, Asbjørn Eide[460] proposes an interesting approach in which the individual is understood as a producer of culture,[461] and consequently an agent of cultural change and not a mere consumer. Under this understanding, the individual is capable of challenging his own culture in contrast to other existent cultures to which he or she has had access through cultural vehicles available in a diverse market.

This approach is consistent with the proposed interpretation of the role of authors in society and their protection through copyright mechanisms, as argued throughout this thesis. An author's communicative power positions his interests in the core of the communicative rationality not only because of his economic expectative, but also regarding the wider interest for society to have access to different points of view, interpretations of reality, and cultural diverse expressions, that would enhance individual ability to actively participate in democracy. By creating cultural vehicles, the author facilitates such communication, and this is possible because the laws of copyright promise for him a series of guarantees both moral and material.

4. Successors in title

Most of the literature dedicated to the interaction between human rights and copyright is focused on the problem of how to articulate a legitimate exercise of a property right, legally recognised, with the protection of those societal interests in benefit of a creation. However, the side of the author has not been studied with the same attention. As mentioned before, the concept 'author' is often used indiscriminately to refer to the proprietor of the copyright, but that is not always the case. On this matter, the

[460] Asbjørn Eide, 'Cultural Rights as Individual Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (Kluwer Law International 2001).

[461] This idea was proposed by Walter Benjamin in a initial work Walter Benjamin, 'The Author as Producer' in Anna Bostok (tr), *Understanding Brecht* (Verso 1998) <https://yaleunion.org/wp-content/uploads/2013/12/Walter_Benjamin_-_The_Author_as_Producer.pdf>.

Rapporteur for cultural rights has highlighted the importance of differentiating one from the other.[462]

Along with other scholars, Suthersanen, in her study about international copyright law and its relation with human rights,[463] explains the basic interaction between public interests and private interests in the narrative of human rights. Often, such an understanding assumes that the private interests of the authors and other right holders of the copyright are the same. In this case, this author defends the idea according to which corporations should be considered responsible for human rights as well.

However, setting aside the discussion about the interaction of the four elements that Suthersanen identifies (property, freedom of expression, right to access culture, and right to access information),[464] if corporations are responsible for protecting human rights, in what respect to those four elements should they also be responsible of protecting an author's moral and material interests? This scholar proposes a reshaping of the concept of copyright's public interest by introducing a general clause for it in the international arena. Her study reveals that there are some mentions of the protection of the public interest in the narratives of some articles in the Berne Convention (articles 2.4, 2.8, 2bis, 10bis.2), the TRIPS agreement (articles 7, 8, 13), and in the preamble of the WCT. The proposed clause would institute a balance required between 'the rights owners and the larger public interest'. However, if so, where shall the author be positioned? Should the author obtain another principle in terms of the protection of her interests?

For instance, the language of most of those human rights instruments under study includes a protection referred to the protection of the individual, that is, the author.

[462] Farida Shaheed, 'Copyright Policy and the Right to Science and Culture. A/HRC/28/57' (2014) para 40.

[463] Uma Suthersanen, 'Towards an International Public Interest Rule? Human Rights and International Copyright Law' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Freedom of Speech. Comparative and International Analyses* (Oxford University Press 2005).

[464] Uma Suthersanen, 'Towards an International Public Interest Rule? Human Rights and International Copyright Law' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Freedom of Speech. Comparative and International Analyses* (Oxford University Press 2005) 113.

However, as indicated above, for some scholars, the concept of 'author' could be understood in a wider manner. The common law copyright tradition, for example, includes other right holders in the concept. For Suthersanen, the fact that most of the international intellectual property laws have been influenced in some way by the corporative interest who owns 'the majority of intellectual property rights'[465] creates a problem in how intellectual property deals with public interests. This is probably correct from the point of view of the possible excessive exercise of intellectual property rights in hands of corporations. However, such an approach could minimise the role of creators—authors in particular—in the exchanges of interests. When the discourse about the author is separated from the discourse of other entities who have proprietary interests in the copyright, the argument should change. An author could be any person who expresses thoughts in an original form which would be then protected as a copyrighted work. This person's interests are economic and moral, but more important, they belong to her, and in principle, such interests should be guaranteed as a human right.

Would the above mean that author's rights are absolute? Not necessarily. The language of human rights creates three types of duties to States:[466] respect, protect, and fulfil. Basically, the obligation of respect implies that States should not intervene in the private matters of their citizens. However, the obligation to protect obliges the State to act deterring actions of any person that would affect the enjoyment of the economic, social and cultural rights. Such an obligation requires the positive action of the State providing measures to avoid such actions. Finally, the duty of the State is to provide certain resources to achieve minimum standards of living, particularly for those who cannot achieve such levels of living by themselves.

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[465] See Uma Suthersanen, 'Towards an International Public Interest Rule? Human Rights and International Copyright Law' in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Freedom of Speech. Comparative and International Analyses* (Oxford University Press 2005) 109-110. This author cites the UNDP Report on Trade from 2003. The trend is persistent in the 2016 report. See UNDP, 'Human Development Report 2016. Human Development for Everyone' (2016) <http://hdr.undp.org/en/content/human-development-report-2016-human-development-everyone>.

[466] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2nd edn, Hart Publishing 2016) 31.

A classical understanding of copyright would identify this right with the first of the duties mentioned above. If copyright is considered merely a property, its protection would rest in the principle of no State intervention in the private matter of its citizens. Nevertheless, it could be argued that the very existence of these rights concerning intangible assets require the positive action of the State in order to create the legal framework surrounding its protection, scope, characteristics and therefore, its limitations. Often the limitations on such property have been argued as mechanisms of redistribution and retribution to society of the wealth that the recognition of such property provides. The reader probably foresees the end of this argumentation. To what extent could the duty of protection surpass the limits of non-intervention on the free exercise of a property limiting it, in order to protect the rights of the author? If the author is the beneficiary of the protection of article 15.1.c ICESCR, then what are the tools that States provide for such a protection?

As it has been noted in the third chapter, the contentious question here is: to what extent does author's right create an interference against the property lawfully acquired by a third party? The justification for such interference would be that the author sees her dignity and right to obtain an adequate standard of living affected because of the actions or omissions from the right holder. However, the case law studied in the previous chapter has shown that this is probably not enough. It should also be demonstrated that there is at least negligence of some sort from the right holder in the exploitation of the work (*Escalona* case), or that the revenues the third party obtains are significantly disproportionate in contrast with the royalties the author receives (for instance, the fair remuneration proposal from the EU). In addition, there should be no other available mechanism in the law to revisit the contract, and therefore the judicial intervention could protect the author's rights through human right rationales.

This question leads to a systematic interpretation of the human rights related to the problem. On one hand, those rights can be classified in those related to the provision of a wide range of access to the property held by particular citizens; in this case, cultural goods. These would be the right to education, access to information, and access and participation and benefit of cultural life. On the other hand, there is the interest in protecting the people that originate those goods: the creators. On this side of the argument there are two basic interests at play: the protection of author's own

freedom of creation in connection with freedom of expression and the protection of author's dignity in terms of guaranteeing a minimal standard of living. This obviously can be achieved if the works of the author produce or could potentially produce enough income to satisfy the requirements. Otherwise, it is out of the sphere of copyright law to provide and guarantee such standards of living. In such a case, the State would intervene through its social security strategies.

However, while protecting author's interest in relation to the public interests of other individuals in society might seem a matter of balancing concomitant interests, the protection of other owners under the same ratio could create a maximalist perception of author's protection, altering the expected balance between private and public interests.[467] Would this mean that a copyright property in the hands of someone other than the author should not be protected as a human right? According to the General Comment No.17, mentioned above, the answer would be negative under its interpretation of Article 15.1.c of the ICESCR. However, as the case law from the CJEU has shown, it is not impossible to consider that, in terms of the right to property and the right to pursue a business, there is protection available. The consequence is that another balance is required, the one between the interests of those acquirers and the interests of the authors. The assessment of such a balance should consider the two elements mentioned in the previous paragraph; the protection of author's freedom of creativity and the protection of author's dignity. If the result is that those elements are affected in an unjustified manner, the author's rights must prevail, and a restoration of the balance should be sought.

For example, the producer of a cinematographic work might have certain rights required for the exercise of his rights to property and to develop a business. Such a right is not at the same level as the right of the authors involved in the production or the director's rights. By the same token, the right holder who owns the copyright of a work created by its employee or commissioned creator could not argue for a human rights protection for such a property in terms of author's rights, for that entity would not

[467] See Christophe Geiger, 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015).

be an author by the terms of the CESCR. In such a case, the fundamental rights of the author might have an effect on such ownership to the extent that an unbalanced situation could undermine the author's freedom of creativity, freedom of choice of work, or her rights to adequate remuneration and an adequate standard of living.

5. The status of the author

During its General Conference in 1980, the UNESCO adopted a recommendation concerning the status of the artist.[468] This recommendation stated as a principle that the member States have a duty to protect, defend, and assist artists and their freedom of creation. One of the required measures in developing this principle is the improvement of the status of the artists 'by acknowledging their right to enjoy the fruits of their work'. The concept of status, as used by the General Conference in 1980, is similar to the concept of dignity used in the previous chapter as the condition for the symmetrical relations of recognition among members of society.[469] This condition should promote the author's dignity in simple terms: understanding that the dignity should be no different than the dignity that any other person could enjoy. Those conditions of dignity ensure author's freedom of expression and enhance their creativity.[470]

The first draft of Article 27 of the UDHR included the concept of 'just remuneration' as part of the rights of the author. In the proposed text, such a remuneration would last a limited amount of time and arises once the creator publishes the work.[471] Under the interpretation proposed by the CESCR in its General Comment No.17, the concept of

[468] UNESCO, 'Recommendation Concerning the Status of the Artist' (1980).

[469] The recommendation defines in this way: 'The Word 'status' signifies, on the one hand, the regard accorded to artists, defined as above, in a society, on the basis of the importance attributed to the part they are called upon to play therein and, on the other hand, recognition of the liberties and rights, including moral, economic and social rights, with particular reference to income and social security, which artists should enjoy.' UNESCO, 'Recommendation Concerning the Status of the Artist'.

[470] David Felipe Alvarez Amezquita, 'La Libertad de Expresión Como Resultado y Garantía Principal Del Derecho de Autor' (2007) 1 Revista Iberoamericana de Derecho de Autor..

[471] Johannes Morsink, *The Universal Declaration of Human Rights. Origins, Drafting, and Intent.* (University of Pennsylvania Press 1999).

'benefit of protection' as understood by the Committee should be efficient enough to achieve the protected right of 'securing for authors the moral and material interests resulting from their productions.'[472] Nevertheless, in their General Comment, the Committee indicated a discrepancy between that goal and the mechanisms of protection provided by the intellectual property system.

The CESCR defines the scope of the two key concepts used under article 15.1(c) of the ICESCR: the moral and the material interests.[473] The protection of the moral interests of the author is linked to the traditional concept of author's rights (in the continental tradition) in which these rights are considered inalienable and perpetual. Such conditions could perhaps be considered as obvious from the point of view of human rights, but as it has been analysed in the previous chapter, those rights are protected in different ways according to the national legislations compared in this study. The Committee, however, highlights the unbreakable link between the author and her work as part of the main justification for the protection of this moral interest.

According to the CESCR, in the case of the interpretation of article 15.1(c) of the ICESCR, other rights are related to this right. Those rights are the right to participate in the cultural life (15.1(a)), the right to enjoy the benefits of scientific progress (15.1(b)), and freedom of creativity (15.3). The interaction between these different rights create limitations and duties. The Committee also highlights that some other interests are related with the right of authors to benefit from the protection of the moral and material interests resulting from their scientific, literary, and artistic productions. These are the right to the opportunity to gain one's living by work which one freely chooses (6.1), the right to adequate remuneration (7(a)), and the human right to an adequate standard of living (11.1). Other rights also involved with article 15.1(c) can be found in other instruments, such as freedom of expression, and therefore freedom of creativity and the right to receive and impart information and ideas of any kind, the

[472] Committee on Economic Social and Cultural Rights, 'General Comment No. 17 (2005) (Article 15, Paragraph 1 (C), of the Covenant) E/C.12/GC/17' (Committee on Economic, Social and Cultural Rights 2006).

[473] See also Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2nd edn, Hart Publishing 2016) 640-642.

right to property, the right of full development of human personality, and the right of cultural participation.

What is the role of the protection of the material interests of the author? The Committee links this right to the right to own property, and proposes a break point in the discussion mentioned earlier. It states that this right is not linked with the personality of the creator. Does this mean that the right to benefit from the material interests that an author's work produces is not an inalienable right? The Committee links the protection of the author's material interests with the right to enjoy an adequate standard of living. However, this might not be achievable if the economic rights are no longer in the hands of the author. Such a problematic conception is understandable if both the concepts of author and owner of the copyright are not separated in the interpretation of the normativity. Whether the subsequent right holder has certain rights, these cannot affect the author's rights nor societal interests, as has been studied in this section. In fact, according to Chapman and others, part of the core obligations for the protection of these rights is that States respect and protect author's fundamental interests required for 'an adequate standard of living'.[474]

There was a change in the wording used during the adoption of the ICESCR. While the Article 27 of the UDHR states the protection of author's moral and material interests resulted from the production of her work. The Covenant, instead, refers to the right to benefit from those interests. The philosophy of the Covenant in terms of providing and asserting economic, social and cultural rights is in tune with this slight difference.[475] The material interests of the author might be subject to the laws related

[474] Audrey R Chapman, 'Core Obligations Related to ICESCR Article 15(1)(c)' in Audrey R Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002) 315. Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (2nd edn, Hart Publishing 2016) 462. See also Committee on Economic Social and Cultural Rights, 'General Comment No. 17 (2005) (Article 15, Paragraph 1 (C), of the Covenant) E/C.12/GC/17' (Committee on Economic, Social and Cultural Rights 2006); Farida Shaheed, 'Copyright Policy and the Right to Science and Culture. A/HRC/28/57' (2014).

[475] The original text introduced for the Third Committee of the General Assembly did not include this part. The (c) part of article 15.1 was introduced by the delegations of Uruguay and Costa Rica recalling Par.2 of article 27th of the UDHR. In the interpretation of the delegation of Dominican Republic, such an

to the protection of property, but the right to benefit from such a property is not. The reason for this assertion is based on two elements of the discussion.

The first is the link the Committee recognises between the right to an adequate standard of living and also the right to freedom of creativity, and the right to a fair remuneration, as stated earlier. Those rights could only be achieved within the scope of protection of article 15.1(C) if the copyright implied in the protection of the material interest benefits the author in a sufficient manner. If the work of an author does not produce enough for the protection of those rights, other mechanisms of the state should enter into play to provide such rights. However, if such property does produce enough income but the wealth does not reach the author, the mechanisms to rebalance the situation should be found within the copyright system.[476]

The second concerns the protection of author's right to benefit from the moral and material interests which reaches other implications beyond the mere proprietary interests, as argued in this thesis. For instance, an author's freedom of expression and freedom of creativity are at play, but also the enrichment of societies' cultural life and therefore the principle of democracy itself. In simple terms, under the proposed support of the communicative theory, the more that authors are capable of presenting their thoughts to the public and the more that the public can have access to diverse offerings of cultural vehicles, the more a society would widen the exchange of ideas, science, and information to the benefit of all of its members. Such a connection has

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inclusion was 'essential to ensure that men and women should enjoy the fruits of their intellectual and artistic efforts…' UN General Assembly, 'Article 16 of the Draft Covenant on Economic, Social and Cultural Rights. A/C.3/SR.799', *Official Records 12th Session* (UN 1957) <http://repository.un.org/handle/11176/294829>.

[476] In paragraph 16, the General Comment states that the protection of author's material interests does not need to extend more than author's lifespan. It also mentions that an adequate standard of living can be achieved through one-time payments or with temporary rights. No doubt that this is directed to balancing the proprietary interests with the societal interests to access to culture, freedom of expression, the right to education and so on. Such limitations are justified and certainly, they require constant revision towards the protection other human rights. However, bearing in mind the differentiation between the author as a human being and other right holders of the property on the work, it might be advisable to indicate to what extent author's right to benefit from that property require enhanced mechanisms.

been mentioned by Hansen, whose article concerning the right to take part in cultural life defends the thesis of a modern approach to the connection between culture and human rights, in which culture is considered a framework 'within which individuals and collective decisions are made and actions taken, and where human rights can serve to guide these decisions, actions and cultural change itself.'[477]

Would this be too unrealistic? Perhaps it is, but as analysed in this chapter, this argument is supported by most of the international instruments protecting human rights and in most of the instruments protecting copyright. This level of argumentation can also be seen in the constitutional support of some of the countries studied in the previous chapter.

IV. Conclusions for this chapter

The interaction between the rules from international copyright laws and human right instruments has been analysed by various scholars. However, most of those approaches are focussed on the relationship between right holders or proprietary interests and users. This paradigm, which is important and relevant for the discussion, is not the aim of this thesis. Instead, the aim here is the protection of the natural person who creates a work: the author. The problem is that such a protection covers both mere proprietary interests and also interests regarding freedom of expression and creativity, dignity, and the protection of an adequate standard of living.

In the sphere of international trade, this issue has not yet been fully addressed. The economic interests, in which the protection of right holders' property is the most important issue, are normally reluctant to produce general rules aimed at protecting author's interests. An example of such a reluctance is the clause referring to the protection of authors in contractual relationships in the Chilean–US FTA. This clause

[477] Stephen A Hansen, 'The Right to Take Part in Cultural Life: Toward Defining Minimum Core Obligations Related to Article 15(1)(A)...' in Audrey R Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002) 285. See also Asbjørn Eide, 'Cultural Rights as Individual Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights* (Kluwer Law International 2001) 294.

barely passed as a possibility for the countries to create protective mechanisms for author's interests, but it is not an obligation. Within this problem, the relationship between authors and subsequent right holders arises as a key element for the implementation of such protections. Unfortunately, such relationships have been relatively outside the scope of international laws, primarily because the issue is related to contractual relationships based on private law and the principle of freedom of contract.

However, part of the literature on the interface between intellectual property and human rights accept that it is important, for the benefit of the market, that all of its players obtain fair treatment. Or, in terms of Wager and Watal, '…competitive markets, subject to the rule of law, are essential to generate the resources to realize economic, social and cultural rights.'[478]

Nevertheless, the third chapter of this thesis has demonstrated that among the countries studied, certain limitations to the principle of freedom of contract have been established. This chapter has shown that the sphere of international copyright law has considered the protection of the author as a natural person, stating in some cases principles that could help in developing national and even international laws towards improving author's position in contractual relationships. One of the most direct examples of this desired outcome is the recently proposed regulations for the European Union regarding fair remuneration for authors.

Those principles mentioned above can be summarized as follows.

1) Protecting the author is relevant for both the international copyright and the human rights systems.
2) Within the human rights-copyright interface, the author qualifies in a special dimension differing from the one in which other persons' proprietary interests on the copyright might qualify. This special dimension is based on the connection between

[478] Hannu Wager and Jayashree Watal, 'Human Rights and International Intellectual Property Law' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015) 160, 151.

authorship and originality in determining the very existence of the copyright protection in most cases, but also in the impact that an author's cultural vehicle can have on democracy.

3) Although not too politically sound, there is an interest in improving the author's weaker position in contractual relationships, which has been in the international sphere of discussion for some time, and it is a visible, though slight, trend (e.g. the EU Proposal, the US-Chile FTA and the TPP, or earlier, the model laws proposed within BIRPI-UNESCO-WIPO).

4) The sphere of human rights calls soundly to conceptually divide the protection of the author from the protection of other owners of the copyright. Such a separation in the sphere of international copyright exists historically, but its boundaries tend to be blurred.

5) Protecting author's interests should surpass mere economic interests. This complies with the promise of equal conditions and dignity for citizens who decide to propose cultural vehicles to be disseminated in the market of knowledge, and it could also positively impact freedom of expression and democracy.

6) Finally, it should be acknowledged that, even if author's fundamental rights are an important part of a copyright system, the societal interests at stake are important as well, and this could even mean that the protection of investments, in some cases, should be balanced in order to support the opportunity of producing certain works, such as in the film industry.

It is important to highlight that authors' freedom of creativity, freedom of choice of work, the right to gain adequate remuneration, and the right to an adequate standard of living are rights that require mechanisms of protection for the author within copyright law. In this sense, the strong conclusion is that if the copyright system of laws fails in guaranteeing such rights, the judiciary should enter to decide how to protect them in balance with other interests at stake. That is the case of some of the judicial decisions analysed in the previous chapter of this thesis.

Although the most direct response to the problem is the judicial capacity to reinstate balance among stakeholders, the Chile-US FTA's copyright component, as well as the footnote in the TPP, both related to freedom of contract, show that it is possible to think in a normative turn in the international arena towards the protection of the author.

In addition, the recent initiative from the EU related to fair remuneration and transparency within the copyright digital single market, even beyond its own flaws, shows a similar interest. Two problems can be highlighted about this matter, though.

On one side, there is the matter of which kind of instrument would introduce a possible reform. Ideally, a multilateral treaty within WIPO would be the best option, but such idea would probably face great opposition given the history that such interests have had (indicated in Section II of this chapter). A similar problem would have a change of this type if it is proposed within the TRIPS Agreement. The most likely path would be its introduction within new or renegotiated trade agreements in which copyright has a section. For instance, this could be the effect of the reform in the EU on this matter, as it is probable that such reform would be then pushed towards the trade agreements to be signed in the future with the EU. If the international development of copyright follows the phases enunciated in this chapter, the fifth phase still in motion would see as one of its most important changes, the introduction of regulations related to freedom of contract. Then it will be possible to envisage a sixth phase in which all the reforms included in different FTAs would have to be unified towards a new copyright treaty. Would this happen? It seems farfetched for now, as loads of issues would have to be decanted on copyright first for this to happen.

On the other side, there is the very nature of such a possible normative change. The possible solutions are, as indicated in the conclusions of chapter 4: 1) a reversionary clause, limiting the duration of transfer of a copyright; 2) a clause creating limits to the scope of the rights transferred, for instance, a scope defined by the nature of the business of the assignee at the moment of the contract; or, 3) an open clause of guidelines for the countries, in which the balance in contractual relationships would be stated. Although the reversionary clause is the most effective tool for the purpose of improving author's bargain position, in the sphere of international law, it is improbable to obtain enough consensus towards a matter affecting freedom of contract directly, as this mostly is a matter of internal law. The same comment applies for the second option. The third option seems more likely. A mandatory clause can be introduced, making the parties in an eventual treaty responsible for procuring effective measures within national legislation towards a fair balance in contractual relationships between authors and other persons interested in their copyright (creators contracts) and, in

case it can be demonstrated that the author's dignity is affected or whereas there is a manifest unbalanced situation during the execution of the contract, the State Party should make possible to revisit such contracts. In addition, and this is very important towards an effective protection of authors in general, such a legislative change should introduce similar principles for employed or commissioned authors.

In summary, there are three interests at stake instead of just two: the author, the producer, and the public. The focus here is on the author, but it cannot be denied that the other two are important and worth taking into account to protect the market of knowledge as a whole. There is some interest in protecting the author in the international framework but it is still growing; there is also support in both systems for claiming some protection from the judiciary if the applicable norms are not enough.

Chapter 5 General conclusions

The purpose of this thesis was to determine how the interface between copyright and human rights can be reinterpreted for the protection of an author's moral and material interests, particularly regarding copyright contract laws. The base for such reinterpretation is a modern understanding of natural rights, in which, as proposed by Habermas, it is accepted that cultural vehicles have a role in the construction of the justification of the law, and that as such, the author, the individual who creates a work proposing his ideas and contributions to society through such communicative instrument, is entitled to certain rights (moral and material) that enhance and stimulate the participation of individuals in the cultural life of society.

By giving weight to the role of the author in the interaction between culture and democracy, the romantic construction of the concept 'author', understood as a gifted human being, a rare person within society, should be replaced with a neutral, yet human, construction. This is why this work searches for legal mechanisms at hand for the author's protection in national jurisdictions and highlights the importance of understanding who the author is in the international arena related to both copyright and human rights. Anyone who creates an original work under the rules of copyright should be considered an author in legal terms and be protected as such because of those creations. Consequently, the interface between human rights and copyright has re-acquired a player: the author.

The second chapter has shown that copyright is aimed towards the person who creates the work. Some principles based on such aim of copyright can be summarised below:

- The creation of the work should be rewarded.
- Copyright protects freedom of expression.
- The space where the two previous principles operate is the market of knowledge.
- Freedom of choice should be guaranteed, both in the perspective of diversity through the offering of cultural products within the market of knowledge, and in terms of author's freedom to decide whether to participate in such market.

- Copyright is basically an author's right created to protect human beings and their potential capability of creativity in society.

The protection of a system that promotes creativity, rewards it, and facilitates the diversity of cultural expressions has a direct impact on a construction of popular sovereignty. This thesis asserts that the principles mentioned above can be related to a modern understanding of natural law which recognises that culture plays a definitive role in the construction of a consensus towards the justification of the law. Because a construction of consensus about the moral principles which structure societies can be influenced by the cultural vehicles circulating in the society, the copyright related to those cultural vehicles is fundamental for democracy under the moral principle of equal access and participation in the cultural life of society.

Placed at the centre of the problem, the author then becomes a qualified person who would be entitled to certain rights and duties regarding her creations. And, as every citizen, the author should be guaranteed in her right to participate in the cultural life and in the decisions of society. If such participation meets the conditions for copyright protection, that citizen should be considered an author and be protected as such by both copyright law and human rights instruments at hand in the particular jurisdiction.

The qualification of authorship in the comparative analysis proposed in the third chapter shows that there is a direct relationship between the aggregate value that an author adds to an expression through his personal contribution (originality) and the notion of communicative power that such an expression denotes.[479] The corollary of this is that the definition of who could be an author should differentiate the physical person or persons who created the work from the person that would own the copyright. The comparative study shows that when the physical person who creates the work and other owners of the copyright are unified on a single concept of 'author' by the

[479] It is important to bear in mind that the concept of communicative power refers to a *motivating* force which is capable of '…mobilizing citizens' communicative freedom for the formation of political beliefs that in turn influence the production of legitimate law'. Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 147.

copyright laws, this is done so, for reasons of economic efficiency and is the exception rather than the rule.

The partition of the concept of ‘author’ from other owners of the copyright would create a separate bundle of interests for each of those stakeholders. On one hand, the author is the beneficiary of the protection enacted in the human rights instruments and in the constitutions of most of the countries studied. Three elements comprise such protection: the protection of the material interests toward the guarantee of author’s dignity, autonomy, and freedom of creation; the protection of the moral interest of the author; and the impact that both have in active participation in the decisions of society. On the other hand, the interests of right holders in the copyright other than the author, whose investments require protection as property towards the market of knowledge, cannot have the same category of an author’s human rights. In this case, such right holders should see their property rights protected so long as such rights do not affect the author’s rights in an unjustified manner.

Copyright promises rewards for the author in terms of moral and material rights. However, if such a promise is read under the pitch of human rights, the rewards are related to primary interests, the protection of author’s dignity, freedom of creativity, and autonomy. The comparative study developed in the third chapter shows how copyright laws try to keep such a promise through some mechanisms of protection of author’s interests. One of the most important mechanisms identified in this thesis is the possibility of limiting freedom of contract towards the protection of authors' interests, especially in what refers to their weaker bargaining position in the contractual relationships.

The tools used for the protection of authors are of three kinds. One is the introduction of legal clauses that would fill eventual gaps in contractual relationships, such as the lack of indication of the duration of the contract or the scope of the rights transferred. In such cases, the law would imply that the contract is limited, for 5 years in the case of Colombia, and similar provisions found in Mexico and Spain. Another is the restriction in the duration of the transfer. A reversionary clause would make possible for the author to renegotiate after some time the contract itself. The main example in this case is Section 203 of the US Copyright Code. However, the Mexican law also

introduces a clause limiting the time of the transfer of a copyright to 15 years unless the nature of the work determine otherwise. Finally, another possibility is to limit the scope of the rights transferred to those related to the nature of the business of the assignee at the moment of the contract.

Nevertheless, in the comparative study of the case law, it was shown that the judiciary can also intervene in limited circumstances if the existing law is not sufficient to provide mechanisms to protect an author's interests. Such intervention has been based on the fundamental protection of author's interests, providing guarantees for authors to 1) benefit of the success of their works towards the protection of their dignity and autonomy, and 2) protecting others that might also benefit from the creation, including members of society interested in the dissemination of knowledge and those persons whose investment, in some cases, is required for the propagation of the work or its very existence, as in the case of films.

Finally, the objective of the fourth chapter was to find possible points of contact for the interaction between the spheres of international copyright and international human rights towards the protection of authors. In addition, it also identified some coincidences between the characteristics found in the comparative study and the international landscape.

In the international landscape there is some reluctancy to intervene in matters of freedom of contract. However, on the side of copyright, the interest in strengthening an author's weaker position has been part of the narrative in the international arena. For instance, the model laws proposed under the umbrella of the BIRPI, UNESCO, and WIPO were, in part, aimed to such an interest. In the area of trade and intellectual property, while discussed, the protection of authors has been treated with less attention. However, the interest towards better conditions for authors in their contractual relationships has been identified, although not within the TRIPS Agreement itself, it has been considered in other agreements related to commerce. Examples of such a trend are the clauses included in the US-Chile FTA and the TPP, which allow the country members to procure a balance between authors and other owners of the copyright. The European initiative towards fair remuneration of authors, which is still under discussion, is another example.

On the side of human rights instruments, the protection of the author can be qualified by its relation with the role of culture in a democracy. This is coherent with the second chapter of this thesis in which it has been asserted that the author should have a prevailing position within constitutional democracies given his active role in the proposition of vehicles of knowledge that enrich the cultural context in which society is based. By differentiating the author's entitlement of human rights from the protection of another person's property, it is possible to define a range of interpretation towards limitations to the principle of freedom of contract. The range of interpretation is aimed to protect the interests of the author in her dignity, freedom of creation, and autonomy. This is evidenced in some decisions from the judiciary in the national jurisdictions, but is yet to be defined in other instances.

Stronger international instruments on this matter are desirable, and perhaps the evolution of international copyright would walk through such a path. Though, it is a difficult path to follow as in many cases the influence of author's interests is weak in comparison with the power of other interests. Nevertheless, based on constitutional principles stated above, certain public policies, the case law analysed and the existence of strong elements in the sphere of human rights, the range of interpretation in favouring the author in case of intervention to freedom of contract might find a strong support.

As indicated earlier, limitations to freedom of contract are one possible outcome for a reform in the international arena. However, the matter of freedom of contract seems to be restricted to national legislations. Therefore, it is possible to propose a clause towards effective measures within the national legislation aimed at a fair balance in contractual relationships between authors and other persons interested in their copyright (creators contracts). Such a clause should indicate that the protection of author's dignity is the main interest and that in case there is a manifest unbalanced situation during the execution of the contract, the State Party should make possible to revisit such contracts.

The findings of this study suggest that a legal differentiation between the author and other copyright holders, towards the interface between copyright and human rights, is

sound. This gives structure to the interest of protecting the author. Such a differentiation should be stated in terms of the interpretation of copyright laws in connection to the protection of author's human rights. For instance this could be part of the guidelines commanding either new copyright reforms or new international instruments related to copyright. Such a guideline could be stated as follows: 'The main function of copyright is to promote the creation of works enriching societies culture and democracy. Therefore, it should be understood that the protection of the author's moral and material interests prevails and has to be differentiated from the protection of the property of other right holders of the copyright. In case there is a clash between the interests of the author and the interest of other right holders over the work, author's dignity and autonomy should be taken into account to achieve a balance between the opposed interests. However, such a balance should have to consider the communicative nature of the copyrighted and its role in the dissemination of thoughts within society as well, for author's interests must coincide with such communicative nature.'

Such a differentiation could impact the interpretation of copyright laws in the following areas:

1- The reasonability of limiting, in some cases, the principle of freedom of contract towards the protection of author's dignity, freedom of creation, and autonomy. It would introduce duties to the counterpart in the contract in protection of the author. Such duties relate to transparency in the development of the contract and solidarity guaranteeing author's social security.
2- The structure of argumentation in the interface between copyright and human rights, which might alleviate the emphasis given to a maximisation of proprietary rights in the hands of right holders who are not authors. In this sense, it has been highlighted that proprietary rights are one part of a complex bundle of rights related to an author's interests. Although the investments required for the production or dissemination of some works should be protected in their economic returns, it is also reasonable that those interests should be balanced with author's rights.

3- The judiciary has a role in the protection of author's rights through their power to intervene in specific cases where the law is not capable of protecting those rights, even against the rights of other individuals in cases of horizontal effect.

This study substantiates that some international instruments have considered the protection of an author's interests, even by limiting freedom of contract, either through soft law (in the case of the model laws for copyright) or as an open possibility for the States involved, as in the case of the TPP and the US-Chile FTA. Thus, it is yet to be seen the future of the EU Proposal on the matter of fair remuneration for author, which is still under discussion.

This work contributes to the existing knowledge about the interface between copyright and human rights by providing a different perspective in which the author is considered a separated subject of concern. It responds to a complex understanding of the significance of the protection of author's rights, regarding not only their property, but also the role that their cultural productions play in society.

It also contributes by comparing jurisdictions with different traditions responding to diverse economic conditions. It has shown that the participation of developing countries in the international scenario has a long history. For instance, some of the Latin American countries, in parallel with the development of the Berne Convention, developed the IACS. The role of these countries in the discussion of copyright and human rights were positive towards the protection of author's rights.

The Latin American perspective also presents interesting findings regarding the mechanisms that the countries studied here have developed for the protection of authors. In those countries, there is a strong constitutional framework towards cultural rights which incorporates an integrated understanding of copyright in balance with the public interests. In some of those countries, there is also a framework which creates certain limitations to freedom of contract to protect the interests of the author. A wider study from other countries in the region would reaffirm that characteristic. It would be interesting to expand the boundaries of this study to other jurisdictions to evaluate whether the principles identified here could be applied and developed, and how that might be done.

The scope of this study was limited in terms of the number of countries analysed. A wider number of countries from different traditions, such as France, Germany, Canada, or Australia, could increase the finding of possible solutions and distinct approaches towards the protection of the author. By the same token, other jurisdictions from developing countries, such as the African countries, could provide a new vision towards the development of mechanisms for the protection of authors.

Regretfully, it was not possible to assess the Chilean context due to the lack of information available regarding their case law; therefore, their important role in creating mechanisms for protecting an author's interests in their contractual relationships, both in the US-Chile FTA and in the TPP, cannot be examined here. However, their copyright laws state similar provisions restricting the condition of transfer of copyrights as those established in Mexico.

An issue that will require further research is whether creating limitations to freedom of contract might generate a negative impact in the overall of negotiation of contracts between authors and others. Such an impact is possible if the industries find that, given such limitations, no sufficient return for their investment is guaranteed, which would make the very beneficiaries of the protection worse off than negotiating within a completely autonomous market. Such a possibility needs to be assessed based on the characteristics of the different industries and the grade of development of particular jurisdictions.

More research is needed to better understand the role of the communicative theory in copyright. This could help in proposing a more comprehensive understanding of copyright in its relation to democracy and the structuring of societies. However, such a study would perhaps require moving outside the limits of legal research and towards other areas of study, such as the social sciences.

The cases of limitations to freedom of contract, explored in the third chapter, create questions regarding the applicability of those laws in international private law. How would that legal sphere be affected if the protection of author's interests is claimed

from the perspective of human rights and not from the principles of private law, especially where it refers to freedom of contract and choice of law?

It would be interesting to assess the effects of other players in the market of knowledge. For instance, in some countries, agents participate by representing the author in the bargaining of contracts. In other cases, authors' guilds have promoted the collective bargaining of contracts for certain industries.[480] Although those are not general practices in every country, they are important cases to consider for the comparative perspective. Unfortunately, there is not enough information regarding these issues and more research from the comparative perspective would be helpful, particularly taken into consideration the fact that collective bargaining is not a common issue for all the countries under study and the practice of agents is not well documented particularly in the case of the Latin American countries.

Nevertheless, the case of mandatory collective bargain, as mentioned earlier for the conclusions of chapter 4, can be an indicative of the possibilities at hand for a legal change towards the protection of author's interests. For example, the Authors Guild in the US have developed some principles regarding the fairness in contracts. It has highlighted some issues towards those principles that coincide with what it has been indicated here as possible changes. Collective bargain has had an influence in the way moral rights are protected, particularly in the case of the US film industry[481]

Finally, some implications can be highlighted. National public policies towards the protection of authors rights could enhance their bargaining position. Such policies could move from the improvement of legal expertise in the management of their rights to the creation of legal mechanisms towards the protection of author's rights, as evidenced in some countries. Yet, the options at hand are the limitation on the duration of the transfer of a copyright which would create a sort of reversionary rights (for

[480] See for example Martin Kretschmer, 'Creator Contracts ('Supply Side')' in Martin Kretschmer and others (eds), *The Relationship Between Copyright and Contract Law* (SABIP 2010) <www.sabip.org.uk> 41, 79.

[481] See Bernt Hugenholtz, 'The Great Copyright Robbery. Rights Allocation in a Digital Environment', *A Free Information Ecology in a Digital Environment* (IViR 2000) https://www.ivir.nl/publicaties/download/thegreatcopyrightrobbery.pdf, Section 2.

instance the US, Mexico), or the possibility of renegotiation of the contract in search for fair remuneration for authors, as in the case of the Directive proposed for the EU.

The private sector could also develop its own policies towards the protection of their authors, in the interest of an entrepreneurial spirit, and perhaps the author could be no longer considered a cog in the machinery of the industry, but a coparticipant in the creation of wealth and well-being through the market of knowledge.

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