



Building a Copyright Commons in Brazil: Copyright Exceptions & Limitations in a Comparative Context

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Abstract

This thesis aims to build a creative commons culture by exploring L&Es to copyright in a developing country, namely Brazil, and compare it with other jurisdictions seeking to propose future changes in policies among jurisdictions, which are the basis of its contributions. This thesis proposes that the Brazilian law should regulate compulsory licenses applied to copyright as well as new clauses regarding limitations for religious, official celebrations and broadcasts for social institutions. Furthermore, it favours expanding the scope of limitations for educational purposes as well as it suggests policy recommendations to surpass the lack of clarity regarding the concept of parody in international forums. Additionally, the 'sui generis' of database lacks protection under Brazilian law and could be enlightened by international treaties in this area. Finally, the questionnaire illustrated the importance of Open Access movement to economic development in Brazil.

Keywords: IP, Developing countries, Brazil, UK.

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LIST OF ABBREVIATIONS

CDPA	Copyright, Designs and Patents Act
CL	Compulsory license
CMO	Collective Management Organizations
EC	European Council
EC Treaty	Treaty establishing the European Community
ECJ	European Court of Justice
EU	European Union
IP	Intellectual Property
IPO	Intellectual Property Office
IPR/IPRs	Intellectual Property Rights
GATT	General Agreement on Tariffs and Trade
L&Es	Limitations and Exceptions
Marrakesh VIP Treaty	Marrakesh treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled
MCM	Mandatory Collective Management
MP3	MPEG-1 Audio Layer 3 (digital audio encoding standard)
R&D	Research and Development
Rome Convention	Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
TRIPS	Agreement of Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
US	United States
WCT	WIPO Copyright Treaty

LIST OF ABBREVIATIONS

Continued

WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization

CHAPTER 1: Introduction

1.1 Research context

The impact of Intellectual Property Rights (IPRs) on economic development and on transfer of knowledge (distribution of wealth) has been an area of increasing interest among scholars. There is an assumption, particularly spread from wealthy nations, of a positive relationship between Intellectual Property (IP) and economic development.¹ Those powerful nations, dictated a global trend to strength IP laws.² Many international treaties were influenced by this rationality³. During IPRs' consolidation, finding a workable theory of justification was vital. Natural rights and personality rights are some examples of theories that seek to provide theoretical support to IP. Nevertheless, it is arguable if those rights provide enough justification to IP.⁴ The utilitarianism theory acknowledges that IP leads to economic wealth. This issue has been the focus of many papers; however, this topic is far more complex than it is propagated. Studies based on developed countries often point out that IP protection is positively correlated to

¹ 'Truman Library, 'Truman's Inaugural Address' (1949) 'Greater production is the key to prosperity and peace. And the key to greater production is a wider and more vigorous application of modern scientific and technical knowledge'.

<https://www.trumanlibrary.org/whistlestop/50yr_archive/inagural20jan1949.htm> accessed on 9 November 2015 See also United Nations, *Measures for the Economic Development of Under-Developed Countries* (United Nations 1951) 28-30.

² Keith E Maskus, *Intellectual Property Rights in the Global Economy* (Washington, DC: Institute for International Economics, 2000); Mark F. Schultz and David B. Walker, 'How Intellectual Property became Controversial: NGOs and the New International IP Agenda' (2005) 6(2) *Engage* 82, 90-91.

³ On copyright The Trade-Related Aspects of Intellectual Property Rights (TRIPs) (1994) and WIPO Copyright Treaty (1996). On industrial design rights, Hague Agreement (1925). In patent rights the Patent Law Treaty (2000) and the Patent Cooperation Treaty (PCT) (2001).

⁴ Jeremy de Beer, 'Evidence-Based Intellectual Property Policymaking: An Integrated Review of Methods and Conclusions' (2016) 19(6-7) *Journal of World Intellectual Property* 150, 164 'None of these frameworks alone are fully capable of providing complete, reliable information about the economic importance of intellectual property in any one particular country'.

development.⁵ However, the findings of researches measuring the impact of IP on developing countries are less conclusive.⁶ Those results are in line with the history of global industrialization. Stronger protection and free trade does not necessarily boost intellectual works. In fact, during early stages of development high-income countries took advantage of interventionist trade and industrial policies to boost their national industry. Those nations prospered in the context of weaker IP protection and controlled trade. Regardless of that evidence, developing countries and least developing countries are constantly forced to adopt high standards of IP protection.⁷ Countries that did not take advantage of those practices are forsaken by the same nations which used those tools in their early stages of development, which is at least paradoxical. A study from a non-governmental organization which addressed consumer protection in several jurisdictions, found that countries with stronger IP laws occupied the worst positions in the ranking.⁸

⁵ Rod Falvey, Neil Foster and Olga Memedovic, 'The Role of Intellectual Property Rights in Technology Transfer and Economic Growth: Theory and Evidence' (United Nations Industrial Development Organization (UNIDO) 2006) < https://www.unido.org/sites/default/files/2009-04/Role_of_intellectual_property_rights_in_technology_transfer_and_economic_growth_0.pdf > accessed on 15 November 2015 'The developed countries benefit the most in terms of growth from stronger IPR protection, because stronger IPR protection encourages domestic innovation and technology transfer'; Chih-Hai Yang, 'Do Stronger Intellectual Property Rights Induce More Innovations? A Cross-Country Analysis' (2014) 55(2) Hitotsubashi Journal of Economics 167, 168-169 'After considering the threshold effects, IPRs protection remains a significantly positive influence on innovations for high-income countries, but it has no effect on fostering innovations for non-high-income countries'.

⁶ See the following papers for an empirical insight. Elhanan Helpman, 'Innovation, Imitation, and Intellectual Property Rights' (1993) 61(6) *Econometrica* 1247, 1248; Edwin L. C. Lai, 'International Intellectual Property Rights Protection and the Rate of Product Innovation' (1998) 55(1) *Journal of Development Economics* 133, 134; Phillip McCalman, 'Reaping What You Sow: An Empirical Analysis of International Patent Harmonization' (2001) 55(1) *Journal of International Economics* 161, 161-163; Amy Glass and Kamal Saggi, 'Intellectual Property Rights and Foreign Direct Investment' (2002) 56(2) *Journal of International Economics* 387, 391-392; Gene M Grossman, and Edwin L C Lai, 'International Protection of Intellectual Property' (2004) 94(5) *American Economic Review* 1635, 1636

⁷ Ha-Joon Chang, 'Kicking Away the Ladder: The "Real" History of Free Trade' (Foreign Policy in Focus 2003) < www.personal.ceu.hu/corliss/CDST_Course_Site/Readings_old_2012_files/Ha-Joon%20Chang%20-%20Kicking%20Away%20the%20Ladder-The%20%20Real%20History%20of%20Free%20Trade.pdf > accessed 12 July 2015.

⁸ Consumers International, 2010 IP Watchlist Report (2010) < http://www.iplaw.uct.ac.za/sites/default/files/image_tool/images/317/Publications/Overview/IPWatchList-2010-ENG.pdf > accessed 10 February 2018

Another research examining the effect of parody to copyrighted works pointed to a positive correlation between those two.⁹

Copyright is based on two main arguments: it provides an incentive to create (1) and to distribute (2) the work. The first is at least unprecise; financial incentives are not the motivation for all creations. Hence, it does not take into consideration that it is human's nature to create, nor does it recognize practical examples of non-profit initiatives. The second argument is based on a hard to assert belief as to whether and to what extent copyright fees direct to this end since the cost of exploitation discourages distribution of works; a reality which is changing due to the advancement of technology and the internet. As a result of these issues, IP's structure has been the target of many criticisms. In contrast to the IP ideology of 'all rights reserved', another concept surged, namely intellectual commons (ICs). ICs offer an alternative way of using those rights under a structure of 'some rights reserved'. However, it does not necessarily mean the extinction of IP as, despite its flaws, most ICs take advantage of IP's framework. Following the idea that 'more rights do not automatically produce more innovation', a notion while it may be applicable to physical rights does not necessarily work in the same manner for intellectual goods; a group of scholars initiated a movement named The Creative Commons in 2002.¹⁰ The Free Software Foundation (FSF) also embodies this belief in the common nature of intellectual rights. As the FSF curbs the right of paying fees, this goes well beyond the notion of 'some rights reserved' of Creative Commons to

⁹ Dinusha Mendis and Martin Kretschmer, 'The Treatment of Parodies Under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles' (Intellectual Property Office, Newport, UK, 2013) < <http://eprints.bournemouth.ac.uk/21881/1/ipresearch-parody-report2-150313.pdf>> accessed 15 October 2016.

¹⁰ James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press 2008) 179-204.

the concept of copyleft which states 'all rights reversed'.¹¹ There is also open-source and open-content license schemes. The open-source movement arose in 1998¹², whereas open-content¹³ began in 2011. All of those initiatives challenge the traditional way of administering IPRs. Those movements have been gaining more force and space in academic debate and usage.¹⁴ As an example, David Lang recruited 1000 volunteers to perform an original song named public domain, creating the lyrics out of online autocomplete searches.¹⁵

It is worth noting that ICs have also been the target of criticism. The tragedy of commons is an argument which is opposed to the idea of a system of commons. The argument can be traced back to William Forster Lloyd's work which studied overgrazing in non-private areas of pasture in England,¹⁶ whose observations became relevant in shaping economic theory.¹⁷ The tragedy of commons argues that a system of commons would inevitably lead to disaster.¹⁸ Nevertheless, physical and intellectual property do not operate in the same manner. Thus, the tragedy of commons may not apply to the field

¹¹ Douglas E Phillips, *The Software License Unveiled: How Legislation by License Controls Software Access* (Oxford University Press 2009) 119-120.

¹² The Debian Free Software Guidelines (DFSG) provides the definition of open source. Among its characteristics, a free software must allow free distribution, and display the source code. Debian, 'Contrato Social Debian' (2004) <www.debian.org/social_contract#guidelines> accessed 15 September 2017.

¹³ Open-content allows user's a free and perpetual permission to retain, reuse, revise, remix and redistribute a content under this license scheme. See more Open Content, 'Defining the "Open" in Open Content and Open Educational Resources' (2017) <www.opencontent.org/definition/> accessed 15 September 2017.

¹⁴ Dean A Frantsvog, 'All Rights Reversed: A Study of Copyleft, Open-Source, and Open-Content Licensing' (2012) 5(1) *Contemporary Issues in Education Research* 15, 16-17.

¹⁵ Wall Street Journal, 'David Lang's, The Public Domain' on Lincoln Center Plaza King', (2016) <https://search-proquest-com.ezproxye.bham.ac.uk/docview/1810445628?accountid=8630&rfr_id=info%3Axri%2Fsid%3Aprim> accessed 15 September 2017.

¹⁶ Egbert Tellegen, *Society and Its Environment: An Introduction* (Psychology Press 1998) 92-93.

¹⁷ Craig Parks Collins, *Coalitions to Consensus a Comparative Analysis of Stratospheric Ozone and Climate Change Negotiations* (University of California 2000) 17-20.

¹⁸ Garrett Hardin, 'The Tragedy of the Commons' (1968) 162(3859) *Science* 1243, 1244-1245.

of digital creations. Therefore, in the case of conflict between monopoly interests derived from IPRs and intellectual commons, the latter should be favoured.¹⁹

Later, the tragedy of commons was revisited.²⁰ So far, the concept of commons was under the umbrella of a property rationality.²¹ From the movement of reinterpreting the essence of the commons, new terminologies surged, such as: anticommons²² and initiatives such as the creative commons²³. The concept of IP surges to solve the problem of administrating public resources. The commons rationality does not require the end of all property rights but rather proposes a balance. Regarding the example of Creative Commons, the Movement operates in parallel with the IP framework. The commons operate on a symmetry of power based on inclusivity, whereas IP is a system to create exclusivity.²⁴ In this sense, IP focus on creating exclusivity through property, however it becomes a problem when it results in reducing the same values that it aims to foster. At this stage, the tragedy of commons become the tragedy of anticommons.²⁵ Then, scholars questioned the role of IP and whether it was fostering creativity and innovation,

¹⁹ Mark Cooper, 'Access to the Knowledge Commons in the Digital Age' (2006) 16(3) *Consumer Policy Review* 105, 106-107.

²⁰ Carol Rose, 'Comedy of the Commons: Commerce, Custom, and Inherently Public Property' (1986) 53(3) *The University of Chicago Law Review* 711, 739; Charlotte Hess, 'Mapping the New Commons' (2008) <http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/304/Mapping_the_NewCommons.pdf> accessed 22 May 2018; Elinor Ostrom, *Governing the Commons* (first published 1990, Cambridge University Press 2015) 2-3, 23-28.

²¹ Yoshai Benkler, 'Between Spanish Huertas and the Open Road: A tale of two Commons?' (2011) <http://www.benkler.org/Commons_Unmodified_Benkler.pdf> accessed 10 June 2018; Brett M. Frischmann, Michael J. Madison, Katherine Jo Strandburg, 'Governing Knowledge Commons' in Brett M. Frischmann, Michael J. Madison, Katherine Jo Strandburg, *Governing Knowledge Commons* (Oxford University Press, 2014) 7.

²² Michael A Heller, *The Tragedy of Anticommons: Property in the Transition from Marx to Markets* (1989) 111(3) *Harvard Law Review* 621, 637.

²³ Niva Elkin-Koren, 'Exploring Creative Commons: A Sceptical View of a Worthy Pursuit' in Lucie M. C. R. Guibault and P. B. Hugenholtz (eds), *The Future of the Public Domain: Identifying the Commons in Information Law*, (Kluwer Law International 2006) 325-328.

²⁴ Sèverine Dusollier, 'The Commons as a Reverse Intellectual Property – From Exclusivity to Inclusivity' in Helena Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013) 262.

²⁵ Michael A Heller, 'The tragedy of Anticommons: Property in the transition from Marx to Markets' (1989) 111(3) *Harvard Law Review* 621, 640.

and its effects on society. The commons system can offer an alternative way of exercising property rights. An example of commons is the Free Open Source Software; it shares an open source and object code. Unlike a work under public domain there is still some restricting of usage.²⁶ Examples of these software are for instance, the open software Mozilla, whereas Wikipedia is an example of open website.²⁷ This content generator operates under a General Public License scheme, which the document refers as a ‘copyleft’ license. Thus, the Wikipedia Foundation does not hold any copyright over its content.

In the path of finding a philosophical foundation for IP, this term is often associated with property right under an author-oriented view. As a result of the critics towards this model, as well as with the rise of open theories towards intellectual assets and inclusive movements, IP becomes on the spot for stronger justification. IP theories have been dealing with complex issues surround IPRs, such as public domain and commons. In Locke’s view the commons derives from the state of nature; it is a start point in which any individuals can benefit from it. In IP, the state of commons can be identified as ideas, nonetheless ideas respond differently to the economic paradigm of scarcity. At this stage, Locke conceives the commons within the public’s domain notion. Alternatively, IP can be interpreted as an author’s right to preserve and enlarge the IC, in contrast to exclusivity.²⁸

²⁶ FOSS, ‘Free Open Source Software’ (2018) <http://freeopensourceoftware.org/index.php/Main_Page> accessed 22 June 2018.

²⁷ Wikipedia, ‘Text of the GNU Free Documentation License’ (2018) <https://en.wikipedia.org/wiki/Wikipedia:Text_of_the_GNU_Free_Documentation_License> accessed 22 June 2018.

²⁸ Henry C Mitchell, *The Intellectual Commons: Toward an Ecology of Intellectual Property* (Lexington Books 2005) 153-160.

The most visited philosophical bases in the Copyright literature are: Utilitarianism, Labour theory, Personality Theory and Social Planning Theory. For utilitarianism copyright is a positive right; or a right created by the legislator, whereas for labour and personality theorists, copyright is a natural right.²⁹ The Utilitarianism approach centres on a cost-benefit analysis in which copyright protection acts to promote social welfare.³⁰ This philosophy is vulnerable to criticism when discussed in parallel with the role of public domain and, because this rationality was conceived to address physical goods, it struggles to interpret some aspects related to immaterial goods, specially copyright. The Labour theory stresses the natural right of property over a person's intellectual work, nonetheless it is inadequate when debating copyright. The Personality theory is built on the personality right, which means that an intellectual work is an extension of the personality of its creator. The social planning theory focus on building a 'just and attractive culture',³¹ thus the aim of copyright law is to facilitate 'participatory society'. There are some concepts which a certain theory can provide stronger foundation than other. That is, the labour and personality theories seem to explain better the existence of copyright, whereas the utilitarianism seems to be more appropriate when discussing the scope and duration of copyright.³² From this brief exposure of the main theories of IP, it may be more appropriate to use a pluralistic approach instead of being restricted to one. It seems to show that more recently theories

²⁹ Ana Ramalho, *The Competence of European Union in Copyright Lawmaking: a normative perspective of EU powers for Copyright Harmonization* (Springer 2016) 3-6.

³⁰ E C Hettinger, *Justifying Intellectual Property* (1989) 18(1) *Philosophy and Public Affairs* 31, 40.

³¹ Jia Wang, *Conceptualizing Copyright Exceptions in China and South Africa: A Developing View from Developing Countries* (Springer 2018) 23.

³² Ana Ramalho, *The Competence of European Union in Copyright Lawmaking: a normative perspective of EU powers for Copyright Harmonization* (Springer 2016) 5, 69.

on IP aim to embrace the democratic role of managing IP assets. ICs also stress the commitment of an inclusive use of resources.

Depending on which justification a country chooses to adopt within its laws. As an example, countries closely related to the labour and personality theory are likely to use a *droit d'auteur* system.³³ In this system, L&Es are interpreted more openly.

As well as other issues, IP is subject of regulatory law; the government coordinates inventions and tries to harmonize two main rights: the IP owner's interest and public interest. The balance created must ascertain a way to ensure people will not only be stimulated to develop new technology, but that their right to these inventions will be guaranteed, otherwise the development of new technology could be at risk. Nevertheless, the state needs to limit the rights of the inventor in order to provide further benefits for public interest. Therefore, government and its regulatory agencies need to satisfy both sides of the balance: inventors and citizens.

Before pursuing further considerations regarding IP, it is necessary to trace the major historical milestones that have solidified this debate internationally to date. In this sense, these treaties have great relevance since they seek to harmonize national legislation while at the same time promoting communication among countries. Moreover, they have an especial power to conciliate the protection of IPRs amid a sphere, which clearly exceeds territorial borders.³⁴

Despite the fact that all over the world, including developing countries, there are many treaties and national laws that seek to protect IP, this issue continues to be a

³³ *ibid.*

³⁴ Antonio Márcio Buainain, Sergio M Paulino De Carvalho, Sonia Regina Paulino and Simone Yamamura, 'Propriedade intelectual e inovação tecnológica: algumas questões para o debate atual' (Intellectual property and technological innovation: some issues for the current debate) (2014) <www.egov.ufsc.br/portal/conteudo/propriedade-intelectual-e-inova%C3%A7%C3%A3o-tecnol%C3%B3gica-algumas-quest%C3%B5es-para-o-debate-atual> accessed 02 October 2017.

paradigm. There are several treaties that focus on this matter: the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)³⁵, the Berne Convention for the Protection of Literary and Artistic Works,³⁶ the Paris Convention for the Protection of Industrial Property,³⁷ and the Universal Copyright Convention (UCC)³⁸. Many developed countries propagate the benefits of IPRs and push for other nations to sign treaties, this is a questionable agenda as the distribution of wealth is concentrated among them.³⁹ This may sign that exclusivity emphasize asymmetric disparity in a country's stage of development. Protectionism practices aligned with lower standards were the secret weapon to boost developed nations. Brazil did not use the transitional period and adopted a Trips-plus, 80 years' duration of copyright instead of 60. Current IP framework leaves little space for free use. It is not surprising the poor performance of Brazil in studies evaluating IP laws.

There are many evidences which support a crisis on management of IP in Brazil. The following briefly describes 3 examples to illustrate this statement and support the need to revise Brazilian copyright laws. First, the Brazilian exception of private copy for personal use is also an example of a problem in Brazilian Copyright system. The current Copyright law is from 1998, however it is more restrictive than the previous Copyright Laws of 1973⁴⁰ and 1916⁴¹. The current exception for photocopying does not allow a full

³⁵ TRIPs Agreement (open for signature 15 April 1994, entry in force on 01 January 1995).

³⁶ Berne Convention (signed on 9 September 1886, entered into force December 5, 1887, revised at Paris on 24 July 1971, and amended on 28 September 1979).

³⁷ UCC, with Appendix Declaration relating to articles XVII and Resolution concerning article XI 1952 (open for signature 6 September 1952, entry in force on 27 September 1955, No. 2937).

³⁸ The Paris Convention for the Protection of Industrial Property Rights (open for signature on 20 March 1883, entry in force on 7 July 1884).

³⁹ J H Reichman, 'Universal Minimum Standards of Intellectual Property Protection Under the TRIPs Component of the WTO Agreement' (1995) 29 *The International Lawyer* 345, 346.

⁴⁰ Brazilian Copyright Law 1973, art 49, II allowed full copies for private use conditioned that it was limited to a single copy and for non-profit purposes.

⁴¹ Brazilian Civil Code 1916, art 666, VI authorized full copies of any work, restricted to for non-profit purposes and limited to copy done by hand. Later, The Brazilian Copyright 1973 waived any

reproduction for private use, the legislator created a private copy exception restricted to partial reproductions. In addition, the law complicates even more the use of this exception when it chose to use a vague wording ‘small exempts’ to delimit the amount legally permitted of copying by this exception. The high price of books in Brazil does not relate only to the value of the book but also connects with the low purchase power of its citizens.⁴² This situation is even worse for students. The Brazilian Association of Reprographic Rights—Associação Brasileira de Direitos Reprográficos (ABDR) has been showing a stricter approach along last years, which resulted in a cut of license schemes.⁴³ From 2004 and onwards, the ABDR pushed for enforcement of author’s rights and started to fill lawsuits against educational institutions in an attempt to force them to stop allowing students to photocopy. In reaction to those attacks some of those institutions arbitrated a percentage of what it was considered legal.⁴⁴ This topic is further explored on Section 4.2.5.

Second, under the current system of L&Es there is no exception for religious works. There is a Bill from the senator Cleissi Hoffmann from 2011 in which she proposed to include an exception for religious activities, exempting from the payment of copyright fees. The project allows the ‘execution, by any means, of musical or lyrical-musical works in the context of cults, ceremonies or events carried out by religious organizations, with no profit objective’.⁴⁵ However, the overall process to create a law

technological restrictions.

⁴² Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, ‘Exceptions and Limitations to Copyright in Brazil: A Call for Reform’, in Lea Shaver (ed), *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 56.

⁴³ *ibid.*

⁴⁴ The University of São Paulo (USP, in Portuguese) and Pontifical Catholic University of São Paulo (PUC-SP, in Portuguese) interpreted it as 10%. IIPA, ‘Special 301 Report 2008 (Brazil)’ <<http://www.iipa.com/rbc/2008/2008SPEC301BRAZIL.pdf>> accessed 5 July 2018.

⁴⁵ Senate, ‘Bill No 100 from 2011 at the Senate’ (2011) <<https://www25.senado.leg.br/web/atividade/materias/-/materia/99480>> accessed 12 April 2018.

in Brazil takes many years. As an illustration, the last information from the public website responsible to inform the stage of the Bill and all updates shows that the Bill is in a commission since 2015, which means that it has been waiting for more than 3 years to be approved by this commission.⁴⁶ A Bill to be transformed into law can easily take 20 years to be approved.⁴⁷ This issue was brought to the Court's attention. In the Supreme tribunal court of Justice (STJ) ruling, the Court relied on the three-step test to decide in favour of the church.⁴⁸

Third, a dispute between the School of Music of Brasilia and Central Bureau for Collection and Distribution (ECAD). In 2012, students of this institution made a tribute to a Brazilian musician, Altamiro Carrinho, from a movement called *chorinho*. Although the event in question was for educational purpose and free, ECAD insisted for the payment of fees.⁴⁹ The argument defended by ECAD is based on the law does not cover this type of exception. The current law has an exception for educational establishments, however it only does not cover stage or musical performances open to the public.⁵⁰

Although Brazil's being a civil law country and having a closed approach towards L&Es, the issue of reinterpreting the L&Es system more openly has been left to the Courts. Nonetheless, a Court's decision overall will not be a binding precedent. In 2004,

⁴⁶ The last update shows that the Bill has been given to the Commission of Constitution, Justice and Citizenship (Secretariat of Support to the Commission of Constitution, Justice and Citizenship) on 05/05/2015. Senate, 'Bill n 100 from 2011 at the Senate' (2011) <<https://www25.senado.leg.br/web/atividade/materias/-/materia/99480>> accessed 12 April 2018.

⁴⁷ Bruno André Blume, '*Por Que um Projeto de Lei Pode Levar 20 Anos Para Ser Aprovado e Virar Lei?*' (2015) <<http://www.politize.com.br/projeto-de-lei-processo-legislativo/>> accessed 13 August 2018.

⁴⁸ Supreme Tribunal of Justice, 'Recurso Especial No 964.404 - ES (2007/0144450-5)' (2011) <https://www.jusbrasil.com.br/diarios/25220093/pg-2549-superior-tribunal-de-justica-stj-de-10-03-2011?ref=next_button> accessed 14 April 2018.

⁴⁹ Correio Braziliense, 'ECAD Exige Cobrança de Direitos Autorais em Escola de Música de Brasília' (2012) <https://www.correiobraziliense.com.br/app/noticia/cidades/2012/09/22/interna_cidadesdf,323884/ecad-exige-cobranca-de-direitos-autorais-em-escola-de-musica-de-brasilia.shtml> accessed 18 April 2018.

⁵⁰ Brazilian Copyright and Neighbouring Rights 1998, art 46, VI (BR).

the Reform of the Judiciary by the Constitutional Amendment n. 45 created a constitutional binding effect mechanism.⁵¹ The *Sumula Vinculante*⁵² is the only decision with legal binding effect.⁵³ This procedure is restricted to Supreme Court and subject to some formalities.⁵⁴ Despite the Judiciary's effort, the best tool for reviewing L&Es system is changing the law.

Next section illustrates the research objective of this study.

1.2 Research objective

Considering that a country needs to guarantee the production of knowledge, foment invention, and at the same time attend the public interest, the scope of IP under the Creative Commons perspective becomes tremendously important. Due to the rapid advancements of technology, IP laws have to evolve accordingly in order to safeguard both the rights of the people and the institutions involved. In such an environment, opportunities to implement new laws or to revise previous legal texts are important to safeguard IP rights. This study aims to support the building of a Creative Commons in a developing country, namely Brazil. To this end it seeks to improve IPRs in Brazil through a creative commons perspective by focusing on copyright laws and copyright limitations and exceptions within the framework of IP law. Therefore, 2 objectives come to the fore. First, this study seeks to review the systems of limitations and exceptions in Brazil and suggest changes to it. Second, in order to complement the first objective this study also investigates the degree of knowledge of Brazilian people surrounding copyright laws.

⁵¹ Matthew M Taylor, *Judging Policy: Courts and Policy Reform in Democratic Brazil* (Stanford University Press 2008) 5-10.

⁵² Brazilian Constitution 1998, art 103-A (BR).

⁵³ Augusto Zimmermann, 'How Brazilian Judges Undermine the Rule of Law: A Critical Appraisal' (2008) 11 *International Trade and Business Law Review* 179, 180.

⁵⁴ Matthew C Ingram, 'Uncommon Transparency' in Richard Davis (ed) and David Taras (ed), *Justices and Journalists: The global perspective* (Cambridge University Press 2017) 62.

These objectives are important because, apart from the examples outlined in the introduction regarding the importance of reviewing the system of L&Es due to its crisis, the current system is privatizing art in a destructive and anti-democratic way. As an example of this protectionist approach, the original material of the film *A hora e a Vez de Augusto Matraga* is perishing because it cannot be digitalized until the heirs of Leonardo Villar, the film-maker, agree on the amount due to copyright fees. According to the current law, the digitalization of a copyrighted material without the authorization of its owner's is against the law, even if it is for preservation purposes.⁵⁵ The current law is one of the strongest barrier against the dissemination of knowledge and information. As an example, the aforesaid problem towards digitalizing copyrighted material for preservation purposes.⁵⁶ Another example related to the reproduction right is the absence of an exception for out-of-print works. Thus, the law neglects the challenges and changes brought by the internet. In 2010, Marcus Souza, the general coordinator of copyright of the Ministry of Culture (MinC), pointed out the fact that Brazil was one of only countries the country where there was no public entity to monitor Ecad's attributions.⁵⁷ Regarding those concerns, the issue has been improved in 2013 with the amendment of Brazilian Copyright law.⁵⁸ It is worth stressing that the changes on the law was the result to a prior public scandal involving an investigation targeting Ecad. Many issues are left untouched and revising the law is a matter of safeguarding the public interest.

⁵⁵ Tatiana de Mello Dias, 'Copyright: A Batalha Copyright: The Battle 02.05.2010 Estadão' (2010) <<https://link.estadao.com.br/noticias/geral,copyright-a-batalha,10000044376>> accessed 10 August 2018.

⁵⁶ Camilo Rocha, 'Quais os Entraves na Digitalizacao de Acervos no Brasil' (2018) <<https://www.nexojornal.com.br/expresso/2018/02/23/Quais-os-entraves-na-digitalizacao-de-acervos-no-Brasil>> accessed 11 August 2018.

⁵⁷ Tatiana de Mello Dias, 'Copyright: a Batalha Copyright: the Battle 02.05.2010 estadao' (2010) <<https://link.estadao.com.br/noticias/geral,copyright-a-batalha,10000044376>> accessed 10 August 2018.

⁵⁸ Brazilian Law No 12,853 (adds collective management of copyright and gives other provisions) 2013 (BR).

A study from the Brazilian Ministry of Culture studied countries members of the *Rede Internacional de Políticas Culturais* (International Network of Cultural Policemaking). The study seems to identify a trend on the level of development and the amount of adopted L&Es; the results show that developed nations adopt more L&Es than what they are legally bounded, whereas developing countries adopted less.⁵⁹ It also points out a general trend to national laws strength some aspects of author' rights, such as the duration of copyright, which would not benefit developing nations because they have generally stricter laws already.⁶⁰

Additionally, addressing these objectives have further significance as it can provide a framework which may be applied and discussed by other developing nations.

1.3 Methodological approach

Copyright theories are a significant resource to IP systems and a great way to set its boundaries.⁶¹ Many theories in IP are related in some degree, despite any similarities and each one brings a valuable element into the copyright discourse. In the search for a justification to Copyright, so far scholars' attempts to categorize this subject matter resulted in either being 'misleading or incomplete'.⁶² In copyright literature, there are many ways to classify copyright justifications.⁶³

This study utilizes three different methodologies to address the research objectives. First, a comparative analysis is used comparing current Brazilian copyright

⁵⁹ Ministerio da Cultura, 'Rede Internacional de Políticas Culturais Direitos Autorais, Acesso à Cultura e Novas Tecnologias: Desafios em Evolução à Diversidade Cultural. Estudo Preparado pelo Ministério da Cultura com a Colaboração do Centro de Tecnologia e Sociedade (CTS) e a Fundação Getulio (FGV)' (2006) <http://www.cultura.gov.br/documents/10883/38605/estudo-minc-ripc-versao-final-port_1165585538.pdf/1a8485a0-a660-4d89-be51-5ac5a2a51515> accessed 20 July 2018.

⁶⁰ Bruna Castanheira De Freitas, Mariana Giorgette Valente, *Memórias Digitais: o Estado da Digitalização de Acervos no Brasil* (FGV Editora 2017).

⁶¹ Lior Zemer, *The Idea of Authorship in Copyright* (Routledge 2016) 8-22.

⁶² *ibid* 8-22.

⁶³ Jia Wang, *Conceptualizing Copyright Exceptions in China and South Africa: A Developing View from Developing Countries* (Springer 2018) 16-17.

laws with those of other worldwide jurisdictions mainly centered on the EU, US and UK which are countries that are way ahead in this area according to the intellectual property rankings discussed before. This method of comparative law promotes a dialogue between different laws while also enabling a better understanding of the decision-making process in some countries.⁶⁴ According to the same author, there are some advantages of this method such as not repeating mistakes and enhancing success decisions rate. Moreover, further benefits can be cited, such as: to prepare authorities for social change that has already been experienced elsewhere, to intensify legal culture, and build up information regarding the function and firmness of communal law in particular legal situations. In addition, there are regions undergoing a process of internationalization or standardization of rights, which has attenuated the distance between different legal regimes in order to generate the unification of rights and duties. This phenomenon therefore forsakes rigid and traditional ideas of territorial and ideological boundaries among countries.

Second, in order to address the first objective, a rights-based approach is also used. The right-based approach sets creativity as an ‘individual liberty’, thus arguments in the thesis are built upon this approach as well.⁶⁵ The reason of relying on this method is complimentary to the comparative legal research. Third, an empirical research design via questionnaire is also employed to investigate the level of knowledge of Brazilian people and address the second research objective. The use of the questionnaire is a valuable source for this study to identify gaps on public knowledge regarding IP. For the purpose of this thesis, the qualitative-empirical research focused on copyright and its

⁶⁴ Tobias Johannes Scott ‘The Comparative Method of Legal Research’ (2014)

<https://web.up.ac.za/sitefiles/file/47/J%20Scott%20-%20Comparative%20research%20perspectives%20_Private%20law_.pdf>

accessed 09 January 2014.

⁶⁵ Julie E Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 UC Davis Law Review 1151, 1152.

system of L&Es. In empirical research, the data has the potential to bring more consistency to the results. In this light, ‘well-executed research with a data component is likely to make more important, influential, and, frankly, better contributions to policy and law’.⁶⁶ This tool helps addressing the particular points which requires more attention, while it can point out tendencies.⁶⁷ In other words, the qualitative approach helps the researcher to ‘understand key patterns or themes’.⁶⁸ Those points can identify which areas are demanding police-focus strategies by public and private sectors. This approach of study contributes to the legal discourse by giving greater detail of the objective of study.⁶⁹ It is not the main objective of the empirical research to deliver a generalization of the findings, but a focused study on the Brazilian perception regarding copyright and its flexibilities. In this sense, it can contribute to solve problems in the legislation, find ‘best practices insights and the effect of policy shifts.’⁷⁰

This mixed research approach adopted has been due to the complexity of the phenomenon, and the limitations in resource to certain data. It is worth noting that it has been a limitation to this study to find easier mechanisms to search for bills and decisions from lower courts.

The next section presents the contributions of the study.

⁶⁶ Lee Epstein and Andrew D Martin, *An Introduction to Empirical Legal Research* (Oxford University Press 2014) 4.

⁶⁷ Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration* (Nijhoff International Investment Law) (Brill – Nijhoff 2017) 202-205.

⁶⁸ Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 926-927, 930, 948.

⁶⁹ *ibid* 926-927.

⁷⁰ *ibid* 930.

1.4 Contributions of the research

The purpose of this thesis is to promote the culture of Creative Commons in Brazil, which, has one of the strictest Copyright laws among all countries. Based on this, it offers a critical analysis of Brazilian system of Limitations and Exception to Copyright. It supports that knowledge should not be treated as a pure property right, but it also needs to consider human rights. Hence, it proposes a system of copyright, which also effectively addresses users' access-rights. One way to tackle this issue is by exploring the full potential of copyright flexibilities. In this light, it presents a detailed study of Brazilian system of L&Es, which is particularly well-known as being problematic, and, for this reason have a great room for improvement. By doing so, it contributes to legal literature by offering a prime example of implementing an interpretation accordingly to a balanced point of view between copyright holders and users in a Copyright law. This study supports the use of copyright flexibilities in the improvement of a countries' economic and cultural development. Moreover, it provides evidence that may support the understanding of IPRs by other emerging economies. Therefore, the main contributions of this work are based on supporting Brazil in securing distribution and creation of knowledge without compromising the system. Thus, this study suggests policy recommendations that aim to enhance the effectiveness and the balance of securing creativity and a culture of sharing in the digital era.

Specifically, the contributions of this dissertation according to each chapter are as follows. Chapter 2 presents an overview of Brazilian history aiming attention to the evolution of authors' rights. Based on this, it enables a better understanding over the current system. Thus, it makes some correlations between the historical application of IPRs and its contemporary implications.

Chapter 3 seeks to clear some key points, such as limitations' legal nature and the implications underlining the various forms of limiting authors' rights. Then, it surveys different approaches towards copyright limitations, suggesting the need of an alternative model to allocate those rights.

Chapter 4 individually analyses Brazilian L&Es in order to alter some limitations and recommend insertion of other flexibilities to Brazilian legislation. Hence, it offers a comparative study, especially focusing on UK legislation and EU Directives regarding this matter.

Chapter 5 presents policy recommendations regarding parody not only for Brazil but also guidelines to be adopted by international law makers. Some criteria are discussed in order to avoid contradictory decisions among signature countries of TRIPs.

Chapter 6 presents a questionnaire regarding the importance of IP and the open access movement in relation to the economic development in Brazil. This contributes by suggesting the promotion of the open access movement and also by revealing to Brazilian government that the initial survey illustrates a high importance attributed to the Open Access movement in securing economic development.

These contributions are achieved by critically evaluating laws in Brazil, international treaties and laws all over the world in particular in the UK, EU and US, as well as providing policy recommendations further discussed in the conclusion of the following chapters; and by conducting a questionnaire in Brazil.

Overall, the main implications of this study is to discuss and propose policy recommendations for the Brazilian government that may benefit the government and Brazilian citizens if an open approach is adopted in the country. Moreover, by comparing cases from different jurisdictions, this thesis may also be helpful in clarifying unclear

aspects regarding the system of L&Es for the U.K government as well as for other jurisdictions.

1.5 Structure of the thesis

This thesis is structured as follows. Chapter 2 provides an overview of Brazilian History and authors' rights as well as it discusses the relevant theories of IP. Chapter 3 discusses the limitations and exceptions to copyright law, as well as it discusses the historical background of IP and its theories. Chapter 4 presents the Brazilian current system of limitations and exceptions comparing that to other developed nations. Chapter 5 provides an international framework comparing Brazil among other jurisdictions discussing copyright and its exceptions regarding Parody. Chapter 6 presents some insights regarding the knowledge of IP rights by presenting an explorative study in Brazil, as well as it discusses the Open Access movement in Brazil. Finally, Chapter 7 presents the main conclusions, limitations and implications of this study to the literature.

CHAPTER 2: An overview of the Brazilian history on authors' rights and IP history

2.1 Introduction

In order to understand the problems in copyright law, it is important to review Brazilian history and the development of Author's rights, which can highlight the reasons why the current copyright law needs revision. Moreover, it is important to discuss the theories of IP and how they influenced the Brazilian position. Thus, the aim of this chapter is bifold. First, this chapter describes the history of Brazil in relation to authors' rights, which is divided into seven periods: Colonial, Imperium, the Old Republic, the Vargas Era, the Democratic Period, the Military Regime and the New Republic. Brazil was discovered by Portugal in 1500 but colonization started effectively in 1530. As such, IP development rights started late in Brazil when compared to other countries. Specially authors' rights which only commenced in 1827. One of the reasons for such a late start is related to the history of the press, which was prohibited during the colonial period (1500 to 1822). Currently, intellectual property rights (IPRs) in Brazil are regulated under two main pieces of legislation, Industrial Property Law⁷¹ and Author's Law⁷². Second, this chapter aims to briefly review the theories of IP.

This chapter is organized as follows. Section 2.2 is a brief review of Brazilian history which covers the colonial period. Section 2.3 discusses the history of authors' rights in Brazil according to each period: Imperium, the Old Republic, the Vargas Era, the Second Republic, the Military Dictatorship, and the New Republic. Section 2.4 discusses the main theories that support IP. Section 2.5 presents the historical

⁷¹ Brazilian Industrial Property Law 1996 (BR).

⁷² Brazilian Copyright and Neighbouring Rights Law 1998 (BR).

background of IP. Finally, section 2.6 concludes mainly focusing on the history of Brazil and its impact on copyright law.

2.2 Overview of Brazilian History (1500-1822)

The history of authors' rights in Brazil is relatively short, partly due to its colonial legacy (1500-1815).⁷³ Brazil⁷⁴ was formally 'discovered'⁷⁵ on 22nd April 1500. The king of Portugal appointed Pedro Álvares Cabral, a Portuguese nobleman, to lead the expedition with the assistance of the Portuguese explorer Bartolomeu Dias following the recently discovered route unveiled by Vasco da Gama⁷⁶ (1497-1499).⁷⁷

The territory of the New World⁷⁸ covers Latin America where Brazil is situated, which was divided between Portugal and Spain prior to Cabral's expedition under the terms of the Treaty of Tordesillas of 7th June 1494.⁷⁹ According to this treaty, all lands that are nowadays Brazil were owned by Spain. Due to the discovery of new Brazilian territory in 1500, Portugal required a change to the Treaty, which gave part of the Brazilian Lands to Portugal.⁸⁰ The other territory, which constituted a part of Brazil and Latin America remained under Spanish control.

Despite the initial efforts of the Portuguese Empire to acquire Brazilian lands

⁷³ In 1815, Brazil left the status of a colony. The territory was united with Portugal which created the United Kingdom of Portugal, Brazil and Algarves.

⁷⁴ The name of the colony is a reference to a valuable red dye wood located in the land known as pau-brasil.

⁷⁵ According to reports found on the book *De Situ Orbis*, Duarte Pacheco Pereira, a Portuguese explorer, was in Brazil in 1498.

⁷⁶ However, the fleet diverted from its original path, and anchored instead at the shore of Porto Seguro.

⁷⁷ Edgar Prestage, *The Portuguese Pioneers* (Johnston Press 1933) 257-259; William Brooks Greenlee, *The Voyage of Pedro Álvares Cabral to Brazil and India: From Contemporary Documents and Narratives* (Asian Educational Services 1938) 196; Charles David Ley, *Portuguese Voyages, 1498-1663* (Dutton Dent 1953) 39-59; Gilbert Renault, *Caravels of Christ* (George Allen & Unwin 1959) 153-154

⁷⁸ New world covers the areas discovered in the Western Hemisphere, made up of the Americas and their islands.

⁷⁹ The Treaty of Tordesillas was a document issued by the Pope Alexander VI. It set a line 100 leagues west of the Cape Verde Islands and regulated that the lands discovered on the east were entitled to Portugal and on the west to Spain.

⁸⁰ The new resolution relocated the line to 370 leagues west of the Cape Verde Islands.

during the period from 1500 to 1530, Portugal did not explore these lands. Instead, Portugal exploited the Eastern colonies, which proved to be very valuable. In 1530, the king of Portugal (D. João III) sent an expedition led by Martim Afonso de Souza aiming to establish a long-term base to explore the trade of Brazilian wood and to verify alleged claims regarding the existence of precious metals in the country.⁸¹ Portugal could not afford to invest public money in these endeavours. As a result, D. João III instituted the Donatary system in 1534, a form of governance used in previous Portuguese colonies.⁸² Those administrative divisions, named captaincies, were granted by the Crown to a captain or donatary, who were Portuguese nobles financially responsible for developing and securing the land.⁸³ Brazilian territory was initially divided into fifteen captaincies which were given to eleven captains.

In 1548, Portugal maintained the captaincies but created a General Government. The new system instituted the figure of a general governor based on the captaincy of Salvador who was the direct representative of the King and who would give directions to donataries; the pioneer was Tomé de Souza who arrived in 1549.⁸⁴

The mixed model of captaincy and general government, survived until the declaration of Brazilian Independence in 1822. The independence modified the administrative divisions of the country from captaincies to provinces. Although the first draft of captaincies changed massively during their period of application, these unities served as guidelines to define the current states in Brazil.⁸⁵

⁸¹ Boris Fausto, *A Concise History of Brazil* (Cambridge University Press 1999) 11.

⁸² The captaincy system was previously tested at Madeira and Azores.

⁸³ Stuart B Schwartz, *Sovereignty and Society in Colonial Brazil: The High Court of Bahia and Its Judges, 1609-1751* (University of California Press 1973) 24.

⁸⁴ Alida C Metcalf, *Go-between and the Colonization of Brazil: 1500-1600* (University of Texas Press 2005) 83.

⁸⁵ Benjamin Keen and Keith Haynes, *A history of Latin America*, vol 1 (9th edn, Cengage Learning 2013) 128.

The next section focuses on the history of authors' rights in Brazil.

2.3 History of Authors' rights in Brazil

This section focuses on the development of authors' rights in Brazil following independence in 1822. This section is divided according to the history of Brazil in six sections: author's right in the Imperium, the Old Republic (1889-1930), the Vargas Era (1930-1945), the Second Republic (1946-1964), the Military Dictatorship (1964-1985) and finally the New Republic (1985-present).

2.3.1 Author's right during the Imperium (1822-1889)

Following the independence of Brazil of 1822, D. Pedro I created a Constitutional Convention in 1823 in order to enact a new constitution. The convention supported the liberal democracy model as used by the North American Constitution of 1787, whereas D. Pedro I wanted to use the absolutism model adopted by the French Constitution of 1814. The final draft conformed with the Emperor's desires, which instituted a 'hereditary catholic monarchy'.⁸⁶ This new constitution reformulated the concept of separation of powers of Montesquieu, which argued that the power of a nation should be governed by three independent powers: Legislative, Executive and Judicial. By the enactment of the Constitution of 1824, Brazil recognized four spheres of power, instead of three: Legislative, Executive, Moderator⁸⁷ and Judicial.⁸⁸ The Moderator power had supremacy

⁸⁶ Keith S Rosenn, 'Conflict Resolution and Constitutionalism: The Making of the Brazilian Constitution of 1988' in Laurel E. Miller and Louis Aucoin (eds), *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute of Peace 2010) 436.

⁸⁷ The Moderating Power was exercised by the Emperor who had constitutional prerogatives (art 101 of the Brazilian Constitution of 1824) such as the right to dismiss or nominate members of the House of Deputies.

⁸⁸ Brazilian Constitution 1824, art 10 (BR).

over the other powers and it was under the control of D. Pedro I.⁸⁹ With regard to authors' rights, this constitution, namely the Brazilian first Constitution, covered rights over inventions but was silent regarding authors' rights.⁹⁰

The earliest mention of authors' rights in the Brazilian legal system dates to a law of 1827.⁹¹ This law was enacted by Dom Pedro I, the emperor, who instituted the first undergraduate course of 'Social and Legal Sciences' based in the cities of São Paulo and Olinda.⁹²

The law that created this course in Social and Legal Sciences was a pioneering piece of legislation in terms of the development of authors' rights in the country. It provided protection for 10 years for the works used by the professors who lectured one of the modules as defined by this law.⁹³ Furthermore, protection was conditioned to approval of a general committee, which was responsible for examining whether the theories presented in the books were aligned with the juridical system of the Empire. By requiring this analysis, literary works could be easily controlled by the government. Although it represented an innovation to the national's legal system, the law did not have a substantial impact on society.⁹⁴ Its scope was restricted specifically to the materials related to the lectures. Thus, most works continued without protection.

⁸⁹ *ibid.*, arts 98-101.

⁹⁰ Brazilian Constitution 1824, art 179, XXVI '*The inviolability of the Civil and Political Rights of Brazilian Citizens is based on freedom, individual security, and property, is guaranteed by the Constitution of the Empire in the following manner*' [Inventors will own their discoveries or their productions. The Law will assure them a temporary exclusive privilege, or will compensate them for the loss, that their works may suffer for the common knowledge] (BR).

⁹¹ Brazilian Imperial Law 1827 (BR).

⁹² Celso Campilongo, 'History and Sources of Brazilian Law' in Fabiano Deffenti and Welber Oliveira Barral (eds), *Introduction to Brazilian Law* (Kluwer Law International 2011) 15-24.

⁹³ Brazilian Imperial Law 1827, art 7 (BR).

⁹⁴ Ronaldo Porto Macedo Junior and Carla Henriete Bevilacqua Piccolo, 'Philosophy of Law in Brazil in the 20th Century' Enrico Pattaro and Corrado Roversi (eds), *A Treatise of Legal Philosophy and General Jurisprudence: Legal Philosophy in the Twentieth Century: The Civil Law World*, vol 12 (Springer 2016) 840, 842.

The next legislation that mentions authors' rights is the Imperial Criminal Code, which was enacted in 1830. Although Brazil declared independence in 1822, the former colony did not cut legal connections with Portugal. Due to a lack of national criminal laws, the country used Portuguese criminal laws to regulate crimes in the country. As such, the Code was inspired by previous Portuguese laws, but it created a reformulated version of it, with less rigorous interpretation of crimes and punishments. The most intensive debate was towards whether it should allow the death penalty.⁹⁵ The Code was influenced by the utilitarian doctrine of Jeremy Bentham⁹⁶ and the liberal principles of the Enlightenment.⁹⁷ As such, it weakened punishments toward the violation of freedom of speech and press.

This Code was divided into larger sections called parts, which were in turn divided into titles and then subdivided into Chapters. Under the Title 'Crimes Against Property' and in the Chapter titled 'To Steal', the Criminal Code of the Empire created a law to punish unauthorized use of works.⁹⁸ By the creation of this new law, the Imperial Criminal Code was the first Brazilian law to recognize the authors' right over the reproduction of works.⁹⁹ The Imperial Criminal Code did not mention any other pecuniary rights or moral rights at this stage, and it was restricted only to Brazilian citizens. Moreover, compared with the previous law of 1827, the Criminal Code of the Empire expanded the scope of protection to national works as well as modifying the term

⁹⁵ Brazilian Criminal Code 1830 (BR).

⁹⁶ Vicente Riccio, 'Tropical Utility: Jeremy Bentham and 1830 Brazilian Criminal Code', (2009) *The Law and Society* <http://www.allacademic.com/meta/p17921_index.htm> accessed 16 November 2017.

⁹⁷ Giza Lopes, 'Brazil' in Graeme R. Newman, *Crime and Punishment around the World*, vol 1 (ABC-CLIO 2010) 62-69.

⁹⁸ Thomas Flory, *Judge and Jury in Imperial Brazil, 1808–1871: Social Control and Political Stability in the New State* (University of Texas Press 1981) 110-111.

⁹⁹ Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, 'Exceptions and Limitations to Copyright in Brazil: A Call for Reform' in Lea Shaver, *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 71.

of protection, which was previously only 10 years, to cover the authors' lifetime plus 10 years.¹⁰⁰ The punishment provided by the Criminal Code of the Empire stated that the offender would lose all unauthorized copies, and in cases for which the copies were unavailable, the penalty would be calculated by their economic value. The offender was subjected to a further fine of 'three times the double of the copies' value'.¹⁰¹

The next period in the history of Brazil is characterized by the creation of the Republic of Brazil. For ease of exposition this period is subdivided into five periods: The Old Republic (1889-1930), The Vargas Era (1930-1945), The Second Republic (1945-1964), The Military Republic (1964-1985) and The New Republic (1985-present). These are discussed in the following sections.

2.3.2 The Old Republic (1889-1930)

During the nearly 60 years since the Imperial Criminal Code of 1830 had been instigated, no further issue was addressed regarding the authors' rights. The following Brazilian law to address authors' rights was the Penal Code of the United States of Brazil of 1890.¹⁰² Compared to the Imperial Criminal Code of 1830, it provided greater measures to safeguard authors' rights. As with the previous Code, unauthorized reproduction of a work was considered a crime against property; however, under the Code of 1890 for the first time, it was treated as a crime against IP. Moreover, it

¹⁰⁰ Previously, the Law of 1827 which created the Social and Legal Sciences course recognized solely the works approved by the General Committee.

¹⁰¹ Brazilian Criminal Code 1830, art 261 *'Imprimir, gravar, lithographar, ou introduzir quaesquer escriptos, ou estampas, que tiverem sido feitos, compostos, ou traduzidos por cidadãos brasileiros, enquanto estes viverem, e dez annos depois da sua morte, se deixarem herdeiro. Penas - de perda de todos os exemplares para o autor, ou traductor, ou seus herdeiros; ou na falta delles, do seu valor, e outro tanto, e de multa igual ao tresdobro do valor dos exemplares. Se os escriptos, ou estampas pertencerem a Corporações, a prohibição de imprimir, gravar, lithographar, ou introduzir, durará sómente por espaço de dez annos'*. [Print, engrave, lithograph, or introduce any writings or prints that have been made, composed or translated by Brazilian citizens, as long as they live, plus ten years after their death, in case where they left heirs] (BR).

¹⁰² Brazilian Criminal Code (Decree n. 847) 1890, ch V, s I, arts 342-350 (BR).

introduced new legal terms regarding types of properties, such as literary, artistic, industrial and commercial.¹⁰³

The Penal Code of 1890 inserted a provision which prohibited the reproduction of legal texts issued by members of the Legislative and Executive branches.¹⁰⁴ Regarding the term of protection, the law maintained the same period,¹⁰⁵ but this rule created new criminal liabilities of IP. It gave protection to speeches and prayers from unauthorized breaches of reproduction.¹⁰⁶ Additionally, it created a liability of illicit trafficking of counterfeit goods,¹⁰⁷ as well as it inserting Brazil's first express limitation to authors' rights, which permitted a partial citation of any written work with the aim of 'criticism, polemics or teaching'.¹⁰⁸

¹⁰³ Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, 'Exceptions and Limitations to Copyright in Brazil: A Call for Reform' in Lea Shaver, *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 72.

¹⁰⁴ Brazilian Criminal Code (Decree n. 847) 1890, art 342 (BR).

¹⁰⁵ *ibid* art 345. '*Reproduzir, sem consentimento do autor, qualquer obra litteraria ou artistica, por meio da imprensa, gravura, ou lithographia, ou qualquer processo mecanico ou chimico, emquanto viver, ou a pessoa a quem houver transferido a sua propriedade e dez annos mais depois de sua morte, si deixar herdeiros: Penas - de apprehensão e perda de todos os exemplares, e multa igual ao triplo do valor dos mesmos a favor do autor*'. [To reproduce, without the consent of the author, any literary or artistic work, by means of the press, engraving, or lithography, or any mechanical or chemical process, as long as he lives, or the person to whom he has transferred his property and ten years More after his death, if he let heirs: Penalties - of apprehension and loss of all copies, and a fine equal to three times the value of the same in favour of the author].

¹⁰⁶ Brazilian Criminal Code (Decree n. 84) 1890, art 346 '*Reproduzir por inteiro em livro, collecção ou publicação avulsa, discursos e orações proferidos em assembléas publicas, em tribunaes, em reuniões politicas, administrativas ou religiosas, ou em conferencias publicas, sem consentimento do autor: Penas - de apprehensão e perda dos exemplares e multa igual ao valor dos mesmos, em favor do autor*'. [To reproduce in full in a book, a collection or a single publication, speeches and prayers given in public assemblies, in tribunals, in political, administrative or religious meetings, or in public conferences, without the author's consent: Penalties - of apprehension and loss of copies and fine equal to their value, in favour of the author] (BR).

¹⁰⁷ Brazilian Criminal Code (Decree n. 847) 1890, art 349 '*Importar, vender, occultar ou receber, para serem vendidas, obras literarias ou artisticas, sabendo que são contrafeitas: Penas - as de apprehensão e perda dos exemplares e multa igual ao dobro do valor dos mesmos a favor do dono ou autor*'. [To import, sell, hide or receive, for commercial use, literary or artistic works, knowing that they are counterfeited: Penalties - loss of copies and a fine equal to the double of their value to be reverted on favour of the owner or author] (BR).

¹⁰⁸ Brazilian Criminal Code 1890, art 347 (BR).

After the proclamation of the Republic in 1890, Brazil enacted its first republican constitution on 24 February 1891. This Constitution was influenced by several events as follows: the enactment of the Constitution of the United States from 1787, the enactment of the Constitution of Argentina from 1853 and the Pan-American Conference in 1889. Although strongly inspired by the Constitution of the United States¹⁰⁹, the Brazilian constitution did not present an express aim for authors' rights.¹¹⁰ The Constitution of 1891 reshaped three major pillars of the country: it changed the form of government from monarchy to republic, it modified the system of government from parliamentary to presidential and the governmental structure changed from unitary state to a federation of states.¹¹¹ Formerly Brazil was governed by four branches, the Constitution of 1891 extinguished the Moderator power, which had been exercised by the Emperor, and defined instead three independent powers: Executive, Legislative and Judiciary.¹¹²

The constitutional document of 1891 was a landmark for Brazilian authors' rights as it was the earliest of its kind to recognize authors' rights under the scope of constitutional protection.¹¹³ It sheltered authors' exclusive rights over literary and artistic

¹⁰⁹ Constitution of the United States 1787, art I, 8 (8) 'to promote the progress of Science and Useful Arts' (US).

¹¹⁰ Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, 'Exceptions and Limitations to Copyright in Brazil: A Call for Reform' in Lea Shaver, *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 73.

¹¹¹ Celso Campilongo, 'History and Sources of Brazilian Law' in Fabiano Deffenti and Welber Oliveira Barral (eds), *Introduction to Brazilian Law* (Kluwer Law International, 2011) 15-24.

¹¹² Arim Soares do Bem, 'Continuities and Discontinuities in Brazilian Political and Institutional Life: Past and Present Dilemmas for Democracy' in Dana de la Fontaine and Thomas Stehnen (eds), *The Political System of Brazil* (1st edn, Springer 2016) 29-30.

¹¹³ Constitution of Brazil 1891 (Rewritten by the Constitutional Amendment of 1926), art 72, §26-A '*Constituição assegura a brasileiros e a estrangeiros residentes no País a inviolabilidade dos direitos concernentes à liberdade, à segurança individual e à propriedade, nos termos seguintes: Aos autores de obras literárias e artísticas é garantido o direito exclusivo de reproduzi-las, pela imprensa ou por qualquer outro processo mecânico. Os herdeiros dos autores gozarão desse direito pelo tempo que a lei determinar*'. [The Constitution safeguards to Brazilians and foreigners residing in the country the inviolability of the rights concerning freedom, individual security and property, in the following terms: §26. Authors of literary and artistic works have secured the exclusive right to reproduce them by the

works, and provided two characteristics of those rights as follows: transferability and limited duration for a fixed period. However, regarding the second characteristic, it didn't provide a specific period as it stated that the issue would be treated by a future law.

After the recognition of authors' rights on the Constitution of 1891, Brazil enacted its first law, designed to address authors' rights¹¹⁴ in detail, the Law No 496¹¹⁵ in 1898.¹¹⁶ The Law No 496 is also known as 'Medeiros e Albuquerque Law' which is the surname of the congressman who presented the Bill to the Brazilian Congress. It covered literary, scientific and artistic works owned by nationals and foreigners residing in the country.¹¹⁷ This law provided international protection regardless of the nationality of the author for registered works.¹¹⁸ The nature of those rights, for legal purposes, was defined as movable, transferable in part or in total, for no further than 30 years and heritable.¹¹⁹ Furthermore, it fixed the term of protection of 50 years (for any type of reproduction) and of 10 years (for translations, representations and performances)¹²⁰. Under the scope of this law, authors had to register their works at the National Library by presenting a copy of the work, as a condition to receive legal protection.¹²¹

The 'Medeiros e Albuquerque Law' presented seven limitations under the scope of Article 22. The first limitation allowed the reproduction of parts of a text or small parts

press or by any other mechanical process. The author's heirs will exercise this right for as long as the law determines] (BR).

¹¹⁴ It is worth nothing that the Law from 1827 that instituted the first undergraduate course of Social and Legal Sciences in Brazil has an article that mentioned authors' rights but it was not designed to legislate on this issue.

¹¹⁵ Brazilian Copyright Law (No 496) 1898 (BR).

¹¹⁶ Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, 'Exceptions and Limitations to Copyright in Brazil: A Call for Reform' in Lea Shaver, *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 74-75.

¹¹⁷ Brazilian Copyright Law (No 496) 1898, art 1 (BR).

¹¹⁸ Elisangela Dias Menezes, *Curso de direito autoral* (Del Rey 2007) 26

¹¹⁹ Brazilian Copyright Law (No 496) 1898, art 4 (BR).

¹²⁰ *ibid* art 3.

¹²¹ *ibid* art 13.

of works already published. Additionally, it allowed the insertion of a longer part of the text within the body of a bigger work, as long as it had scientific and learning purposes. It is therefore mandatory to quote the original work from where the passage was copied (Article 22 (1)).¹²² The second limitation permitted journal and newspapers to reproduce news and political articles from other journals and newspapers as well as permitting the reproduction of speeches in public reunions, as long as credit was given to the original publisher and author (Article 22 (2)).¹²³ The third limitation, presented in article 22 (3), granted permission for the reproduction of official acts from all levels of the Brazilian federation.¹²⁴ Article 22 (4) presents the fourth limitation, which allowed the reproduction of passages of any work in books or newspapers, for the purpose of criticism.¹²⁵ Article 22 (5) brings the fifth limitation, which authorized the reproduction of figures (illustrations) within written works in order to provide greater clarification to a text, as long as the main element of the work was the text itself, and credit was given

¹²² *ibid* art 22, 1 ‘a reprodução de passagens ou pequenas partes de obras já publicadas, nem a inserção, mesmo integral, de pequenos escriptos no corpo de uma obra maior, comtanto que esta tenha caracter scientifico ou que seja uma compilação de escriptos de diversos escriptores, composta para uso da instrução publica. Em caso algum a reprodução pôde dar-se sem a citação da obra de onde é extrahida e do nome do autor’ [the reproduction of passages or small parts of works already published, or the insertion, even integral, of small writings in the body of a major work, although this one is scientific character or that is a compilation of writings of several writers, composed for the use of the public instruction. In no case could reproduction take place without the citation of the work from which it is extracted and of the author's name].

¹²³ *ibid* art 22, 2 ‘a reprodução, em diarios e periodicos, de noticias e artigos politicos extrahidos de outros diarios e periodicos e a reprodução de discursos pronunciados em reuniões publicas, qualquer que seja a sua natureza. Na transcrição de artigos deve haver a menção do jornal de onde são extrahidos e o nome do autor. O autor, porém, quer dos artigos, qualquer que seja a sua natureza, quer dos discursos, é o unico que os pôde imprimir em separado’ [the reproduction, in newspapers and periodicals, of news and political articles extracted from other newspapers and periodicals and the reproduction of speeches pronounced in public meetings, of whatever nature. In the transcription of articles there should be the mention of the newspaper from where they are extracted and the name of the author. The author, however, of the articles, whatever their nature or speeches, is the only one that could print them separately].

¹²⁴ *ibid* art 22, 3 ‘a reprodução de todos os actos officiaes da União, dos Estados ou das Municipalidades’ [the reproduction of all official acts of the Union, the States or the Municipalities].

¹²⁵ *ibid* art 22, 4 ‘a reprodução, em livros e jornaes, de passagens de uma obra qualquer com um fim critico ou de polemica’ [the reproduction, in books and journals, of passages of any work with a critical or controversial purpose].

to the figure's author.¹²⁶ Article 22 (6) addresses the sixth limitation, which permitted the reproduction of any works of art that lies in public areas.¹²⁷ Finally, article 22 (7) presents the last limitation, which allowed for the reproduction of privately commissioned portraits or sculptures' busts, when the copy was made by the owner of the physical objects.¹²⁸

Afterwards, the Fourth Pan-American Copyright Convention at Buenos Aires in 1911, of which Brazil was a member, stated that works which gained copyright protection in one of the signatories' countries, would automatically receive protection in the other member states without need of bureaucracy, just an express mention to the 'all rights reserved' clause.¹²⁹ This Convention influenced the enactment of the Brazilian Law No 2,577 on 17th January 1912.¹³⁰ This law extended all Brazilian provisions on authors' rights to foreign works, as long as the nationality of the author belonged to one of the signatory nations of the Treaties on copyright and subject to the condition that the foreign work complied with all the requirements provided in the law where the work was produced.¹³¹ The sole requirement, which was not suppressed by the reciprocal provision, was the obligation to register all works at the National Library.

¹²⁶ *ibid* art 22, 5 'a reprodução, no corpo de um escripto, de obras de artes figurativas, comtanto que o escripto seja o principal e as figuras sirvam simplesmente para a explicação do texto, sendo, porém, obrigatoria a citação do nome do autor' [the reproduction, in the body of an article, of works of figurative arts, so long as the writing is the main one and the figures serve simply to explain the text, but it is obligatory to cite the author's name].

¹²⁷ *ibid* art 22, 6 'a reprodução de obras de arte que se encontram nas ruas e praças' [the reproduction of works of art found in the streets and squares].

¹²⁸ *ibid* art 22, 7 'a reprodução de retratos ou bustos de encomenda particular, quando ella é feita pelo proprietario dos objectos encomendados' [the reproduction of portraits or busts of particular order, when it is made by the owner of the objects ordered].

¹²⁹ Aaron Schwabach, *Internet and the Law: Technology, Society, and Compromises* (2nd edn, ABC Clío 2014) 18-19, 149.

¹³⁰ Laurence Hallewell, *Books in Brazil: A History of the Publishing Trade* (The Scarecrow Press, Inc. 1982) 139.

¹³¹ United States Department of States, *Treaties in Force: A list of Treaties and Other International Agreements of the United States in Force on January 2005* (United States Government Printing Office 2005) 33.

Since the proclamation of Brazilian independence in 1822, the Constitution of 1824¹³² required the urge of a Civil Code.¹³³ In 1855, D. Pedro II assigned Teixeira de Freitas, a Brazilian jurist, to present a draft for a civil code. After two attempts of Teixeira de Freitas following the Consolidation of Civil Laws in 1857 and Civil Code 1860, the Brazilian Congress approved the Civil Code of 1916.¹³⁴ This code was influenced by the Pandectist school¹³⁵ and the German Civil Code of 1896.¹³⁶ The enactment of a new Civil Code revoked the Portuguese Ordinances¹³⁷ and the Law No 496 of 1898.¹³⁸

The Civil Code of 1916 still did not recognize authors' rights as an autonomous area of study. Consequently, those rights were addressed by the 'Right over Things' and under the group of 'literary, scientific and artistic property'; it also aligned its provisions with the Berne Convention of 1886. Additionally, it maintained the protection of copyright in translations for the time of 10 years and modified the general term of protection to the author's lifetime plus 60 years. Regarding foreign works, the term of protection provided by the Civil Code would be used unless it exceeded the term defined

¹³² Brazilian Constitution 1824, art 179, XVIII '*Organizar-se-ha quanto antes um Codigo Civil, e Criminal, fundado nas solidas bases da Justiça, e Equidade.* [as soon as possible, a Civil and Criminal Code shall be established, based on the solid bases of justice and equity]' (BR).

¹³³ Nilton Soares de Souza Neto, '*A relação do Rio de Janeiro no Brasil imperial*' (ANPUH – XXIII Simpósio Nacional De História, Londrina, July 2005).

¹³⁴ Emeric Lévy, '*A Codificação do Direito Civil Brasileiro pelo juriconsulto Teixeira De Freitas* (2016)

<https://www.tjrs.jus.br/export/poder_judiciario/historia/memorial_do_poder_judiciario/memorial_judiciario_gaicho/revista_justica_e_historia/issn_1676-5834/v2n3/doc/08-_EMERIC_LEVAY.PDF> accessed 1 December 2016.

¹³⁵ The Pandectist School was originated in Germany on the 19th Century. This tradition was influenced by the Historical School of Friedrich Carl von Savigny and based on the methodical study of Roman laws.

¹³⁶ Celso Campilongo, 'History and Sources of Brazilian Law' in Fabiano Deffenti and Welber Oliveira Barral (eds), *Introduction to Brazilian Law* (Kluwer Law International, 2011) 15-24

¹³⁷ Portuguese Ordinances were legal documents in which Portugal ruled its colonies. Each ordination would take the name of the king who issued them, such as the Philippine Ordinance promulgated by the Portugal king Filipe II.

¹³⁸ Celso Campilongo, 'History and Sources of Brazilian Law' in Fabiano Deffenti and Welber Oliveira Barral (eds), *Introduction to Brazilian Law* (Kluwer Law International, 2011) 15-24.

by the law where the work was first published.¹³⁹ Thus, the Civil Code of 1916 expanded the limitations of authors' rights from seven to ten topics. In general guidelines, this law included two new limitations and an expansion. The limitations created were toward the permission of handwritten copies of a work, for non-commercial use¹⁴⁰ and authorisation to use works of figurative art, when those works were aimed at obtaining a new work.¹⁴¹ Hence, it modified the limitation that secured the reproduction of public acts from all levels of Brazilian federation to conceive a further protection permitting the reproduction of all official documents derived from the members of the federation.¹⁴²

Following the trend in Brazil to promote the internalization of copyrights, during the celebrations of the centenary of the declaration of independence, Brazil signed The Special Convention over literary and artistic property between Brazil and Portugal on 26th September 1922. This document represented a further step towards greater unification of laws between Portugal and Brazil.¹⁴³ In addition, its effects were beyond the provisions of 1912, it declared full exemption of import tax regarding books in a paper format.¹⁴⁴ This bilateral Convention discouraged the commerce of Brazilian books, causing strong consequences for the publishing industry in Brazil.

¹³⁹ Laurence Hallewell, *Books in Brazil: A History of the Publishing Trade* (The Scarecrow Press, Inc. 1982) 138-140.

¹⁴⁰ Brazilian Civil Code 1916, art 666, VI '*a cópia, feita à mão, de uma obra qualquer, contanto que se não destine à venda*' [*a copy, made by hand, of any work, provided it is not for sale*] (BR).

¹⁴¹ *ibid* art 666, VIII '*A utilização de um trabalho de arte figurativa, para se obter obra nova*' [The use of figurative works of art in order to obtain new work].

¹⁴² *ibid* art 666, III '*A reprodução, em diários e periódicos, de discursos pronunciados em reuniões públicas, de qualquer natureza*' [The reproduction, in diaries and periodicals, of speeches pronounced in public meetings, of any form].

¹⁴³ Márcia Abreu, 'Duzentos Anos: os Primeiros Livros Brasileiros' in Aníbal Bragança and Márcia Abreu (orgs), *Impresso no Brasil: dois séculos de livros brasileiros* (UNESP 2010) 41-49.

¹⁴⁴ Laurence Hallewell, *Books in Brazil: A History of the Publishing Trade* (The Scarecrow Press, Inc. 1982) 139.

Brazil had been governed by its two most powerful states, São Paulo and Minas Gerais.¹⁴⁵ According to the agreement between São Paulo and Minas Gerais, Brazil's most powerful states, this Brazilian presidential succession would be alternatively represented by a member of each state. The Old Republic ends when the president Washington Luís endorsed a candidate from Minas Gerais instead of São Paulo. Following this tension, the Vargas Era took place, which is discussed in the next section.

2.3.3 The Vargas Era (1930-1945)

The start of the Vargas Era took place after the Global Crisis in 1920 and the collapse of the previous agreement between São Paulo and Minas Gerais.¹⁴⁶ This period of economic and political instability led to the Revolution of 1930, which was commanded by Getúlio Vargas, who became the interim president of Brazil with the assistance of part of Brazil's elite.¹⁴⁷ This period represented the Brazilian change from an agricultural to an urban society.¹⁴⁸

Despite being drafted in the course of an authoritarian regime, a new Constitution based on liberal ideas was approved on 14th July 1934.¹⁴⁹ This document was inspired by the Weimar's Constitution of 1919 and the Spanish Constitution of 1931.¹⁵⁰ Unlike the previous constitution (1891), it promoted structural changes by embracing a social-political reform. These transformations were particularly toward the solidification of

¹⁴⁵ These two states alternate on power in a system named Coup d'état. One time the president was chosen from São Paulo and next time from Minas Gerais.

¹⁴⁶ Sonia de Deus Rodrigues Bercito, *Nos tempos de Getúlio: da Revolução de 30 ao fim do Estado novo* (Atual Editora 1990) 4-7.

¹⁴⁷ Alberto Aggio, Agnaldo de Sousa Barbosa and Hercília Mara Facuri Coelho, *Política e sociedade no Brasil, 1930-1964* (Annablume 2002) 26.

¹⁴⁸ Celso Campilongo, 'History and Sources of Brazilian Law' in Fabiano Deffenti and Welber Oliveira Barral (eds), *Introduction to Brazilian Law* (Kluwer Law International 2011) 15-24.

¹⁴⁹ Brazilian Constitution of 1934 (BR).

¹⁵⁰ Arim Soares do Bem, 'Continuities and Discontinuities in Brazilian Political and Institutional Life: Past and Present Dilemmas for Democracy' in Dana de la Fontaine and Thomas Stehnen (eds), *The Political System of Brazil* (1st edn, Springer 2016) 30.

labour protection rights¹⁵¹ and the democratization of education.¹⁵² For feminists, this constitution was a milestone¹⁵³; it secured woman's same 'political and nationality' rights.¹⁵⁴ Shortly after the promulgation of the new constitution, Getulio Vargas was indirectly elected.¹⁵⁵ Although the ideas of this constitution proposed a liberal democratization of Brazil, this constitution was put forward in an unfortunate moment, which occurred during the period of authoritarian regimes in Europe.¹⁵⁶ This was Brazil's shortest constitution.

This constitution brought changes to the previous constitution of 1891 with regard to authors' rights. The former constitution granted the exclusive right to the author to 'reproduce' literary and artistic works,¹⁵⁷ whereas the new constitution expanded the scope of authors' rights and included also scientific works.¹⁵⁸

In 1935, Brazil faced another coup by Getulio Vargas who wanted to maintain himself in power with the allegation that the country was under a communism threat.¹⁵⁹ The successful political move led Brazil to a regime with traces of dictatorship. In order to secure his power, the Brazilian dictator sought to legitimate his regime through a new constitution enacted on 10th November 1937¹⁶⁰, which was inspired by the Polish

¹⁵¹ Brazilian Constitution 1934, art 121, § 1º, a. It instituted equal pay by prohibiting any discrimination regarding age, gender, nationality or civil status (BR).

¹⁵² *ibid* art 150, sole paragraph, a. It created mandatory basic free education.

¹⁵³ *ibid* art 52, § 1º. It instituted woman's right to vote by introducing universal suffrage.

¹⁵⁴ June Edith Hahner, *Emancipating the Female Sex: The Struggle for Women's Rights in Brazil, 1850-1940* (Duke University Press 1990) 170.

¹⁵⁵ Circe Bittencourt, *Dicionário de datas da história do Brasil* [Dictionary of dates of Brazilian history] (Contexto 2007).

¹⁵⁶ Celso Campilongo, 'History and Sources of Brazilian Law' in Fabiano Deffenti and Welber Oliveira Barral (eds), *Introduction to Brazilian Law* (Kluwer Law International 2011) 15-24.

¹⁵⁷ Brazilian Constitution 1891, art 72, § 26 (BR).

¹⁵⁸ Brazilian Constitution 1934, art 113, 20 (BR).

¹⁵⁹ Sonia de Deus Rodrigues Bercito, *Nos tempos de Getulio: da Revolucao de 30 ao fim do Estado novo* (Atual Editora 1990) 9.

¹⁶⁰ Brazilian Constitution 1937 (BR).

Constitution of 1935 and fascist regimes in Europe.¹⁶¹ This constitutional document was the first authoritarian constitution of the republican period. Among its provisions, it inserted several undemocratic measures such as the concentration of the Executive and Legislative prerogatives to the Executive power, indirect election and the restoration of the death penalty.¹⁶² Compared to the previous constitution of 1934, it was a setback to individual rights.¹⁶³ Considering the influence of the political moment in Brazil, it did not cover authors' rights but did mention industrial property rights. In fact, this Constitution was the only one of its kind that did not address author's rights in the whole history of Brazil.

This period lasted until the end of World War II, when Vargas called for new elections in 1946. Not long after his announcement, suspicions arose that he would do another manoeuvre to keep himself in power. Getulio Vargas was deposed by military forces.¹⁶⁴ This led to Brazil's next phase: the Second Republic, which is explored in the following section.

2.3.4 Second Republic (1946-1964)

The Second Republic or Republic of 1946 begins after the collapse of Getulio Vargas's regime in 1945, when military forces secured the election of Brazil's next president. This period was illustrated by an increase of populist measures, which focused in bringing greater satisfaction to the population. The newly elected president promoted a new constitution that re-established individual rights and re-inserted democratic

¹⁶¹ Arim Soares do Bem, 'Continuities and Discontinuities in Brazilian Political and Institutional Life: Past and Present Dilemmas for Democracy' in Dana de la Fontaine and Thomas Stehnken (eds), *The Political System of Brazil* (1st edn, Springer 2016) 32.

¹⁶² John W. F. Dulles, *Vargas of Brazil: A Political Biography* (University of Texas Press 1967) 1-5.

¹⁶³ Arim Soares do Bem, 'Continuities and Discontinuities in Brazilian Political and Institutional Life: Past and Present Dilemmas for Democracy' in Dana de la Fontaine and Thomas Stehnken (eds), *The Political System of Brazil* (1st edn, Springer 2016) 32.

¹⁶⁴ Todd L Edwards, *Brazil: A Global Studies Handbook* (ABC-CLIO 2008) 51-58.

principles, which was approved in 1946.¹⁶⁵ By these changes, the constitution abolished the death penalty, promoted freedom of expression and re-established Montesquieu's division of powers.¹⁶⁶ This constitution restored the protection of authors' rights by enacting that authors were entitled to the right to reproduce literary, artistic and scientific works. The constitution opted to use the verb 'reproduce' from the Constitution of 1891 to legislate over these rights instead of 'produce', based on the Constitution of 1934.

During this time, Brazil's political system was weak which gave room for greater involvement of members from the military to insert themselves into politics.¹⁶⁷ Consequently, Brazil suffered another military coup in 1964, which resulted in the deposition of João Goulard, who was the Brazilian president at that time and led Brazil into a period of military dictatorship.¹⁶⁸ This represents the end of the Second Republic.

2.3.5 The Military Dictatorship (1964-1985)

The Brazilian military dictatorship period began with a successful military coup, which lasted for two decades.

During the military regime, the leader of the Executive in power ruled the country by emitting several Institutional Acts which resulted in the enactment of the Constitution of 1967.¹⁶⁹ After multiple amendments, the Constitution of 1946 was revoked by a new constitution¹⁷⁰, which was the first to recognize authors' exclusive right to exploit their

¹⁶⁵ Sonia de Deus Rodrigues Bercito, *Nos tempos de Getulio: da Revolucao de 30 ao fim do Estado novo* (Atual Editora 1990) 3-5.

¹⁶⁶ José Tarcízio de Almeida Melo, *Direito Constitucional do Brasil* (Del Rey 2008) 258, 279, 307, 716, 786.

¹⁶⁷ Riordan Roett, *Brazil: Politics in a Patrimonial Society* (5th edn, Greenwood 1999) 12, 39-40, 104.

¹⁶⁸ Todd L. Edwards, *Brazil: A Global Studies Handbook* (ABC-CLIO 2008) 63-64; 158-159; 282.

¹⁶⁹ Brazilian Constitution 1967 (BR).

¹⁷⁰ Fausto Saretta, 'O Governo Dutra na Transição Capitalista no Brasil' in Tamás Szmrecsányi and Wilson Suzigan (orgs), *História econômica do Brasil contemporâneo: coletânea de textos apresentados no I Congresso Brasileiro de História Econômica*. [Economic history of contemporary Brazil: collection of texts presented at the First Brazilian Congress of Economic History] (2nd edn revised, Hucitec 2002) 100.

work.¹⁷¹ Apart from this, it followed previous constitutional standards on authors' rights protection.

Succeeding the political instabilities which resulted in the enactment of three constitutions in the time span of 12 years of Brazilian history¹⁷², a new civil law was enacted on 14th December of 1973. The Law n. 5,988¹⁷³ revoked previous provision, found in Articles 649 to 673 of the Civil Code of 1916, which legislated over authors' rights. Furthermore, it elucidated, among other issues, the debate among lawyers with regard to the nature of the registration of a work in order to be protected under the scope of authors' rights laws. In particular, the new law expressed that registration was not a mandatory assessment to constitute rights over a work. According to Article 17 of the law 5,988, the registration of works could be made at the National Library, at the School of Music, at the School of Fine Arts, at the Federal University of Rio de Janeiro, at the National Institute of Cinema and at the Federal Council of Engineering, Architecture and Agronomy.¹⁷⁴ As well as protecting authors, this rule safeguarded the owners of neighbouring rights and created the National Council of Authors' rights. Thus, it unified the legislation over this issue and provided a modernization of Brazilian copyright law in order to meet the requirement of Berne's Convention from 1886, which was ratified

¹⁷¹ Brazilian Constitution 1967, art 150, §25 'A Constituição assegura aos brasileiros e aos estrangeiros residentes no País a inviolabilidade dos direitos concernentes à vida, à liberdade, à segurança e à propriedade, nos termos seguintes: (...) - Aos autores de obras literárias, artísticas e científicas pertence o direito exclusivo de utilizá-las. Esse direito é transmissível por herança, pelo tempo que a lei fixar' [The Constitution guarantees to Brazilians and foreigners residing in the country the inviolability of the rights concerning life, liberty, security and property, in the following terms: (...) - The authors of literary, artistic and scientific works belong the exclusive right of use them. This right is transferable by inheritance, for the time fixed by law] (BR).

¹⁷² Francisco Vidal Luna and Herbert S. Klein, *The Economic and Social History of Brazil since 1889* (Cambridge University Press 2014) 20-32.

¹⁷³ Brazilian Copyright Law (No 5,988) 1973 (BR).

¹⁷⁴ *ibid* art 17.

nationally by the Decree No 75,699 of 1975¹⁷⁵, as well as the Paris Revision, which was ratified by the Decree No 76,905 of 1975.¹⁷⁶

Regarding the Brazilian system of limitation on authors' rights, the new legislation removed the statement of article 666 (IV) which permitted the reproduction of public acts and official documents from all levels of the Brazilian federation. Hence, it revoked another provision of article 666 (VIII), which enabled the usage of works of figurative art when those works were aimed to obtain a new work. However, the new authors' rights law (law 5,988) introduced six new limitations. Article 49 (4) presented the first limitation, which is with regard to students' notes. That is, it is not considered an infringement of the authors' rights when students' notes are taken during the course of lessons in teaching establishments by lecturers of the institution, provided that their complete or partial publication is prohibited without the express prior authorization of the person who gave the lessons.¹⁷⁷ Article 49 (5) of the aforesaid law shows the second limitation in which it is not considered an infringement when there is a reproduction of phonograms as well as the broadcast of radio or television in commercial establishments if this is in order to show to its own clients.¹⁷⁸ Article 49 (6) allows theatrical and musical reproductions, when carried out in a private family environment or for teaching purposes in educational establishments, provided that they do not seek profits.¹⁷⁹ Article 49 (7) describes the fourth limitation, which allowed the usage of intellectual works when those are critically necessary to guide judicial and administrative procedures, in particular as

¹⁷⁵ Brazilian Decree No 75,699 (Promulgated the Berne Convention for the Protection of Literary and Artistic Works, dated 9 September 1886, revised in Paris on 24 July 1971) 1975 (BR).

¹⁷⁶ Brazilian Decree No 76,905 (Promulgated the Universal Copyright Convention, Paris Review 1971) 1975 (BR).

¹⁷⁷ Brazilian Copyright Law (No 5,988) 1973, art 49, IV (BR).

¹⁷⁸ *ibid* art 49, V.

¹⁷⁹ *ibid* art 49, VI.

evidence.¹⁸⁰ Article 50 presents the fifth limitation, which entitles the creation of paraphrases and parodies that are not exact reproductions of the original work and do not harm in any way the original work.¹⁸¹ Lastly, Article 51 permitted the reproduction of photography in scientific works or on works with learning purposes, provided that the author's name was quoted and a fee was paid to him. This fee was defined by the Nacional Council of authors' rights.¹⁸²

This period ended when the military regime failed to elect a president in 1985. The next president, João Figueiredo, a General from the Brazilian army, had started to gradually introduce Brazil to democracy in 1974. In 1984, Brazilian society urged for direct presidential elections, which was called 'Diretas Já'. However, the movement did not achieve its main purpose and the following year presidential election was decided by an indirect voting system. The election of 1985 was the last presidential election to be decided through the indirect voting system and the last one under the military regime.

2.3.6 The New Republic (1985-present)

After the end of the military dictatorship period in Brazil, the New Republic commenced with the presidential election of 1985. With regard to Brazilian authors' rights history, the final and current Constitution was enacted in 1988, which represents a transition from the military dictatorship to democracy. It is worth noting that this constitution was a modern and profoundly meticulous document which adopted the European 'welfare state' paradigm.¹⁸³ Although this constitution granted a vast list of

¹⁸⁰ *ibid* art 49, VII.

¹⁸¹ *ibid* art 50.

¹⁸² *ibid* art 51.

¹⁸³ Celso Campilongo, 'History and Sources of Brazilian Law' in Fabiano Deffenti and Welber Oliveira Barral (eds), *Introduction to Brazilian Law* (Kluwer Law International 2011) 15-24.

constitutional rights to its citizens, these contrasted sharply with Brazilian social and economic realities, which were undeveloped.

The current constitution consolidated the protection of authors' rights within the section of fundamental rights.¹⁸⁴ The structure of the statements which refer to authors' rights has remained similar since the Constitution of 1891. The distinctness of the Constitution of 1988 was to insert new provisions regarding co-authorship, publishing rights and authors' rights in order to manage the income related to their work.¹⁸⁵

The enactment of the constitution of 1988 triggered a reformulation of Brazilian laws, Brazil enacted several laws in the post-1988 period. That is, Brazil enacted on 19th February of 1998 the Law No 9,610¹⁸⁶, which is the current law that regulates authors' and neighbouring rights in Brazil. As a consequence of this approval, the Law No 5,988 from 1973 was almost entirely revoked, with the exception of Article 17, which is still partially valid. This article is still valid because it is responsible for listing the locations in Brazil where a work can be registered. The law No 9,610 follows the idea-expression dichotomy¹⁸⁷ and incorporates the legal understanding settled on the previous law over the optional nature of the registration.¹⁸⁸ This law reproduces the majority of articles from Law No 5,988 (89 out of 115).

With regard to the limitation of authors' rights, the majority of the limitations were transferred from the previous legislation. However, it created a new limitation

¹⁸⁴ Constitution of Brazil of 1988, art 5º, XXVII 'aos autores pertence o direito exclusivo de utilização, publicação ou reprodução de suas obras, transmissível aos herdeiros pelo tempo que a lei fixar' [authors have the exclusive right to use, publish or reproduce their works, transmissible to their heirs for a period fixed provided by law] (BR).

¹⁸⁵ Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, 'Exceptions and Limitations to Copyright in Brazil: A Call for Reform' in Lea Shaver, *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 74.

¹⁸⁶ Brazilian Copyright and Neighbouring Rights 1998 (BR).

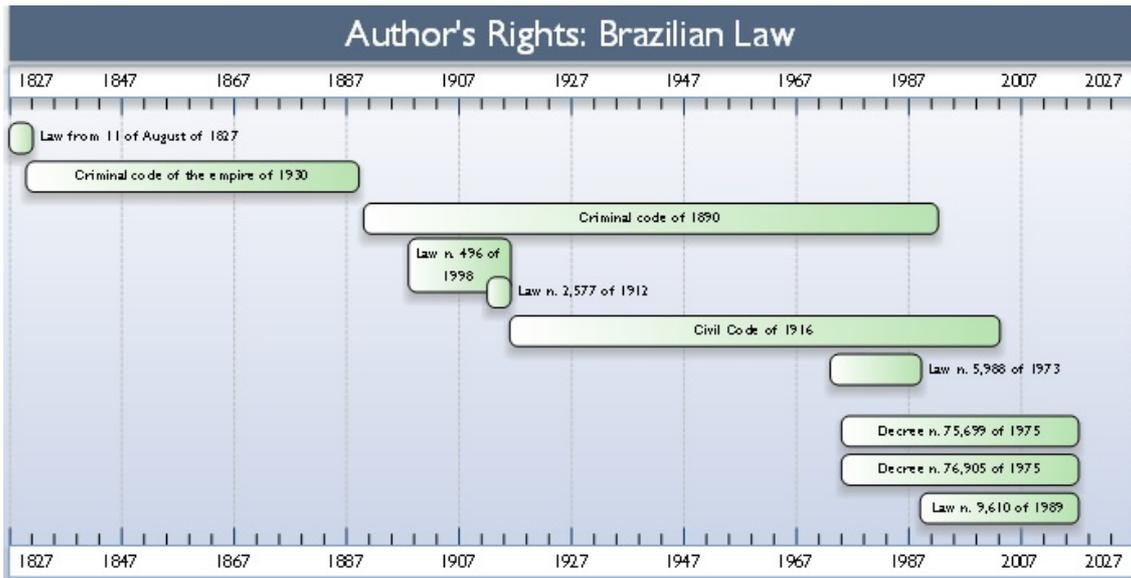
¹⁸⁷ *ibid* art 7.

¹⁸⁸ *ibid* art 18.

which covers the right to reproduce literary, artistic and scientific works for the visually impaired. Among its contributions, it extinguished the National Council of Authors' rights.¹⁸⁹

Figure 1 summarizes the laws in Brazil regarding authors' rights.

Figure 1: Background timeline of authors' rights in Brazil.



The following sections present briefly the theories of IP and a survey of IP history. It identifies the perception of international literature regarding the effect of harmonized IP standards on access to common knowledge, and it provides a review of this topic pertaining to Brazil. Areas of controversy and questions are identified.

2.4 Theories of IP focusing in Copyright

Many scholars' endeavors to fill IP's scientific gaps are due to its economic and cultural relevance. In particular, there is a great emphasis on pursuit justification for such rights and its legitimacy.¹⁹⁰ Despite those efforts, each theory attempting to tackle this

¹⁸⁹ Elisangela Dias Menezes, *Curso de direito autoral* (Del Rey, 2007) 27.

¹⁹⁰ Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 *Georgetown Law Journal* 287, 288; Robert P Merges, *Justifying Intellectual Property* (Harvard University Press 2011) 40-48; Peter

issue seems to have not met the challenge in its fullness.¹⁹¹ However, it does not mean that this task should be abandoned. Considering many studies, there seems to be a common ground among researches pointing out the presence of flaws in each IP theory.¹⁹² Nevertheless, there is still much value in these theories.¹⁹³ The ideas from these rationalities contributed to develop IP laws in various countries with fundamental elements.¹⁹⁴ As an example, the US law covering copyright and patent relies heavily on the utilitarian approach.¹⁹⁵ In fact, IP Lawmaking and policy is constructed in parallel to a theoretical framework and scientific models. So, those theories might help legal scholars to address challenges and opportunities arisen in the digital era.

As a science, IP crossed an equivalent path of an emerging field of study where a lack of theoretical framework defies its existence. Even long after its consolidation in the scientific world, there is still ongoing discussions over IP goals and foundation. The creation of more rights combined with few room of flexibility within the system for users might have helped this to happen. IP's philosophical frame has been revisited and taken into a new perspective.¹⁹⁶

Justifying copyright is particularly problematic for many reasons.¹⁹⁷ Currently, Copyright's subject matter cover works of various natures; some closely related to

Drahos, *A Philosophy of Intellectual Property* (Routledge 1996); William Fisher, 'Theories of Intellectual Property' in Stephen Munzer (ed), *New Essays in Legal and Political Theory of Property* (Cambridge University Press 2011) 168.

¹⁹¹ Giuseppina D'Agostino, *Copyright, Contracts, Creators: New Media, New Rules* (Edward Elgar Publishing 2010) 203-204; Helen Norman, *Intellectual Property Law Directions* (Oxford University Press 2011) 16-18.

¹⁹² Peter Drahos, *A Philosophy of Intellectual Property* (Routledge 1996); William Fisher, 'Theories of Intellectual Property' in Stephen Munzer (ed), *New Essays in Legal and Political Theory of Property* (Cambridge University Press 2011) 200.

¹⁹³ Lior Zemer, 'On The value of Copyright Theory' (2006) *Intellectual Property Quarterly* 55, 56

¹⁹⁴ Ge Chen, *Copyright and International Negotiations: An Engine of Free Expression in China?* (Cambridge University Press 2017) 14-15.

¹⁹⁵ US Constitution, art 1, s 8 (US).

¹⁹⁶ Robert P Merges, *Justifying Intellectual Property* (Harvard University Press 2011) 317.

¹⁹⁷ S G Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs' (1970) 84(2) *Harvard Law Review* 281, 284.

personality rights, such as books and, others greatly related to mechanical procedures such as in computer programs.¹⁹⁸ This branch of IP has a strong link to human rights.¹⁹⁹ Accordingly, the Universal Declaration of Rights relates Copyright among the human rights.²⁰⁰

In Copyright, corresponding theories have roots either in ‘philosophical’ or ‘economical’ approach, which has been addressed by the entitlement of the ‘rights-economics binary’.²⁰¹ In one side, there are the theorists who advocate a rights-based approach such as in the natural right theory and in the labour theory. In the other side, there are theorists who base their approach in rationalities from the economic indicator. In the utilitarianism theory, the rationality is based on the idea of an economic efficiency and on the premise that authors are driven by financial motives.²⁰² Despite its differences, both approaches prioritize finding ‘first principles and encoding first-order normative choices’.²⁰³ In other words, there is an excessive effort on understanding copyright through theoretical terms. As a consequence, there is less focus on empirical research. This is aligned with the disjointed evidence of many studies in supporting IP and transfer of knowledge.²⁰⁴ The following theories are discussed in this section: the utilitarianism theory, the labour theory, the personality theory and the social planning theory.

¹⁹⁸ Paul Torremans, *Holyoak and Torremans Intellectual Property Law* (8th edn, Oxford University Press 2016) 623, 627-628.

¹⁹⁹ Christophe Geiger, ‘Author’s Right, Copyright and the Public’s Right to Information: A Complex Relationship (Rethinking Copyright in the Light of Fundamental Rights)’ in Fiona Macmillan, *New Directions in Copyright Law*, vol 5 (Edward Elgar Publishing 2007) 24; Christophe Geiger, ‘The Constitutional Dimension of Intellectual property’ in Paul Torremans, *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Kluwer Law International 2008) 101.

²⁰⁰ Universal Declaration of Human Rights of 10 December 1948 (UDHR48), art 27, (1).

²⁰¹ Julie E Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 UC Davis Law Review 1151, 1155.

²⁰² William Landes and Richard Posner, ‘An Economic Analyses of Copyright Law’ [1989] *Journal of Legal Studies* 325.

²⁰³ Julie E Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 UC Davis Law Review 1151, 1156.

²⁰⁴ Consumers International, 2010 IP Watchlist Report (2010).

2.4.1 Utilitarianism

The utilitarianism is often pointed out as the most famous theory of IP.²⁰⁵ Unsurprisingly, the US, one of the most powerful nations worldwide, has justified copyright by using underlying concepts of the utilitarianism. In early stages, this philosophy can be traced back to the Warring States Period of China (479-381 BC).²⁰⁶ In much recent times, this rationality was influenced by thinkers such as Jeremy Bentham²⁰⁷ and Jon Sturt Mill²⁰⁸, also known as classical utilitarians.²⁰⁹ Nevertheless, there are works in which, under different perspectives, might advocate to economic or natural rationalities. As an example, Lockean ideas can be interpreted to advocate to utilitarianism and labour theories.²¹⁰ Under the utilitarianism justification, the creative process depends on the state's capacity of securing suitable incentives for those who employ their intellectual resources in a work. Securing IPRs cause a dual effect: it sets positive incentives on creation, while discourages copying. This approach conceives copyright as a positive right and operates under the presumption that protecting IP is not the end, but it seeks to foment social welfare.

This approach helped to shape the national law of several countries.²¹¹ In Brazil, Bentham's thoughts on liberalism and utilitarianism affected the course of Brazilian

²⁰⁵ E C Hettinger, Justifying Intellectual Property (1989) 18(1) Philosophy and Public Affairs 31, 42.

²⁰⁶ YiJun Tian, *Re-thinking Intellectual Property: The Political Economy of Copyright Protection in The Digital Era* (Taylor & Francis Group 2009) 61-64.

²⁰⁷ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press 1907) 1-5.

²⁰⁸ John Stuart Mill, *A System of Logic, Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence, and The Methods of Scientific Investigation*, vol 2 (4th edn, John W Parker 1843) 3-8.

²⁰⁹ Jeremy Bentham, John Stuart Mill and John Troyer (ed, introduction), *The Classical Utilitarians: Bentham and Mill* (Hackett Publishing Company 2003) VII-XV.

²¹⁰ Tanya Frances Aplin and Jennifer Davis, *Intellectual Property Law: Text, Cases, and Materials* (3rd edn, Oxford University Press 2017) 4, 13.

²¹¹ Ge Chen, *Copyright and International Negotiations: An Engine of Free Expression in China?* (Cambridge University Press 2017) 17.

history.²¹² It is worth pointing out that this thinking offered theoretical support to events of great significance;²¹³ such as the war of independence, in which culminated with the declaration of independence in 1822, and the enactment of the Brazilian Criminal Code of 1830, the first national law to address the criminal liability for the reproduction right.²¹⁴

Utilitarianism copyright theorists advocate that ideas can be owned by their creators as a representation of their personalities and, in return, their creators' need to be rewarded for the time and effort waged.²¹⁵ There is an understanding that creating exclusive property rights can harm the public interest, however, this restriction would eventually lead others to create, and the loss would be sufficiently compensated at the end. From the economical point of view, the utilitarian framework is based on the cost-benefit analysis, where expenditures with IP protection are justified to the extent that the fruit of intellectual labor is more valuable than what was spent. In this light, lawmakers have problems to find the optimal point in which IP owners' and public exclusive rights should stimulate creativity by restricting access to IP assets. This justification indicates the existence of a tradeoff between limiting and incentivizing IP rights. On one hand, if one allows too much imitation, this will harm the creation of new products, on the other hand, if IP assets are excessively restricted, this will freeze the development of future

²¹² Richard Graham, '1850-1870' in Leslie Bethel (ed), *Brazil Empire and Republic, 1822-1930* (Cambridge University Press 1989).

²¹³ Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, 'Exceptions and Limitations to Copyright in Brazil: A Call for Reform', in Lea Shaver (ed), *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 69-70.

²¹⁴ Genevieve M. Kehoe, *Presidents and Terminal Logic Behavior: Term Limits and Executive Action in the United States, Brazil and Argentina* (Texas A&M University Press 2014) 143-147.

²¹⁵ Andrea Wechsler, 'Spotlight on China: Piracy, Enforcement and The Balance Dilemma in Intellectual Property Law in Annete Kur and Marianne Levin, *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of TRIPS* (Edward Elgar 2011) 68.

products.²¹⁶ A characteristic of IP assets relating to the cost-benefit analysis is that they can be disposed simultaneously without compromising others and they also can be rapidly multiplied.²¹⁷ From another perspective, the distinct characteristics of IP can express a risk of self-destruction as the cost of a product involves not only the production expenditures, but it also compromises the costs incurred to produce the work. Such costs are not paid if someone makes an illegal copy of the asset. This philosophy is vulnerable to criticism when discussed in parallel with the role of public domain and, because this rationality was conceived to address physical goods, it struggles to interpret some aspects related to immaterial goods, especially copyright. This vein of IP is also criticized for claiming that IP is the best tool to foment creativity without giving empirical support. Unfortunately, IP could lead to misuse and inefficiency.²¹⁸ Much is argued whether this theory is only alive in theory, and not really applicable.²¹⁹

The next section discussed is the labour theory.

2.4.2 Labour Theory

The labour theory is a natural rights' justification.²²⁰ There are two scopes to comprehend justifications based on those rights: labour-desert and personhood.²²¹ The justification based on the labour-desert adopts IPRs under Locke's perspective that the labour is the reward of someone's creations. Thus, acknowledging the creator in granting copyright protection for those who have worked sufficiently hard. For this philosophy,

²¹⁶ Mark A Lemley, 'The Economics of Improvement in Intellectual Property Law' (1997) 75(5) Texas Law Review 989, 1013-1015.

²¹⁷ William Landes and Richard Posner, 'An Economic Analysis of Copyright Law' (1989) 18(2) Journal of Legal Studies 325, 326-327.

²¹⁸ Helen Norman, *Intellectual Property Law Directions* (Oxford University Press 2011) 41.

²¹⁹ S K Stadler, 'Forging a Truly Utilitarian Copyright' (2006) 91(2) Iowa Law Review 609, 629.

²²⁰ A John Simmons, *The Lockean Theory of Rights* (Princeton University Press 1994) 89-90; Matthew H. Kramer, *John Locke and the Origins of Private Property: Philosophical Explorations of Individualism, Community and Equality* (Cambridge University Press 2004) 93, 173, 213, 244.

²²¹ William Fisher, 'Theories in Intellectual Property' in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press 2001) 187.

the concept of property precedes any legal recognition, as such, is a right per se. Much of this theory's theoretical support comes from the work on property rights propounded by Locke. Nonetheless, Locke's thoughts on property were not directly meant to immaterial rights. The idea of having property rights over works is closely tied with an individual's liberty. In Locke's work, the property must attend two provisions: 'enough and as good' and 'non waste'. The labour theorists base the existence of property rights based on a rewarding system. An intriguing element of Locke's work relates to adaptability of being a base for argument in opposite directions.²²² This might help understanding why his work surpassed time and continued to be the focus of discussion.

Justifying IP from a natural rights' perspective can be quite challenging. Some scholars criticise this approach saying it may not be adequate to understand IP, and in especial copyright. In other words, it is pointed out that Lockean ideas are unsuitable to comprehend the complexity of nowadays rights. This is exemplified by the difficult of understanding ideas such as 'labour' and 'commons'.²²³ For instance, Lockean labour refers to a distasteful activity almost related to a physical pain. However, a more contemporary idea of labour does not infer those characteristics and might be even enjoyable. Clearly, Locke's view on labour is restricted to a limited time, and it is undeniable that much has changed. There are dramatically more resources available and accessing them became an easier task. It may best suit physical goods intellectual goods. Copyright in the digital era shows various actors influencing law-making as well as social policy. The author-oriented perspective when devalues the other parts involved and it is equation private interest receive more relevance than social ones. This can be particularly

²²² Bertrand Russell, *History of Western Philosophy* (first published 1945, Touchstone Books 1967) 490-491; Stewart E Sterk, 'Rhetoric and Reality in Copyright Law' (1996) 94(5) Michigan Law Review 1197, 1234.

²²³ Helen Norman, *Intellectual Property Law Directions* (Oxford University Press 2011) 191.

challenging to L&Es to copyright. From this sense, derivative works (parody, pastiche, caricature) are in a delicate position due to the Lockean view on originality. In another take, the provision related to the non-waste requirement relates the idea-expression dichotomy and flexibilities on Copyright.

2.4.3 Personality Theory

The personality theory is a rights-based justification, closely tied with moral rights laws. This theory is often mentioned as an alternative to the labour approach.²²⁴ In contrast the Lockean labour theory, the personality theory expressively touches the intellectual property. Some types of works closely relate to an individual's personality, whereas others hardly show any connection to personal identification.²²⁵ Derived from works of Kant and Hegel, it correlates concepts of private property to humans' personality. Unlike labour-oriented arguments, this rights-based theory supports the need to secure the development of human identity. From that perspective, it can be drawn two ideas: personhood and human flourishing. As such, property rights derive from the appropriation or modification artifacts through which authors and artists have expressed their 'will' (an activity thought central to 'personhood') or due to artifacts that are created socially and economically, which in turn is important to human flourishing. As an ultimate expression of the individual liberty, it is fair to say that the property might be relaxed or waived under circumstances of urgent need.²²⁶ This notion of property helps the perception of flexibilities, and consequently brings an abstract view of L&Es. In Brazil, this approach became quite popular among legal experts in the nineteenth

²²⁴Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 *Georgetown Law Journal* 287, 289; Marshall A Leaffer, *Understanding Copyright Law* (5th ed, Lexis Nexis 2010) 15-20.

²²⁶O H Dean, *Handbook on South African Copyright Law* (rev edn 13, Juta & Company 2006) 1-5.

century.²²⁷ This theory was strongly influenced by French and German copyright regimes.²²⁸ Some examples of the impact of personality approach are: extensive protection of moral rights, right to control public exposure, right to remove a work of public circulation, right of paternity, and the right to prevent their works from mutilation or destruction.²²⁹

By taking a similar base of justification to the labour theory, the personality theory shares some of the same weakness.²³⁰ As a shared weakness, both rationalities struggle when it comes to the idea of ownership and whether this type of property can be alienated. The personality theory is challenged by the complexity.²³¹ In addition, it is a challenge to give philosophical support to works involving technical features and those which rely greatly on technological resources. As an illustration, one could argue whether compilation of data embodies personality of an individual. Moreover, which criteria would separate copyrightable works from works of public use. Thus, it seems a prejudicial judgment to recognize rights to certain activities, and, in the meantime, leave others outside the scope of protection even when this work could arguably express greater extend of personality.

²²⁷ Lior Zemer, *The idea of Authorship in Copyright* (Routledge 2007) 8-22; Stef van Gompel, *Formalities in Copyright Law: An Analysis of Their History, Rationales and Possible Future* (Kluwer Law International 2011).

²²⁸ James Holston, *Insurgent Citizenship: Disjunctions of Democracy and Modernity in Brazil* (Princeton University Press 2008) 114, 330-331.

²²⁹ William Fisher, 'Theories of Intellectual Property' in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press 2001) 174.

²³⁰ Sadulla Karjiker, 'Open-source software and the rationale for copyright protection of computer programs' (Doctoral Thesis, Stellenbosch University 2013) 47.

²³¹ Helen Norman, *Intellectual Property Law Directions* (Oxford University Press 2011) 191-192.

During the last decades, it can be seen a trend towards harmonizing copyright law.²³² In Europe, there is the example of the InfoSoc Directive related to copyright.²³³ Internationally, the prime example is the TRIPs Agreement.²³⁴ Regarding the impact caused by distinct theoretical bases when harmonizing copyright, countries affiliated to moral rights justifications push for the recognition of moral rights, whereas countries based on economic justifications refuse to commit to non-economic rights. In short, this happened when the US created several obstacles to sign the Berne Treaty.²³⁵ In spite of those problems, the Berne Convention regulates the rights of integrity and attribution.²³⁶ In this sense, the recognition of personality rights in international treaties seems quite inevitable.

2.4.4 Social Planning Theory

The social planning theory states that IP should help to foster a fair culture, promoting the wellbeing of citizens.²³⁷ This philosophy has been developed recently when compared with utilitarianism and labour theories.²³⁸ In this sense, there is more expectation around the role of copyright. Social Planning theorists are influenced by

²³² Estelle Derclaye, 'By way of Conclusion: What Next' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009) 1; Mireille van Eechoud, P. Bernt Hugenholtz, Stef van Gompel, Lucie Guibault and Natali Helberge, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Kluwer Law International 2009) 297-298; Sheldon W Halpern and Phillip Johnson, *Harmonising Copyright Law and Dealing with Dissonance: A Framework for for Convergence of US and EU Law* (Edward Edgar 2014) 12.

²³³ InfoSoc Directive 2001/29/EC.

²³⁴ TRIPs Agreement 1994.

²³⁵ Stephen M. McJohn, *Copyright: Examples and Explanations* (Aspen Publishers 2006); Mira T Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (Oxford University Press 2011) 102, 235, 416.

²³⁶ Berne Convention, art 6bis.

²³⁷ Peter S Menell, '1600 Intellectual Property: General Theories 129, 130,' in Boudewijn Bouckaert and Gerrit de Geest (eds), *Encyclopedia of Law and Economics*, vol 2 (Edward Elgar 2000); William Fisher, 'Theories of Intellectual Property' in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press 2001) 172-173.

²³⁸ YiJun Tian, *Re-thinking Intellectual Property: The Political Economy of Copyright Protection in the digital Era* (Routledge-Cavendish 2009) 64-65; Jia Wang, *Conceptualizing Copyright Exceptions in China and South Africa: A Developing View from the Developing Countries* (Springer 2018) 23.

thinkers, such as Thomas Jefferson²³⁹ and Karl Marx²⁴⁰. This philosophical line of thinking aggregates a mix of people from different background, in which mostly vary from legal and politics areas.²⁴¹ As a rationality closely tied with politics, there is a expectation that is within copyright to foment public education and encourage diversity.²⁴²

There is some resemblance between utilitarianism and social planning theory when focusing on promoting social good, however the latest centres on the value of enriching social culture, whereas the underlying principle from the utilitarianisms is social welfare.²⁴³ Copyright is studied under the lens of democracy.²⁴⁴ This theory sets foundation on terms that are hard to define such as the idea of what means to create an attractive and just culture. Nevertheless, this theory goes beyond in comparison to the Utilitarianism theory, in which it promotes that IP should not only be for the wellbeing of the society but to be upon the service of the society.

²³⁹ Thomas Jefferson, *Notes on the state of Virginia: A compilation of Data About the States' Natural Resources, Economy and the Nature of the Good Society* (first published 1787, Madison & Adam Press 2018) 5-10.

²⁴⁰ Karl Marx and Srinivasan S (ed), *Economic & Philosophic Manuscripts of 1844 (Illustrated): Marx's Manuscripts, Written at His Age 26* (first published 1932, LeoPard Books India 2017) 20-25.

²⁴¹ William Fisher, 'Theories of Intellectual Property' in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) 172-173; Lior Zimer, *The idea of Authorship in Copyright* (Routledge 2007) 8-10.

²⁴² YiJun Tian, *Re-thinking Intellectual Property: The Political Economy of Copyright Protection in the digital Era* (Routledge-Cavendish 2009) 61-62.

²⁴³ William Fisher, 'Property and Contract on the Internet' (1997) *Chicago-Kent Law Review* 1203; William Fisher, 'Theories of Intellectual Property' in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press 2001) 172.

²⁴⁴ Siva Vaidhyanathan, 'Copyright and Democracy: Its Implications for the public's right to know' in Nancy C. Kranich (ed), *Libraries & Democracy: The Cornerstones of Liberty* (American Library Association 2001) 155.

Unfortunately, when copyright arose, it was used as a tool to set privileges and censorship.²⁴⁵ However, this kind of use does not follow the social and technological changes from last decades. There is a raising concern among scholars to interpret copyright goals alongside democratic values. In fact, the system shows signs of unbalance.²⁴⁶ Considering this, it becomes relevant to examine problems in the system of limitations.²⁴⁷ So, there are social planning scholars questioning the term of protection and proportion of works in public domain.²⁴⁸ These ideas seem to advocate towards a more open view of IP.

Then, the study departure from traditional theories to discuss open approaches in IP.

2.4.5 Open Approaches in IP with focus on Creative commons

In the last decades, developed nations pushed for the adoption of higher standards which then influenced international forums and national laws.²⁴⁹ The central points in

²⁴⁵ Stef van Gompel, *Formalities in Copyright Law: An Analysis of Their History, Rationales and Possible Future* (Kluwer Law International 2011) 58-59, 62-63; Jane C Cinsburg, 'Proto-property in literature and artistic works: Sixteenth Century Papal Printing Privileges' in Isabella Alexander, H. Tomás Gómez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Edward Elgar Publishing 2016) 237-240.

²⁴⁶ Siva Vaidhyanathan, 'Copyright and Democracy: Its Implications for the public's right to know' in Nancy C. Kranich (ed), *Libraries & Democracy: The Cornerstones of Liberty* (American Library Association 2001) 155; Tom W Bell, 'Five reforms for Copyright' in Jerry Brito (ed), *Copyright Unbalanced: From Incentive to Excess* (Mercatur Center 2012) 7.

²⁴⁷ Martin Senftleben, *Copyright, Limitations, and the Three-step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (Kluwer Law International 2004) 34-40.

²⁴⁸ Neal W Netanel, 'Copyright and a Democratic Civil Society' (1996) 106(2) *Yale Law Journal* 283, 297.

²⁴⁹ Duncan Matthews, *Globalizing Intellectual Property Rights: The TRIPs Agreement* (Routledge 2002) 10-15; Carolyn Deere, *The Implementation Game: The TRIPs Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2009) 41; James Otieno Odek, 'The Illusion of the TRIPs Agreement to promote creativity and innovation in Developing Countries: Case Study on Kenya' in Gustavo Ghidini, Rudolph J.R. Peritz, Marco Ricolfi (eds), *TRIPs and Developing Countries: Towards a New IP World Order?* (Edward Elgar 2014) 56-57. See also Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPs Agreement and Policy Options* (Zed Books 2000) 23-24.

this discourse remain in the idea that would result in two effects: transfer of knowledge (1) and greater economic development (2).²⁵⁰ Many scholars criticize this position towards IP, using arguments based on historical evidence and empirical studies.²⁵¹ In this sense, not only scholars are questioning results but the philosophical foundation of IP; giving emphasis on Copyright and searching for alternatives including ones outside the legal literature.²⁵² This section of the study sheds some light on approaches in IP. It also brings an overview on projects and movements which rely on open approaches towards IP, focusing specially on the Creative Commons Movement. Thus, it links to re-thinking copyright's traditional theories.

Several initiatives came in to existence criticizing in some extent the administration of IP assets. This new line of thinking shares a more inclusive use of protected material, and the cultural relevance of doing so.²⁵³ Some of the most popular initiatives are: Access to Knowledge (A2K), Free/Open Software, Open Access (OA). As an example, the A2K, initiated in 2004, opposed to concentration of educational materials worldwide and the barriers created by the copyright regime.²⁵⁴ The Free

²⁵⁰ Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem Press 2002); Rami M. Olwan, *Intellectual Property and Development: Theory and Practice* (Springer 2013) 126-129, 141.

²⁵¹ Christopher May, 'The hypocrisy of forgetfulness: The contemporary significance of early innovations in intellectual property' (2007) 14(1) *Review of International Political Economy* 1, 1-2; Otieno Odek, 'The Illusion of the TRIPS Agreement to promote creativity and innovation in Developing Countries: Case Study on Kenya' in Gustavo Ghidini, Rudolph J.R. Peritz, Marco Ricolfi (eds), *TRIPS and Developing Countries: Towards a New IP World Order?* (Edward Elgar 2014) 247.

²⁵² Julie E Cohen, 'Creativity and Culture in Copyright Theory' (2007) 40 *UC Davis Law Review* 1151, 1152.

²⁵³ Charlotte Hess and Elinor Ostrom, 'Introduction: An Overview of the Knowledge Commons' in Charlotte Hess and Elinor Ostrom, *Understanding Knowledge as a Commons: From Theory to Practice* (The MIT Press 2007) 3-10.

²⁵⁴ Sarah Bannerman, *International Copyright and Access to Knowledge* (Cambridge University Press 2016) 1.

Software Movement in Brazil has been promoting annual forums since 2000.²⁵⁵ In Brazil, the open software got the government's close participation.²⁵⁶

The Creative Commons is a non-profitable organization originated in the US, and propounded by Lawrence Lessig.²⁵⁷ This movement arose in contrast to the 'all rights reserved' mentality rooted in IP systems.²⁵⁸ This shift of paradigm brought authors and users on focus.²⁵⁹ The movement, initiated in the US, has followers in many countries. In Brazil, the Creative Commons is led by the professors and researchers of the *Centro de Tecnologia e Sociedade* (Centre of Technology and Society) Pedro Mizukami and Eduardo Magran and by the professor Sérgio Branco, who works at the *Instituto de Tecnologia e Sociedade* (Institute of Technology and Society). Under this regime, creators are offered greater flexibility in administrating IPRs. The licenses vary according to four items: attribution (1), non-commercial (2), non-derivative (3) and share-alike (4).²⁶⁰ Those four criteria further derive into six types of licenses.²⁶¹ Those licenses only apply to copyrightable works. In other words, it does not create rights nor conceive non-exclusive rights outside copyright's subject matter. The movement criticises the current form of treating IP assets, however it does not intend to break through.

²⁵⁵ Software Livre, 'Software Livre' (*Software Livre*, 22 April 2011), 'Quem Somos' (*Who are we?*) <<http://softwarelivre.org/portal/quem-somos>> accessed 20 August 2018.

²⁵⁶ Yochai Benkler, 'Coase's Penguin, or Linux and The Nature of the Firm [2002] Yale Law Journal 369

²⁵⁷ Elkin-Koren, Niva, 'Exploring Creative Commons: A Skeptical View of a Worthy Pursuit' in P. Bernt Hugenholtz & Lucie Guibault (eds), *The Future of the Public Domain* (Kluwer Law International 2006) 325-328; Simone Aliprandi, *Creative Commons: A User Guide* (Ledizioni 2011) 13-16.

²⁵⁸ Lawrence Lessig, *Free Culture: How Big media use technology and the law to lock it down culture and Control Creativity* (first published 2004, Lulu 2015) 81; Kabilen Sornum, *Creative Commons: Business, Social & Educational Implications* (GRIN Verlag 2010) 5-10.

²⁵⁹ Laikwan Pang, *Creativity and Its Discontents: China's Creative Industries and Intellectual Property Rights Offenses* (Duke University Press, 2012) 75-79.

²⁶⁰ Creative Commons, 'Licensing Types' (Creative Commons) <<https://creativecommons.org/share-your-work/licensing-types-examples/>> accessed 25 April 2017.

²⁶¹ *ibid.*

The Creative commons is the target of many criticisms.²⁶² Those critics might be related to the pretentious goal of making the current copyright framework viable, despite all the diversity of backgrounds and actors.²⁶³ There is the problem regarding the fact that those licenses rely on a copyright model that is unable to address the current level of development of IP. The claims of being an alternative approach on administrating IP rights and whether it shows a real opposition to the current system is often a point of discussion. In this sense, one can argue that choosing which rights would be restrained in a license is an action entirely seen by standard copyright laws. So, the importance is undermined. There is an argument which blames the Movement of having palliative effect and for delaying an actual reform. For part of those who are pro-reform, the initiative creates mechanisms that do not match the challenges opposed by the current stage of technology. By doing so, it could be diverging the society's attention to deeper issues. A concern due to the various types of licenses promoted by the Creative Commons sustain that it aggravates combining licenses that might be irreconcilable. The misuse of the licenses, especially on the internet, can bring a confusion to users who might think that they are under a legitimate use of a work.²⁶⁴ Despite Creative Commons' critics, it is promoting less restrictive use of copyrightable works. The CC zero is an open license, the closest type of an open source license. In one's view it was pointed out the 'disconnection' of the copyright system and the civil society, problem is the community's

²⁶² Elkin-Koren, Niva, 'Exploring Creative Commons: A Skeptical View of a Worthy Pursuit' in P. Bernt Hugenholtz & Lucie Guibault (eds), *The Future of the Public Domain* (Kluwer Law International 2006) 325-328.

²⁶³ *ibid.*

²⁶⁴ Simone Aliprandi, *Creative Commons: A User Guide* (Ledizioni 2011) 74.

superficial knowledge over this issue.²⁶⁵ This barrier might indicate a way to begin changing this reality.

For developing nations, those movements are a powerful venue. It is a channel to advocate on fundamental rights, such as the humans' right of having access to knowledge. Countries which chooses to foment free or open sources can maximize their resources to redistribute the money in other sectors of the economy.

2.5 Impact of IP theories in Brazil

Copyright is recognized as a fundamental right by the Brazilian Constitution.²⁶⁶ Although being granted the status of a constitutional right, there is no clear indication to any theory in particular. This fact is pointed out as a weakness of the IP regime, which does not provide underlying elements of interpretation.²⁶⁷ In general lines, the Brazilian law divides intellectual property in two segments: copyright and industrial rights. Despite copyright and industrial rights differences, for legal purposes, both rights are treated as a movable property.²⁶⁸

There is a historical element which connects IP to property.²⁶⁹ As such, there is room to interpret the nature of those rights under a property rationality. Unsurprisingly,

²⁶⁵ Susan Corbett, 'Creative Commons Licences, the Copyright Regime and the Online Community: Is There a Fatal Disconnect?' (2011) 74(4) *The Modern Law Review* 503, 527.

²⁶⁶ Brazilian Constitution 1988, art 5º, XXII (BR).

²⁶⁷ Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, 'Exceptions and Limitations to Copyright in Brazil: A Call for Reform', in Lea Shaver (ed), *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 41-43.

²⁶⁸ Brazilian Industrial Property Law 1996, art 5; Brazilian Copyright and Neighboring Rights Law 1998, art 3 (BR).

²⁶⁹ Peter Drahos, *A Philosophy of Intellectual Property* (Routledge 1996); William Fisher, 'Theories of Intellectual Property' in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) 168; Robert P Merges, *Justifying Intellectual Property* (Harvard University Press 2011) 12.

Brazilian copyright has been influenced by theories of property.²⁷⁰ During the construction of IPRs many theories arose; based on natural right, such as labour and personality and others based on economic rights.²⁷¹ Regardless of some scholars pointing out the failure of these theories, such arguments do not eliminate their value.²⁷² In copyright, the concept of property and its characteristics is generally regulated by the Civil Code²⁷³ and in specific, the Copyright Law will prevail. As previously mentioned on section 2.4.1, Bentham's liberal values and the utilitarianism philosophy was relevant to national law, as in the example of the Brazilian Criminal Code of 1830.²⁷⁴ In other moment of history, the Civil Code of 1916 expressively regulated copyright in a section regulating property rights in general. From those historical events, copyright law developed during the period in which the utilitarianism had great popularity. Brazilian scholars diverge in which aspect (economic or moral) is the most relevant.²⁷⁵ Considering the personality philosophy, the Civil Code of 2002 is silent on moral rights derived from copyright.²⁷⁶

2.6 Conclusion

The history of copyright law in Brazil is quite peculiar. Taking the example of countries such as England and Italy, pioneers on regulating these rights, the law-making

²⁷⁰ Genevieve M Kehoe, *Presidents and Terminal Logic Behavior: Term Limits and Executive Action in the United States, Brazil and Argentina* (Texas A&M University Press 2014) 110.

²⁷¹ William Fisher, 'Theories of Intellectual Property' in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press 2001) 168; YiJun Tian, *Re-thinking Intellectual Property: The Political Economy of Copyright Protection in the digital Era* (Routledge-Cavendish 2009) 61-65; Niva Elkin-Koren and Eli Salzberger, *The Law and Economics of Intellectual Property in the Digital Age: The Limits of Analyses* (Routledge 2013).

²⁷² Simone Nunes, *Direito Autoral e Direito Antitruste* (Elsevier 2013) 21-25.

²⁷³ Brazilian Civil Code 2002, art 1228 (BR).

²⁷⁴ Genevieve M Kehoe, *Presidents and Terminal Logic Behavior: Term Limits and Executive Action in the United States, Brazil and Argentina* (Texas A&M University Press 2014) 110.

²⁷⁵ Simone Nunes, *Direito Autoral e Direito Antitruste* (Elsevier 2013) 26-28.

²⁷⁶ Brazilian Civil Code 2002 (BR).

process in Brazil took a curious path. Those European countries gradually legislated on copyright on the civil sphere, and then moved to the scope of criminal liability. In Brazilian legislation, copyright's first appearance was rather unpretentious. Within the act of opening the first undergraduate course of Law in the country, the legislator inserted the right to reproduce restricted copyrighted works from legal professors of those courses. In the following occasion, the legislator inserted a criminal liability related to the reproduction right in a sole Article from the Criminal Code of 1830. Unsurprisingly, the next legislation to mention copyright was a criminal code. This occurred when the legislator inserted a few articles on the Criminal Code of 1890 among a section covering IPRs. Improperly, copyright protection remained restricted to criminal codes prior being regulated in a civil code or a Constitutional document.²⁷⁷ Similarly, the first limitation to copyright was also mentioned by a criminal statute.

Following the review of the historical evolution of author's rights in Brazil, it becomes apparent that the country took a path of mistreating author's rights, and this still has an impact on the law-making process presently. It is fair to say that, when legislating on this issue, it overrates the criminal venue. One celebrated argument in favour of this understanding is found in the Brazilian law which states that any copyright infringement is a criminal offense. With this mind-set, additionally, there is a lack of an express purpose for copyright protection in national law. In short, there is not a clear stand on a particular philosophical approach. In contrast to the US law, copyright's aims are considerably vague. Although Brazilian law indicates a close relation with economic

²⁷⁷ Pedro Nicoletti Mizukami, *Função social da propriedade intelectual: comparilhamento de arquivos e direitos autorais na CF/88* (Dissertation, Pontifícia Universidade de São Paulo 2007) 285-291.

theories, it can be pointed out that different theories may take a part when taking a Bill into consideration.

Those issues brought by the Brazilian way of legislating copyright pose significant challenges to a copyright reform. In the vagueness of an approach to IP, copyright L&Es fail to show clear purpose of application, which make them open to multiple interpretations. Sadly, this tends to narrow the scope of application of L&Es. This broad conception of L&Es' objectives represent a weak basis to interpret such uses, and it may lead to mass criminalization of Brazilian citizens. Brazil reportedly has a strong stand when securing author's right over users' rights. As a civil law country, Brazil stands on the author's rights tradition. Therefore, it is possible to identify a strong influence of French and German regimes. The seventy-year term of protection for copyright is a good indicator of the Brazilian take on those rights.

Regarding the theories of IP, it makes clear that each line of thinking has restrictions depending on the period which was conceived. Accordingly, more contemporary rights would inevitably demand more complexity of understanding, which by the time of the first theories were conceived, it would not be possible to anticipate such advancements.

According to a study conducted by the Consumers International IP Watchlist, Brazil has one of the world's strictest copyright laws related to legal norms on access of knowledge. This is because Brazilian law does not present a general rule which secures fair use practices. In addition to this, the list of L&Es is fairly limited. Furthermore, another problem of Brazilian copyright law is the approach taken by criminal law which does not tolerate IP offense (even common practices). As a result, the Brazilian legal system prohibits conducts such as the exhibition of a film for academic end, the copying

of a book no longer in print or the copying of a song in another format (for instance, MP3) of reproduction when the copyist bought a version of it (as the original version is a CD).

It can be considered a TRIPS-plus legislation as it establishes standards of protection which are far above what has been agreed upon in international treaties, without incorporating the limitations and exceptions that they allow.

After reviewing Brazilian History, the theories as well as how these have influenced the Brazilian position, the next chapter will focus on the Brazilian list of L&Es to Copyright, which was influenced by its historical background discussed during this chapter.

CHAPTER 3: The Limitations and Exceptions system to Copyright

3.1 Introduction

This chapter deals with Copyright limitations and exceptions. It presents the systems of limitations of several countries. This section reviews the three groups of limitations, emphasizing the fundamental principles behind each group and exposes some concerns and contradictions presented in some L&E systems. Additionally, it intends to explore their main strengths and weaknesses.

Copyright Law is a type of intellectual property law, which seeks to protect the interest of the owners of those assets. It is of significant importance that within a given copyright law there is also a system of limitations and exceptions (L&E). The system of L&E cannot be considered as anti-copyright, instead it promotes greater balance of rights among producers of IP and its users. A comprehensive and solid system of limitations and exceptions (L&E) to copyright requires a deep analysis of its subject matter. The system of L&E is a consequence of historical circumstances, which by their relevance became legally protected. Despite the uniqueness of a country's historical process, L&Es can be classified into three groups: (1) 'serving very strong, overriding public interests', (2) 'serving other public interests which the national legislature considers strong enough in order to justify a deviation from the principle of exclusive' and (3) 'correcting market failure'.²⁷⁸

The first group includes limitations relating to fundamental rights. For instance, transformative uses such as parodies²⁷⁹ are a type of exception to copyright's exclusive

²⁷⁸ Thomas Dreier, 'Regulating Competition by way of Copyright Limitations and Exceptions' in Paul Torremans, *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar Publishing Ltd 2009) 235.

²⁷⁹ *Suntrust Bank v. Houghton Mifflin*, 268 F.3d 1257, 1268 (11 th Cir. 2001) (US).

right, which aims to safeguard the fundamental right of the right of freedom of expression. The American Supreme Court ruled in the *Annie Leibovitz v. Paramount Pictures Corp.*²⁸⁰ case, a lawsuit with regard to whether the parody produced by a Paramount's photographer, featuring Leslie Nielsen, infringed the copyright of Leibovitz, who was the photographer that shot Demi Moore's pregnancy photo, which inspired the parody. The outcome was favourable to the derivative work.²⁸¹ Paramount's photography embodied the right of freedom of expression when it re-interpreted the sourced work, giving it a humorous content. In Brazil, the parody exception is addressed by a national law²⁸²; however, the norm solely cites an exception to derivative works in cases of paraphrases and parodies. Derivative works will be discussed in the next chapter throughout section 4.4. In contrast, the Copyright, Designs and Patents Act of 1988 (CDPA) expressively cites pastiche and parody as permitted acts.²⁸³ The majority of Brazilian legal experts interpret the system of L&Es as a closed-list system. This rationality implies the lack of a pastiche exception in Brazil's national law. In most cases, each country has the authority to dress their own system of L&Es, however those member states which signed the Berne Convention and the Trade Related Agreement of International Property Rights (TRIPS) are obliged to insert a quotation right within national laws. There is however an exception to those treaties when it refers to a fundamental right. Although limitations from the first group support fundamental rights, it does not imply that the use of those limitations has to be declared legal, even in such

²⁸⁰ *Leibovitz v. Paramount Pictures Corporation* [2nd Cir. 1998] 137 F.3d 109 (US).

²⁸¹ *ibid.*

²⁸² Brazilian Copyright and Neighbouring Rights Law 1998, art 47 (BR).

²⁸³ CDPA 1988, 5(3)(k).

cases when other rights might limit their use.²⁸⁴ Thus, each copyright's lawsuit demands case-by-case analyses.

The second group includes limitations addressing important ends. This group consists of copyright limitations that neither express an embodiment of a fundamental right, otherwise they would be allocated to the first group, nor does it attempt to correct copyright's market failure. The exceptions of non-profit broadcast performances carried out in social organizations²⁸⁵ and the uses of works during religious or official celebrations²⁸⁶ are examples of second-group limitations. Brazilian law provides an exception to performances carried out in private families' environments and in educational institutions, the latter restricted to teaching purposes.²⁸⁷ This topic will be further explored in the next chapter on Section 4.3.2. Although the two previous groups classify limitations according to the intensity of rights, the last group focuses on the economic perspective of intellectual assets.

The third group addresses limitations committed to achieving greater efficiency of disposable intellectual resources. This group includes private copying exception²⁸⁸, which allows reproduction of a copyrighted work, restricted to private use and for non-commercial purposes. Brazilian Law provides an exception for educational use, which allows students to reproduce notes originated from teaching lectures, but prohibits any

²⁸⁴ For an example of a pro-limitation decision, see *Campbell v Acuff-Rose Music Inc* [1994] 114 S. Ct. 1164 (US). And, for an example of an against-limitation decision, See *Williamson Music Ltd v The Pearson Partnership Ltd* [1987] FSR 210.

²⁸⁵ For an illustration of this limitation, See the 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, art 4, e.

²⁸⁶ For an illustration of this limitation, See the Directive 2001/29/EC of the European Parliament and of The Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, art 4, g.

²⁸⁷ Brazilian Copyright and Neighbouring Rights Law 1998, art 46, VI (BR).

²⁸⁸ For an illustration of this limitation, See the Directive 2001/29/EC of the European Parliament and of The Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, art 5, 2, b.

publication without the explicit consent of the lecturer.²⁸⁹ By introducing this exception, Brazilian law recognizes that the financial return of the usage of teaching notes is minimal compared to the operational costs of exercising those rights, for example by licensing schemes. The private copying exception acknowledges that the economic exploitation of some copyrighted works, may not be feasible.²⁹⁰ Thus, the side purpose allied with the public interest in this situation seeks to deliver greater economic efficiency to copyrighted materials by correcting market failure resulting from a misuse of available intellectual assets.

The classification of L&E into three groups is useful to study their nature. Copyright law is aimed at protecting individual rights from inventors, whereas limitations often aim to protect, directly or indirectly the public interest.²⁹¹ Each limitation is shaped according to the concerns derived from certain aspects of public interest. Nonetheless, a limitation can serve more than one purpose, as in more than just the public interest. This can be illustrated briefly by examining the parody exception, classified in the first group for mainly protecting freedom of expression, but it can also foment the creation of new works by allowing the use of a copyrighted material in order to produce a derivative work.

As previously stated, limitations derive from a historical process. A criterion to define whether a limitation will receive special protection under a country's national law is complex. From the classification used above, limitations which embody fundamental rights are expected to be less affected by governments' discretion or conditioned to a

²⁸⁹ Brazilian Copyright and Neighbouring Rights Law 1998, art 46, IV (BR).

²⁹⁰ World Intellectual Property Office, 'International Survey on private copying: Law & Practice' (WIPO 2015) < <http://www.wipo.int/publications/en/details.jsp?id=4183> > accessed 20 February 2016.

²⁹¹ Thomas Dreier, 'Regulating Competition by way of Copyright Limitations and Exceptions' in Paul Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar Publishing Ltd 2009) 235.

judgement from sectors of a society. However, even first-group limitations have legal recognition denied by national law. This incongruence of interpretation illustrates the point clearly. For instance, Colombia recognizes legal protection for a first group limitation, and is silent regarding another limitation from the same group. That is, while the country inserted an exception for the visually impaired,²⁹² Colombian national law failed to deliver a parody exception.²⁹³ The inconsistency of application within limitations associated to fundamental rights show ever deeper contradiction in other jurisdictions. This is further exposed when a country gives statutory protection to a limitation from a second or third group, and remains inactive towards a limitation related to fundamental rights. To give another example, Portuguese Law lacks an exception for the purposes of parody, caricature and pastiche within its national law. In contrast, it adopted a private copying²⁹⁴ exception, which was amended in 2015.²⁹⁵

In parallel to a copyright's legislation, there is a number of flexibilities authorizing certain acts that, otherwise, would incur in an infringement. In this light, L&Es work as a counterweight in a set of constituted rights. Unfortunately, the counterweight system struggles to resist the 'supremacy' of the idea of property; in which cases it becomes the rule. By consequence, shared resources, opposing to exclusivity, operates quite restricted, and it is a right for few. Hopefully, a shift of paradigm will greater focus on intellectual commons.

²⁹² Colombian Law relating to Guarantees of the Access to Information, Communications, Knowledge and Information and Communication Technologies for People with Blindness or Low Vision 2013 (Law No 1,680), a 12 (CO).

²⁹³ In 2012, a bill was proposed to the Colombian's Congress, seeking to introduce a parody exception. However, the bill's author withdrew in 2013. See also El Tiempo, 'Proyecto que Regulaba la Parodia Será Retirado' (2017) <www.eltiempo.com/archivo/documento/CMS-12799508> accessed 8 October 2017.

²⁹⁴ Portuguese Code of Copyright and Related Rights 1985 (Amended by the Decree-Law No 100/2017), art 81(b) (PT).

²⁹⁵ In 2015, the Portuguese private copying exception was amended by the Law No 49/2015, which expanded the scope of this exceptions to cover devices such as tablets and mobile phones.

The structure of this chapter is as follows. Section 3.2 discusses the nature of copyright's limitations under a scope of the law. Section 3.3 addresses types of copyright's limitations providing an overview of the use of limitations and restrictions of rights, under the Copyright perspective. Section 3.4 examines the current approaches of copyright's limitations among countries, their *modus operandi* and fragilities. Section 3.5 studies the correlation of L&E and moral rights.

3.2 Legal nature of the limitations

The legal nature of copyright's limitations is a complex issue. There is a discussion in which one should define the legal nature according to the user's right to quote or the user's right to make parodies.²⁹⁶ There is however, another type of limitation that is often referred to as privileges. For example, limitations related to educational use referring to institutions such as universities and schools. This form of limitation will be discussed in the exceptions in Chapter 4. Thus, it remains a complex question, whether the right or privilege surrounding the limitations represents a significant difference in its nature, or if it is just related to a different terminology.²⁹⁷ The following sections attempt to provide clarity upon this topic.

3.2.1 Subjective right

The legal nature of limitations is a complex topic, and as such there are only a few scholars over the world that have attempted to tackle the issue.²⁹⁸ Authors' understanding on the matter diverges; from one perspective, a list of exceptions given by

²⁹⁶ Lucie M.C.R. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002) 7.

²⁹⁷ *ibid.*

²⁹⁸ Hirsch Ballin and André Lucas examined the legal nature of limitations under European Law

the legislator does not confer rights for the benefit of users²⁹⁹, whereas from another point of view authors' rights over their works are a basis for subjective rights, which arise from the close relationship between the author and the objective of the right.³⁰⁰ This relationship is also explored in enforcing and controlling the right.³⁰¹ There is an argument which affirms that the rules of positive law safeguard the author's power of control over the right.³⁰²

The whole challenge entails from what one believes to be the definition of a subjective right. Among the definitions of subjective right given by European literature, there are three recurrent guidelines referring to whether third-party use is a subjective right. First, whether it emphasizes the close relationship between an author and his work, under the view of positive law. Second, whether the author has exclusive control over the work, this depending on the view of a country, the culture and its public. Third, whether the right is sufficiently recognizable to safeguard its enforcement.³⁰³

According to these characteristics, one can imply that the interest that a user has to use a copyrighted work is not a subjective right. Referring to the characteristics of a subjective right, not all of them are present in the user's interest to quote a work. For instance, users do not have any control over copyrighted materials nor are they responsible for its enforcement, thus it fails to be a subjective right.³⁰⁴ Although these characteristics of subjective rights are found in European Law, American common law

²⁹⁹ André Lucas, *Droit d'auteur et Numérique* (Lexis Nexis 1998) 274.

³⁰⁰ E D Hirsch Ballin, 'Author's Rights Compared with Those of The Community' (1956) 10(1) *Revue Internationale de Droit d'Auteur* 18, 20.

³⁰¹ Lucie M C R Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002) 7-14.

³⁰² E D Hirsch Ballin, 'Author's Rights Compared with Those of The Community' (1956) 10(1) *Revue Internationale du Droit d'Auteur* 18, 19.

³⁰³ Jean Dabin, *Le droit subjectif* (First published 1952, Dalloz 2007) 30-41.

³⁰⁴ Lucie M C R Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002) 7-14.

system seems not to describe it clearly, but an analysis of the ‘right’ conferred under the American system leads to similar conclusions to those presented here.³⁰⁵

3.2.2 Objective right or privilege

As a users’ interest in using a work is not a subjective right, it may be classified as an objective right or privilege that the user has over the work. In Europe, positive law safeguards the protection of legitimate interests,³⁰⁶ which can be described as the user’s one.

Positive law is composed of two kinds of norms, either imperative or permissive norms.³⁰⁷ The objective right then can derive from mandatory rules that safeguard users’ interest or when a norm leaves a margin to grant the interest of a user, but it is not necessarily obligatory. For example, on one hand, a person may not have a subjective right to visit museums, but on the other hand depending on the country, museums’ items may need to be disclosed to citizens as a matter of public interest. Thus, in the light of such positive law, legitimate interests regarding copyrights are acknowledged. Although the legitimate interests of the owners may be safeguarded under certain circumstances, they are not infinite; the legitimate interests of other users need to be addressed as well.³⁰⁸

3.3 Forms of limitations

There are various ways to limit rights: total exemption to author’s exclusive rights (I), statutory license (II), compulsory license (III) and mandatory collective

³⁰⁵ *ibid.*

³⁰⁶ *ibid.*

³⁰⁷ P A N Houwing, ‘*Subjectief Recht, Rechtssubject, Rechtspersoon*’ (Thesis, University of Leiden 1939) 52-60.

³⁰⁸ Lucie M.C.R. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002) 7-14.

administration of rights (IV). Those types of limitations are present in open-list, closed-list and hybrid systems. The most common form of limitation to benefit users is a total exemption to author's exclusive rights. This is followed by less common forms of limitations such as statutory licenses and compulsory licenses. Then there is the mandatory collective administration of rights (MCA) 'weaker and last constrained' form of limitation. This section surveys four types of limitations to IPRs. In doing so, it provides examples of jurisdictions which use those mechanisms. The upshot is to examine each form of limitation and its implications. Then, it argues that each type of limitation is a valuable resource delivering greater flexibility to copyright legislation. This section of the study concludes that an ideal system of limitations should incorporate many types of limitations and take advantage of its various scopes and purposes.

3.3.1 Exemptions

Exemptions are the most restrictive form of limiting rights. This type of limitation is characterized as being 'authorization-free' and 'remuneration-free'. Exemptions are found in countries such as Brazil, UK, United States³⁰⁹ and Germany³¹⁰. In Brazil, users' rights are mainly regulated in the form of exemptions.³¹¹ This approach has been used since the enactment of Law No 496 in 1898³¹², the first civil law regulating author's rights in the country. The first Copyright Law in Brazil had 28 Articles in total and, consequently, there was no need to use divisions such as chapters. L&Es were listed in the form of exemptions, indicating which acts were not considered an infringement of

³⁰⁹ For the Classroom exemption, See Title 17, US Code § 110 (US).

³¹⁰ German Copyright Act (amended 16 July 1998) 1965, art 57 (DE).

³¹¹ Reto M Hilty and Sylvie Nérisson, 'Overview' in Reto M Hilty and Sylvie Nérisson (eds), *Balancing Copyright - A Survey of National Approaches* (Springer 2012) 19.

³¹² Brazilian Copyright Law (No 496) 1898 (BR).

Copyright. The subsequent law regulating this issue was from 1973 and contained 134 articles divided respectively in titles and chapters. For the first time in Brazil, a Copyright Law designated a chapter exclusively for Limitations to Copyright. Overall, the Copyright Law of 1973 compared to the one of 1898 introduced few linguistic changes, and maintained limitations to Copyright based on free use. Thus, Copyright Law in Brazil shared a similar format when legislating permitted third-party uses. In the UK, the CDPA presents exemptions for incidental inclusion of copyrighted material³¹³, defences related to public administration³¹⁴, use of notes or recordings of spoken words in certain cases³¹⁵, abstracts of scientific or technical articles³¹⁶, free public showing or playing of broadcast³¹⁷ and time-shifting³¹⁸. In summary, exemptions are an extreme way to limit IPRs. In this light, they should be used to safeguard basic human rights such as freedom of expression. However, this may not be the most adequate form to legislate other interests which are less related to basic human needs. This approach can contribute most effectively by ensuring the inclusion of greater flexibility among jurisdictions.

3.3.2 Statutory licenses

Statutory licenses are a form of limitation to IPRs, which assists Congress on balancing the interest of users and right holders. Statutory Licenses are authorization-free, however unlike exemptions, they are not remuneration-free. In these cases, permitted uses are conditioned to the payment of a fair remuneration to the owner of the

³¹³ CDPA 1988, 31.

³¹⁴ *ibid* 45-50.

³¹⁵ *ibid* 58.

³¹⁶ *ibid* 60-65.

³¹⁷ *ibid* 72.

³¹⁸ *ibid* 70.

IP. Statutory licenses are used in the United States of America³¹⁹, Australia³²⁰ and China³²¹. Brazil, alongside the UK, does not use this type of limitation in their copyright laws. Brazilian Law lists copyright L&Es based on free use, whereas the UK relies on the remuneration right. The UK is a nation highly influenced by liberal ideology, which encourages individual arrangements to solve most issues. Thus, it stimulates the freedom of users to negotiate fees directly with authors.³²²

3.3.3 Compulsory licenses

Many academic papers relating to Brazilian Copyright legislation focus on the compulsory licenses of patented pharmaceutical drugs.³²³ There is limited literature regarding other aspects of the Brazilian system of limitations and exceptions to copyright. Brazilian current copyright system lacks a clause for compulsory license in the field of copyright. First, it focuses on compulsory licenses' characteristics. Second, it briefly presents the Brazilian restricted experience on compulsory licenses in the field of patents. Third, it explores Article 31 from the TRIPs agreement, which covers the use of compulsory license to patents, under the lens of copyright. Fourth, it surveys the use of compulsory licenses on copyright in some jurisdictions. Finally, it suggests the

³¹⁹ US Code, t 17, s 112. It regulates the statutory license for ephemeral recording (US).

³²⁰ Australian Copyright Act (amended in 2012), s 31D. It regulates the statutory license for online broadcast (AU).

³²¹ Chinese Copyright Law, art 23 (CN). China mainly regulates copyright limitations under Statutory licenses and fair use. See also Xiuqin Lin and Tiegung Liu, 'China', in Reto M. Hilty and Sylvie Nérisson (eds), *Balancing Copyright: A survey of National Approaches* (Springer 2012) 255-257, 280.

³²² Allan Rocha de Souza, 'Brazil' in Reto M Hilty and Sylvie Nérisson (eds), *Balancing Copyright - A Survey of National Approaches* (Springer 2012) 194-195.

³²³ Amy S Nunn, Elize M Fonseca, Francisco I Bastos, Sofia Gruskin and Joshua A Salomon, 'Evolution of Antiretroviral Drug Costs in Brazil in the Context of Free and Universal Access to AIDS Treatment' (2007) *PLOS Medicine* e305, 1805; Maurice Cassier and Marilena Correa, 'Nationalizing Efavirenz: Compulsory Licence, Collective Invention and Neo-developmentalism in Brazil (2001-2012)' (2013) 63(4) *Autrepart* 107, 108; Bhaven Sampat and Kenneth Shadlen, 'TRIPS Implementation and Secondary Pharmaceutical Patenting in Brazil and India' (2015) 50(2) *Studies in Comparative International Development* 228, 229; Elize Massard da Fonseca and Francisco Inacio Bastos, 'Implementing Intellectual Property of Pharmaceuticals in Middle-Income Countries: A Case Study of Patent Regulation in Brazil' (2016) *Journal of Health Politics, Policy & Law* 423, 424-425.

creation of a clause for compulsory license applied to copyright in Brazil.

Compulsory licenses are an ‘an authorization permitting a third party to make, use or sell’ a copyrighted work without the consent of its owners.³²⁴ It is characterized by an exceptional break of an IPR under authorized circumstances. This clause applies to situations where a normal exploitation of an IP is unworkable. Considering exemptions, compulsory licenses diverge as on the latter, the use of an IP work is conditional to the payment of a fee, most commonly fixed by public authorities from the country requesting the license.³²⁵

The Brazilian experience with compulsory licence of patents is particularly interesting. Their government has been using this form of limitation as a bargain chip to pressure companies to drop prices of patented pharmaceuticals, based on the Article 31 of the TRIPs agreement.³²⁶ Regarding patents, Brazil used compulsory licences in 2001, 2003 and 2005.³²⁷ In 2007, Lula, the Brazilian president in force³²⁸, signed a decree authorizing the country to issue its first compulsory license. The medicine on issue was named efavirenz, a drug manufactured by a US company named Merck & Co, and sold under the brand name of Stocrin. The Brazilian Decree enabled the purchase of the generic drug from India, which was cheaper than buying from the efavirenz’s patent holder. Brazil became the first country from Latin America to issue a compulsory license for pharmaceutical patents.³²⁹

³²⁴ N S Sreenivasulu and C B Raju, *Biotechnology and Patent Law: Patenting Living Beings* (Manupatra 2008) 187.

³²⁵ Gerald Dworkin and Richard D. Taylor, *Blackstone's Guide to the Copyright, Designs and Patents Act 1988: The Law of Copyright and Related Rights* (Oxford University Press 1989) 105.

³²⁶ TRIPs Agreement, art 31.

³²⁷ Abbott Laboratories holds the patent of the AIDS drug.

³²⁸ Lula was the president in force of the country at that time.

³²⁹ Juana Kweitel, ‘A primeira licença compulsória de medicamento na América Latina Pontes’ (2007) <www.ictsd.org/bridges-news/pontes/news/a-primeira-licença-compulsória-de-medicamento-na-américa-latina> accessed on 15 October 2016.

Compulsory licenses are usually associated to patents regulated on Article 31 from the TRIPs Agreement, and issued ‘when a government allows someone else to produce the patented product or process without consent from the patent owner’.³³⁰ However, this study proposes that some conditions defining whether a patent compulsory license should be granted can, in some extent, serve as guidelines in the cases of licenses involving copyright. Compulsory licenses related to patented goods follow some parameters, which are located on Article 31 of the TRIPs Agreement, as follows. According to the first parameter, a license is defined on a case-by-case basis (1).³³¹ The second parameter states that apart from cases of ‘national emergency or other circumstances of extreme urgency or in cases of public non-commercial use’, it is imperative that the party requesting the compulsory license should try to obtain the authorization of the patent’s owner (2).³³² According to the third parameter, the license’s ‘scope and duration’ must observe the purpose for which it was granted (3).³³³ The fourth parameter affirms that a license does not give exclusive rights to whom the patent was licensed (4).³³⁴ According to the fifth parameter, licenses are not transmissible, ‘except with that part of the enterprise or goodwill which enjoys such use’ (5).³³⁵ The sixth parameter declares that a license should prevail in cases targeting the domestic market (6).³³⁶ According to the seventh parameter, as soon as the situation which gave cause to it changes, the license must be reviewed (7).³³⁷ Thus, the compulsory license must

³³⁰ World Trade Organization, ‘Trips and Health: Frequently Asked Questions Compulsory Licensing of Pharmaceuticals and Trips’ (2017) <www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm> accessed 10 July 2016.

³³¹ TRIPs Agreement, art 31, (a).

³³² *ibid* art 31, (b).

³³³ *ibid* art 31, (c).

³³⁴ *ibid* art 31, (d).

³³⁵ *ibid* art 31, (e).

³³⁶ *ibid* art 31, (f).

³³⁷ *ibid* art 31, (g).

provide an ‘adequate remuneration’ to the owner of the asset, determined according to the conditions presented in the case and should consider the economic value of what is being licensed (8).³³⁸ A license’s validity can be subject to ‘judicial review or other independent review by a distinct higher authority in that Member’ (9).³³⁹ Decisions over the amount of royalties are also subject to the same standards (10).³⁴⁰ Although most of Article 31 can be interpreted under copyright’s lens, paragraphs k³⁴¹ and l³⁴², including subparagraphs i³⁴³, ii³⁴⁴, iii³⁴⁵ details circumstances which are only applicable to patents.

It is worth pointing out that compulsory licenses are disfavoured by owners of IP in general, and especially scorned within copyright holders.³⁴⁶ Compulsory licences for copyrighted works are used in Taiwan³⁴⁷, Japan³⁴⁸ and India³⁴⁹. Brazil has compulsory license³⁵⁰ for patents, however it does not have a compulsory license for copyrighted works. Although most cases are associated to patents, there are some cases built in compulsory license of copyrighted works. In the case of the US, it provides compulsory licenses on copyright to make or distribute phonograms of non-dramatic works previously made public subject to legal requirements including the conditional payment

³³⁸ *ibid* art 31, (h).

³³⁹ *ibid* art 31, (i).

³⁴⁰ *ibid* art 31, (j).

³⁴¹ *ibid* art 31, (k).

³⁴² ‘where such use is authorized to permit the exploitation of a patent (“the second patent”) which cannot be exploited without infringing another patent (“the first patent”), the following additional conditions shall apply’.

³⁴³ ‘the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent’.

³⁴⁴ ‘the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the invention claimed in the second patent; and’.

³⁴⁵ ‘the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent’.

³⁴⁶ Gerald Dworkin and Richard D. Taylor, *Blackstone's Guide to the Copyright, Designs and Patents Act 1988: The Law of Copyright and Related Rights* (Oxford University Press 1989) 105.

³⁴⁷ Taiwanese Copyright Act, art 69. It regulates the sound recording of a musical work (TW).

³⁴⁸ Japanese Copyright Act, arts 67 (1) and 69 (JP).

³⁴⁹ Indian Copyright Act 1957, arts 31 and 31A (IN).

³⁵⁰ Brazilian Industrial Rights Law 1996, art 68 (BR).

of royalties.³⁵¹ The ‘primary purpose of producing phonorecords under it is to distribute them to the public for private use’ (1). The law restricts the use of a compulsory license in cases of non-commercial purposes, which would not significantly harm the economic exploitation of the work by its right holders. Unsurprisingly, the license is restricted in scope in cases of works not previously made public. By doing so, it seems to be the personal responsibility of the user (personality theory) to safeguard the right of the copyright owner to decide when to release his creation. US legislation points out:

it may be obtained only if phonorecords have already been distributed with the permission the owner of the underlying copyright in the music’ (2), the compulsory license does not permit a subsequent producer simply to duplicate a recording made by someone else (3), every sound recording made under a compulsory license is copyrightable as a derivative work (4), the compulsory license may be lost if royalties are not paid on time and if the required monthly and yearly statements of account are not sent to the copyright owner at time (5).³⁵²

In another jurisdiction, there is an Indian case involving a dispute between Reliance Broadcast Network Limited v. Super Cassettes Industries Limited^{353, 354} The dispute is concerned with whether or not the Copyright Board had the power to grant an interim copyright license. Before any formal complains, Reliance contacted the Copyright Board in 2001 trying to negotiate a license. Reliance opposed paying the

³⁵¹ US Code, t 17, 115 and 37 Code of Federal Regulations 201.18 (US).

³⁵² William S Strong, *The Copyright Book: a Practical Guide* (6th edn, The MIT Press 2016) 215-216.

³⁵³ *Music Broadcast Pvt Ltd v Super Cassette Industries Ltd* on 1 September, 2011 The High Court of Delhi (IN).

³⁵⁴ Amlan Mohanty, ‘Copyright Compulsory Licensing Disputes: Copyright Board Lacks Jurisdiction’ (Spicy IP, 17 April 2011) <<https://spicyip.com/2011/04/copyright-compulsory-licensing-disputes.html>> accessed 7 October 2017.

amount that was fixed, arguing that this was an excessive license charge to request for a compulsory license based on Section 31 (b) of the Indian Copyright Act³⁵⁵. In 2011, Reliance filed a complaint to the Board, which in response alleged a lack of power to concede an interim copyright license. Thus, Super Cassettes used in its defence a lack of legal provision to concede the request. Delhi High Court reverted the Board's decision. The High Court provided the following three guidelines for the Copyright Board to be used when considering a compulsory license: the work in question should have been published or performed in public (i); the owner of the copyright/sound recordings should have refused to republish or allowed republication or the performance in public of the work by the reasons of which the work is withheld from the public (ii); has refused to allow communication by a broadcaster of such work on terms which the board must consider reasonable (iii).

In 2012, Super Cassettes appealed against the decision to the Supreme Court.³⁵⁶ The Supreme Court tackled the issue concluding compulsory licenses must be granted when: 'the work is withheld from the public' (1) and 'the owner's refusal is on grounds, which are "not reasonable" in law'.³⁵⁷ Considering the first clause, it should be considered if the withhold causes direct harm to public interest. In this case, the appellant had a commercial interest in the matter. However, the case has to exceed debate over monetary compensation. Considering the second clause, the appellant did not demonstrate that the respondent had refused to grant a compulsory license due to unreasonable legal grounds. As a final conclusion, the Indian Supreme Court stated that 'In the absence of an express statutory grant, I would not imply the power to grant an *ad*

³⁵⁵ Indian Copyright Act 1957 (IN).

³⁵⁶ *Super Cassettes Industries Ltd v Music Broadcast Pvt Ltd* 2012 (50) PTC 225 Supreme Court (IN).

³⁵⁷ *ibid.*

hoc compulsory licence by way of interim order by the Copyright Board'. Thus, this lawsuit's outcome states that a compulsory license must be interpreted as a final relief and not in character of an interim injunction³⁵⁸ and that interim compulsory licenses cannot be inferred from a statute.

Brazil has experienced the benefits of compulsory license schemes in the field of patents, however copyright has not been tackled yet. Considering that the law does not regulate compulsory licenses for copyrighted works, there is jurisprudence involving this issue in Brazil. Other countries, such as India have benefited from it and there are no impediments to adopting this form of limitation to copyright in Brazil. International jurisprudence can provide thoughtful insight to guide judges in future cases. Foreign cases can help to determine on what grounds a copyright compulsory license can be granted. These are a source of legal interpretation for Brazil and other nations to benefit from.

3.3.4 Mandatory collective management

One of the ways to limit Copyright is by the Mandatory Collective Management. Copyright law represents a milestone for authors who have the exclusive right to exploit their works by exercising those rights either for themselves or by authorizing a third party to act on their behalf. In cases of authors authorizing a third party to act on their behalf, there are two ways of doing so: authors can entrust a person to represent their interest (1) or they can join an administration body (2).³⁵⁹ This section focuses on the second way. An administration body is formed of institutions which collectively manage author's

³⁵⁸ The case was mentioned in *Music Broadcast Pvt Ltd v Super Cassette Industries Ltd* on 1 September, 2011 Vikramajit Sen, 'The High Court of Delhi' (2011) <<https://indiankanoon.org/doc/971891/>> accessed 19 October 2017.

³⁵⁹ Paula Schepens, *Guide to the collective administration of author's rights* (UNESCO 2000) 15, 28.

rights. Those organizations can assist authors helping them to diminish expenses to secure their legitimate interest and, by collaborative efforts, can optimise an influence on the market.³⁶⁰ In cases of collective management organizations (CMOs), the adoption can be either voluntary or mandatory. In both contexts of collective management, authors' rights are partially exercised by an intermediary. In voluntary cases, authors materialize their rights by choosing the option of joining a CMOs. In the case of mandatory adoption, the law determines that certain rights which belong to authors be constrained. By doing so, authors are forced to join CMOs. Hence, this form of limiting rights is recognized as Mandatory Collective Management (MCM). This section presents the Brazilian experience on MCM of authors' rights.

In Brazil, MCA of authors' rights is regulated from Articles 97 to 100-B of the Copyright Law.³⁶¹ The Brazilian Copyright Law, on Article 99 points out that: 'public performance of musical works and literary musical works and phonograms'. The name of the institution accountable for the collection and distribution of all earnings derived from public performances of music is the Central Office of Collection and Distribution (ECAD, in Portuguese). In fact, it holds nationally a monopoly over this activity.³⁶² ECAD has been targeted by the Parliamentary Committee of Inquiry (CPI, in Portuguese) in which public investigations were conducted by the legislative branch to verify claims of irregularities from 1995 to 2011.³⁶³ However, the latest CPI had more visibility than

³⁶⁰ Stanley M Besen, Sheila N Kirby and Steven C Salop, 'An Economic Analysis of Copyright Collectives' (1992) 78(1) *Virginia Law Review* 383, 390-391.

³⁶¹ Copyright and Neighbouring Rights Law (amended by the Law No 12,853 of 2013) 1998 (BR).

³⁶² Pedro Belchior, Mariana Valente and Eduardo Magrani, 'The Reform of Collective Management of Music in Brazil Digital Rights LAC' (2013) <www.digitalrightslac.net/en/la-reforma-de-la-gestion-colectiva-de-la-musica-en-brasil/> accessed 10 October 2017.

³⁶³ One in the Senate (1995/96) and three in the following Legislative Assemblies: Mato Grosso do Sul (2005), São Paulo (2009) and Rio de Janeiro (2011). See also Pedro Belchior, Mariana Valente and Eduardo Magrani, 'The Reform of Collective Management of Music in Brazil Digital Rights LAC' (2013) <www.digitalrightslac.net/en/la-reforma-de-la-gestion-colectiva-de-la-musica-en-brasil/> accessed 10 October 2017.

previous ones, and in fact the repercussions of this led to an amendment to Copyright Law. In 2011, the Brazilian Federate Senate appointed a CPI to investigate irregularities and crimes supposedly committed by the ECAD.³⁶⁴ The final report of 2011's legal procedure resulted in a document with punitive measures and recommendations to change the law. The document impacted on the Brazilian artistic community which, then pressured the Government to legislate over the matter. Consequently, the Senate drafted a Bill 129/2012 regulating Collective management organizations (CMOs) and closely ECAD attributions. CMOs are self-administrative bodies with unprofitable purpose. This form of organization is responsible for collecting money, royalties, which must be divided separately for each author. The CMOs have several roles, such as political, legal economic, social and cultural.³⁶⁵ According to the first version of the Bill, the Ministry of Justice (MJ) would choose associations by means of public bidding every five years, furthermore, the CMO would also be organized into a category of rights, which would then be subjected to a performance evaluation. Author and the affiliated association would decide the amount of the fee, and in cases of conflict the MJ would have the prerogative to decide the issue. The version approved by Congress, removed from the MJ and gave it to the Ministry of Culture the attribution of inspecting the activities of the ECAD. Thus, an initial attempt at legislating CMOs via an autonomous law was frustrated, it proved more feasible to pass a Bill which introduced a few articles within the scope of the Copyright Law. The amendment expanded previous attributions.

³⁶⁴Senado, 'Relatório final da CPI do Ecad já está disponível (The final report from ECAD's CPI is released)' (2000) <www12.senado.leg.br/noticias/materias/2012/04/24/relatorio-final-da-cpi-do-ecad-ja-esta-disponivel> accessed 15 January 2016.

³⁶⁵Paula Schepens, *Guide to the collective administration of author's rights* (UNESCO 2000) 15.

The collective administration of author's rights is a global event.³⁶⁶ The CMOs are a special type of organization which focuses solely on the benefit of its members. Due to the advent of new ways to disseminate works, such as by the internet, IP can be reproduced quickly and cheaply to its users. Consequently, the traditional way to administrate copyright assets, centered on the person of the author was challenged. The individual exercise of some author's rights is unworkable in a globalized world. In this context, collective administration of exclusive rights surges as an alternative to enhance the management of copyrighted work. Authors are incapable of monitoring or enforcing their rights in cases of multiplicity of users. A collective administration is particularly helpful for authors as this reduces transactional costs, in such cases, where they face situations when they would otherwise fail to secure their rights. It is not feasible for an author to individually manage his right over all the countries that his work is being used in. Similar to compulsory licenses, a remuneration is due to be paid by common agreement among the parties involved or by a competent body.

Copyright seeks to correct market failure. Just granting those rights, in certain cases, may be insufficient to promote its full intended targets. In mandatory collective management, authors are constrained and administrate certain rights with the assistance of collecting societies under a remuneration scheme in which institutions are entitled to receive and allocate fees.³⁶⁷ This limitation aims 'to facilitate the effective execution of these rights by the authors themselves and to favour the lawful exploitation of works and

³⁶⁶ International Confederation of Societies of Authors and Composers (CISAC), 'Collective Administration of Rights and the public interest' (2017) <www.cisac.org/content/download/1136/19650/file/CISACUniversity_Collective_Administration_of_Rights_and_the_Public_Interest.pdf> accessed 15 January 2017.

³⁶⁷ Annette Kur and Jens Schovsbo, 'Expropriation or Fair Game for all? The Gradual Dismantling of the IP Exclusivity Paradigm' in Annette Kur, *Intellectual Property Rights in a Fair World Trade System: Proposals for reform of Trips* (Edward Elgar 2011) 424-427.

cultural productions'.³⁶⁸ This limitation seeks to overcome the incapacity of an author to manage rights. This limitation works differently among countries. CMO's can operate nationally and internationally. Countries which are in their majority consumers of IP are in a less advantage situation because they do not have a place in the negotiations.³⁶⁹ This type of limitation is already well established on developed nations, especially on the music industry; although in developing nations it is gaining more relevance.³⁷⁰

In Brazil, CMOs have received heavy criticism regarding the strict format of operation and lack of clarity for both author and users.³⁷¹ Although this system has proven to not be beyond criticism, it seems that it is the only feasible way of securing certain authors' rights at the current stage of technological development.

3.4 Approach of Limitations to copyright

L&Es to copyright operate differently among countries. There are two generic forms of listing L&Es: a concise number of clauses, broadly interpreted (1) or vast number of clauses, restrictively interpreted (2).³⁷² From this classification, the US fair use related to the first form, whereas the second form affiliates to European countries, including the UK.³⁷³ Derived from this rationality, there are three types of approaches rooted among jurisdictions: open-list, closed-list and hybrid. Each system has its own deficiencies depending on which approach a country adopts. A legislative approach can

³⁶⁸ Paula Schepens, *Guide to the collective administration of author's rights* (UNESCO 2000) 9.

³⁶⁹ *ibid* 20.

³⁷⁰ *ibid* 9.

³⁷¹ Commission Recommendation 2005/737/EC on 18th May 2005 on Collective Cross-border Management of Copyright and Related Rights for Legitimate Online Music Services [2005] OJ L276/54.

³⁷² Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press 2005) 18-20.

³⁷³ Emily Jane Hudson, 'Copyright Exceptions: The Experiences of Cultural Institutions in the United States, Canada and Australia' (PhD thesis, The University of Melbourne 2011) 56-70.

point to purposeful aims while the adoption of one method over another as reflected in decision-making can be a biased process.³⁷⁴ In general, the regime of limitations of closed civil law countries is a closed system.³⁷⁵ Previous studies highlighted a link between the copyright regime and the perspective of the copyright's creation. The United States has a utilitarian-oriented approach, whereas most European countries use laws which are naturalist-based.

Copyright's L&Es can operate as an open-list or a closed-list system. This section addresses the different approaches towards copyright limitations. First, it exposes the strengths and weakness of each system. By doing so, it incorporates examples of jurisdictions in each subsection. It aims to provide a critical perspective for different types of approaches and the implications these have for implementing copyright flexibilities. Following on it argues that the inefficiencies of open and closed systems stress the urge to revisit those system's structure. With this background in mind, it supports the hybrid model as a bridge to balance between reliability and adaptability. First, this section will study the systems available and its main examples, and it will explore their strengths and their weakness. The open-list or non-exhaustive system consists of a list of Acts which describe certain conditions where an exclusive right can be restricted. This list provided by law exemplifies cases of non-infringement, instead of limiting them. In this case, the list serves as a general guideline in which other limitations can also be considered. In the closed-list system the list of permitted acts provided by the law is exhaustive. In this system the acts are enumerated, a work has protection if it can

³⁷⁴ Pierre Sirinelli, 'Exceptions and Limits to Copyright and Neighboring Rights Workshop on Implementation Issues of the WIPO Copyright Treaty (WCT) and The WIPO Performances and Phonograms Treaty (WPPT)' (1999)
<www.wipo.int/edocs/mdocs/copyright/en/wct_wppt_imp/wct_wppt_imp_1.pdf> accessed 22 February 2017.

³⁷⁵ *ibid.*

be accommodated in at least one of the pre-existent categories.

3.4.1 Open system of limitations

A system is open when the list of considerations provided by the law exemplifies cases of non-infringement. In this case, the list serves as a general guideline in which other limitations may be considered. An open system has the advantage of being flexible and the disadvantage of having less clarity on which cases are allowed under the law.³⁷⁶ The fair use is an affirmative defence to claims of copyright infringement, in which the defendant is entitled to show that his use is fair.³⁷⁷ Under the fair use defence ‘any copying of copyrighted material done for a limited and ‘transformative’ purpose, such as to comment upon, criticize, or parody a copyrighted work’ is allowed regardless of the authorization of the owner of the intellectual property.³⁷⁸ The fair use doctrine is used by the United States³⁷⁹, Israel³⁸⁰ and Singapore³⁸¹. In order to provide further considerations of the open-list approach, this study focuses in the following sections on the American fair use system and concludes by presenting its weaknesses and negative sides.

3.4.1.1 United States “Fair Use”

The United States has adopted a fair use doctrine system of limitations to copyright. Hence, it is pointed out as a ‘prime example’ of a concise and open list of

³⁷⁶ Colombet, *Major Principles of Copyright and Neighbouring Rights in the World – A Comparative Law Approach* (UNESCO 1987) 50; Pierre Sirinelli, ‘Exceptions and Limits to Copyright and Neighboring Rights Workshop on Implementation Issues of the WIPO Copyright Treaty (WCT) And The WIPO Performances and Phonograms Treaty (WPPT)’ (1999)

<www.wipo.int/edocs/mdocs/copyright/en/wct_wppt_imp/wct_wppt_imp_1.pdf> accessed 22 February 2017.

³⁷⁷ Stephen Fishman, *The Copyright Handbook: What Every Writer Needs to Know* (13th edn, NOLO 2017) 251-254.

³⁷⁸ Rich Stim, ‘Copyright and Fair Use’ (2010) <<http://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/>> accessed 28 October 2016.

³⁷⁹ US Code, t 17, s 107 (US).

³⁸⁰ Copyright Act of Israel 2007, s 19 (IL).

³⁸¹ Copyright Act 1987 of Singapore (revised 2006) division III, 35 (SG).

limitations.³⁸² The earliest mention of ‘fair dealing’ on an American case dates from 1869³⁸³, later the legal term acquired statutory protection in 1976.³⁸⁴ Fair use is a complex legal term in which tenuous lines define whether a use qualifies the lawful requirements or incurs an infringement.³⁸⁵ The United States’ fair use is considered here under four elements: ‘the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes (1); the nature of the copyrighted work (2); the amount and substantiality of the portion used in relation to the copyrighted work as a whole (3) and the effect of the use upon the potential market for or value of the copyrighted work (4)’.³⁸⁶ Theoretically, this doctrine is admissible to cover all types of rights derived from author’s rights. In practice, a predominant part of American lawsuits alleging the fair use defence covers the topics of reproduction rights and derivative works.³⁸⁷ Those factors carry distinct weight in a case-by-case basis.³⁸⁸

The first element of interpretation is the purpose for and character of the use.³⁸⁹ A copyrighted material can be used for several purposes. As an illustration, it foments research when it can be used by other users rather than the author. Under the first element, a use has higher chances of being fair if it is closely related to public interest, and consequently, further to sole commercial aims.³⁹⁰ This element considers the intentions

³⁸² Irini Stamatoudi and Paul Torremans, *EU Copyright Law: A commentary* (Edward Elgar 2014) 439

³⁸³ *Lawrance v Dana [1869]* Massachusetts Circuit Court 15 F. Cas. 26.

³⁸⁴ US Copyright Act of 1976, which was followed by additional enactments, such as the Digital Millennium Copyright Act (US).

³⁸⁵ Martine Courant Rife, ‘The Fair Use Doctrine: History, Application, and Implications for (New Media) Writing Teachers’ (2007) 24(2) *Computers and Composition* 154, 155.

³⁸⁶ US Code, t 17, s 107 (US).

³⁸⁷ Jane Ginsburg, ‘Chronique des Etats Unis: L'evolution du Droit D'auteur Depuis 1990’ (1993) 158 *Revue Internationale Du Droit D'auteur* 133, 134.

³⁸⁸ Stephen Fishman, *The Copyright Handbook: What Every Writer Needs to Know* (13th edn, NOLO 2017) 251-254.

³⁸⁹ US Code, t 17, s 107, (1) (US).

³⁹⁰ John Henry Merryman, Stephen K Urice and Albert E Elsen, *Law, Ethics and the Visual Arts* (5th edn, Kluwer Law International 1998) 559-561.

behind the copyist's act, this element is further explored in the judgments of *Campbell v. Acuff-Rose Music Inc.*³⁹¹ and *Leibovitz v. Paramount Pictures Corp.*³⁹² Currently, the first factor has been considered the most significant element of interpretation. Based on the Google Books case, the court recognized the importance of commercial intermediaries in helping society by facilitating access to knowledge.³⁹³ This decision highlights the first element of whether there is the transformative use as a key component on a fair use case.³⁹⁴

The second element of interpretation considers the nature of the copyrighted work.³⁹⁵ This element seeks to balance the demand for information from society and the relevance of propagating facts to the public, by supporting the notion that a copyrighted material which is more closely related to pure factual information should receive weaker protection than works, that assemble more elements of fiction.³⁹⁶ This argument suggests that fictional works demand greater creativeness, which should receive in return stronger copyright protection.

The third element of interpretation considers the extent of the copied work.³⁹⁷ A copy that uses more than what is indispensable should not be considered fair.³⁹⁸ A

³⁹¹ This case decided whether a parody of Roy Orbison's from the song 'Oh Pretty Woman' infringed the copyright of the original song. The US Supreme Court decided that the part that is copied should focus more on the transformative nature of the use than on its commercial aim. *Campbell v. Acuff-Rose Music* (92-1292), 510 US 569 (1994).

³⁹² In this case, a film company used a well-known photograph of Demi Moore while she was pregnant, inserting the head of Leslie Nielsen instead. The decision favoured the parodist, indicating that fair use also applies to advertising purposes. Further, it ruled that the parody did not harm the potential market of the original work. *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214 (SDNY 1996).

³⁹³ Kelvin Hiu Fai Kwok, 'Google Book Search, Transformative Use, and Commercial Intermediation: An Economic Perspective' (2015) 17(1) *Yale Journal of Law and Technology* 283, 307.

³⁹⁴ *Authors Guild, Inc. v. Google Inc* [2013] USSC SDNY Supp. 2d 282, 294 (US).

³⁹⁵ US Code, t 17, s 107(2) (US).

³⁹⁶ Rich Stim 'Measuring fair use: the four factors' (2010) < http://fairuse.stanford.edu/overview/fair-use/four-factors/#the_nature_of_the_copyrighted_work > accessed 28 October 2016.

³⁹⁷ US Code, s 107(3) (US).

³⁹⁸ Anne Lepage, *Overview of exceptions and limitations to copyright in the digital environment* (e-Copyright Bulletin January – March, UNESCO 2003) 6-7.

defendant's fair use claim has higher chances of being considered admissible if the amount of copied material is minimal, or the least amount possible. This factor considers the quantity and the relevance³⁹⁹ of what is being taken.⁴⁰⁰ It allows the use of small parts of a copyrighted material, especially if those parts are not the centre of the work, otherwise this will weight against the recognition of a fair use defence. The recommendation of not copying the core part of a work takes a different consideration in cases of parody.⁴⁰¹ Copying is an essential element in parodies. Thus, the amount of copied material in this derivative type of work is more flexible than in other forms of copyright limitations. Nonetheless, parodies are still submitted to this element of interpretation. A previous study examining parodies' treatment under seven jurisdictions identified nine key factors of permitted parodies.⁴⁰² In fact, one of the criteria is 'parody must not use more of the original work than necessary'.⁴⁰³

The fourth element is the effect caused by third-party use to the potential market of the original work.⁴⁰⁴ The scope of this factor is to examine above and beyond trivial consequences of the act of copying.⁴⁰⁵ It also explores the implications that the use would cause to the owner of the intellectual property in new and potential markets. This element seeks to harmonize the expected gains that owners of the copyrighted work would lose

³⁹⁹ The relevance or quality of the amount copied should not substitute nor represent a key component of the copyrighted work.

⁴⁰⁰ Stephen Fishman, *The Copyright Handbook: What Every Writer Needs to Know* (13th edn, NOLO 2017) 251-254.

⁴⁰¹ The Supreme Court of the United States on *Campbell v. Acuff-Rose Music* (510 US 569 (1994)). It has decided that 'the heart is also what most readily conjures up the [original] for parody, and it is the heart at which parody takes aim'.

⁴⁰² Dinusha Mendis and Martin Kretschmer, 'The Treatment of Parodies Under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles' (Intellectual Property Office, Newport, UK, 2013) < <http://eprints.bournemouth.ac.uk/21881/1/ipresearch-parody-report2-150313.pdf>> accessed 15 October 2016.

⁴⁰³ *ibid* 47.

⁴⁰⁴ US Code, t 17, s 107(4).

⁴⁰⁵ Stephen Fishman, *The Copyright Handbook: What Every Writer Needs to Know* (13th edn, NOLO 2017) 251-254.

due to fair use, as well as noting the advantages of the use to public interest. It is to be expected that works consisting in the employment of greater transformation use have less negative impact on potential markets for the original work.⁴⁰⁶ When considering parodies however, this element should be taken from a different perspective. The relation between a parody and a resourced material can impact the market of the original work in various ways. A previous study investigated the effect of parody works on YouTube and commercial content.⁴⁰⁷ Among the research's main findings, it indicated parodies and original works were positively related.⁴⁰⁸

An open-list system allows greater room for interpretation of copyright's limitations. It considers non-enumerated uses from third-parties, which is a key point of diversion from other approaches.⁴⁰⁹ Open-list approaches offer greater flexibility and comprehensiveness of protection.⁴¹⁰ Other advantages provided by an open-list system are: uncomplicated frameworks and a straightforward application. This method when compared to a system of enumerated permissible clauses allows constant re-examination. Some closed-list countries attempt to allocate non-enumerated clauses due to the lack of creativeness on the assessment of permitted acts. The restraints of a closed-list approach will be discussed in the next section.

A flexible system can offer more possibilities of permitted uses. Nonetheless, no system is beyond criticism. Uncertainty might trigger an overprotective behaviour on

⁴⁰⁶ *ibid.*

⁴⁰⁷ Kris Erickson, *Evaluating the impact of parody on the exploitation of copyrighted works: An empirical study of music video content on Youtube* (Project Report, Intellectual Property Office UK 2013).

⁴⁰⁸ *ibid.*

⁴⁰⁹ Sergio Branco, 'Brazilian Copyright Law and How It Restricts the Efficiency of the Human Right to Education' (2007) 4(6) *International Journal on Human Rights* 114, 124.

⁴¹⁰ Tanya Aplin, 'Subject Matter' in Estelle Derclaye, *Research Handbook on the Future of EU Copyright* (Research Handbooks in Intellectual Property Series, Edward Elgar 2009) 71-75.

users.⁴¹¹ In fact, a classic case which illustrates this situation is Jon Else's documentary about the Wagner' Rings Cycle. The filmmaker successfully achieved permission to use a 4.5-second shot of The Simpsons from the creator of the television show, Matt Groening, and Gracie Films. Jon Else attempted to receive permission from Fox Films, a Gracie Films affiliated company, which conditioned the permission to a payment fee of ten thousand dollars.⁴¹² The few seconds recorded should be admissible as fair use. Nonetheless, Jon Else opted to avoid a lawsuit and used a recording of his own. Open-list systems have higher capacity to adapt to new technologies. However, answering simple issues can be challenging due to unclear boundaries of a user's rights.⁴¹³ After analysing fair use, the following sections continue investigating other types of copyright limitations. The next section presents the closed-list system of limitations.

3.4.2 Closed system of limitations (enumerated permissible clauses)

The closed-list system of limitations to copyright is the approach often adopted in countries descending from a civil law tradition.⁴¹⁴ It is characterized by an exhaustive list of limitations. This approach is adopted in China⁴¹⁵, France⁴¹⁶, Ireland⁴¹⁷ and Netherlands⁴¹⁸. The EU Copyright Directive/2001⁴¹⁹ follows the same system of

⁴¹¹ Robert McChesney, Russell Newman, Ben Scott and Bill Moyers, *The Future of Media: Resistance and Reform in the 21st Century* (Seven Stories Press 2005) 3-10; Sergio Branco, 'Brazilian Copyright Law and How It Restricts the Efficiency of the Human Right to Education' (2007) 4(6) *International Journal on Human Rights* 114, 122; Neil Weinstock Netanel, *Copyright's Paradox* (Oxford University Press 2008) 66.

⁴¹² Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (The Penguin Press 2004) 81.

⁴¹³ Sergio Branco, 'Brazilian Copyright Law and How It Restricts the Efficiency of the Human Right to Education' (2007) 4(6) *International Journal on Human Rights* 114, 126.

⁴¹⁴ Irini Stamatoudi and Paul Torremans, *EU Copyright Law: A Commentary* (Edward Elgar 2014) 440; 465-446.

⁴¹⁵ Chinese Copyright Law 2010, art 22 (CN).

⁴¹⁶ French Intellectual Property Code (consolidated at 17 March 2017), art L122-5 (FR).

⁴¹⁷ Irish Copyright & Related Rights Act 2000, chs 6, 50-51 (IE).

⁴¹⁸ Copyright Act of Netherlands 1912 (amended by Act of October 27, 1972) s 6, ch 1 (NL).

⁴¹⁹ 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, art 5.

limitations. Brazil's system of limitations is inspired by the continental European system.⁴²⁰ For the purpose of providing further examination of the enumerated permissible clause doctrine, this study focuses on the EU Copyright Directive/2001 and Brazil.

3.4.2.1 European Union Copyright Directive/2001

Much has been written about whether the EU copyright legislation adopts an open or closed system of limitations.⁴²¹ Another point of conflict seems to stand between the closed-list clause on Recital 32 and the 'grandfather' clause on Article 5(3)(o). In one view, scholars seem to agree that the EU Directive opted for an enumerated list of L&Es. This is the argument chosen for the purpose of this study. It is a closed-list system of limitations to copyright. In this sense, Recital 32 seems to elucidate EU copyright legislation.⁴²² According to the Directive, on Article 5 there is one mandatory exception⁴²³ and 20 other clauses for member countries to 'pick and choose'. Among the 'pick and choose' clauses, five relate to the author's reproduction right, and the 15 clauses left covers the reproduction right and the author's right to communicate or to make available to the public.⁴²⁴ The aforesaid Article 5 of the EU Copyright Directive of 2001, has received much criticism.⁴²⁵ As an example, the argument that unlike previous European Copyright legislation, article 5 was not based on deep comparative law

⁴²⁰ Sergio Branco, 'Brazilian Copyright Law and How It Restricts the Efficiency of the Human Right to Education' (2007) 4(6) *International Journal on Human Rights* 114, 127.

⁴²¹ Mireille van Eechoud, Bernt Hugenholtz, Lucie Guibault, Stef van Gompel, Natalie Helberger, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Wolters Kluwer 2009) 307.

⁴²² Irini Stamatoudi and Paul Torremans, *EU Copyright Law: A commentary* (Edward Elgar 2014) 445.

⁴²³ Ephemeral copies, 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, art 5 (1).

⁴²⁴ Irini Stamatoudi and Paul Torremans, *EU Copyright Law: A commentary* (Edward Elgar 2014) 1130.

⁴²⁵ *ibid* 446-447.

research nor presented as an express and clear policy.⁴²⁶ Therefore various points are left unclear on EU Copyright laws on the application of copyright L&Es.

3.4.2.2 Brazil

Brazil adopts a closed-list approach of limitations to copyright. Certain historical facts played an important role on Brazilian adoption of an exhaustive list towards L&Es of Copyright. Brazil is a former Portuguese colony⁴²⁷, and Portugal follows civil law⁴²⁸. Consequently, Brazilian law was influenced by the Roman-Germanic tradition. Civil law countries tend to adopt clauses extremely restrained in scope and restricted to acts specific.⁴²⁹ The Brazilian legal system is mainly based on written laws, such as code and statutes.⁴³⁰ In fact, the Brazilian Constitution of 1988, a legal document which prevails over all other rules, is of considerable length and extremely descriptive. As a result of this legal structure, common practices and case law have a narrow scope of application; mostly filling eventual gaps that can arise from conflicts of laws.⁴³¹ Although Brazil has not followed a *stare decisis* doctrine, certain judicial decisions can have exceptionally binding effects.⁴³² As an example, the Brazilian Supreme Federal Court can issue a legal document with binding effect (*súmula vinculante*, in Portuguese).⁴³³ Furthermore,

⁴²⁶ Trevor Cook, 'Exceptions and Limitations in European Union Copyright law' (2012) 17 *Journal of Intellectual Property Rights* 243, 243-244.

⁴²⁷ Celso Campilongo, 'History and Sources of Brazilian Law' in Fabiano Deffenti and Welber Oliveira Barral (eds), *Introduction to Brazilian Law* (Kluwer Law International 2011) 15-24.

⁴²⁸ Steven Vago and Steven E Barkan, *Law and Society* (11th edn, Routledge 2017) 7-15.

⁴²⁹ Pamela Samuelson 'Justification for Copyright Limitations and Exceptions' in Ruth L. Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University press 2017) 45.

⁴³⁰ Brazil has many codes such as: The Civil Code 2002, The Penal Code 1940 and Consumer's Protection Code 1990. Two examples of statutes in Brazil are the Statute of the Child and Adolescence 1990 and The Statute of the Elderly 2003.

⁴³¹ Edilenice Passos, 'Update: Doing Legal Research in Brazil' (2015) <www.nyulawglobal.org/globalex/Brazil1.html> accessed 30 September 2017.

⁴³² *ibid.*

⁴³³ Brazilian Constitution 1988 (amended by Constitutional Amendment 45/2004), art 103-A 'The Federal Supreme Court may, ex officio or upon request, upon decision of two thirds of its members, and following reiterated judicial decisions on constitutional matter, issue a *súmula* (restatement of case

author's rights in Brazil are heavily influenced by *droit d'auteur* rationality. Those conditions have resulted in an overprotection of author's rights in Brazil which is also reflected by an exhaustive list of limitations to copyright.

Brazilian lawmakers designed copyright protection based on two premises: intellectual works must operate in an open-list system (1) and limitations to copyright must operate in a closed-list system (2).⁴³⁴ According to the first premise, copyright subject matter can cover works not listed by a statutory instrument. As such, a non-exhaustive interpretation provides flexibility to the system protecting new types of works. Brazilian lawmakers traditionally assume that a broad protection in this case best represents the creative nature of copyright. According to the second premise, third-party uses must have narrow interpretation, including solely permitted acts defined by law. The Brazilian closed-list system of limitations reflects a well-established practice to overprotect author's rights over user's rights.⁴³⁵ This trend is evident in the former Copyright Law from 1973⁴³⁶ and in the current Brazilian Copyright Law from 1998⁴³⁷. Limitations to copyright are allocated in Articles 46 to 48 and in Article 99.⁴³⁸

Since 2005 the Brazilian Ministry of Culture, at the time led by Gilberto Gil⁴³⁹, has promoted events to discuss changes in policy towards author's rights. From 2007 to 2010, the Brazilian Government promoted conferences and meetings joined by the artistic community and the private sector to discuss and reform Brazilian Copyright Law

law) which, as from publication in the official press, shall have a binding effect upon the lower bodies of the Judicial Power and the direct and indirect public administration, in the federal, state, and local levels, and which may also be reviewed or revoked, as set forth in law. (CA No. 45, 2004)' (BR).

⁴³⁴ João Carlos de Camargo Eboli, 'Direito Autoral - Limites À Proteção' (2007)

<www.buscalegis.ufsc.br/revistas/files/anexos/27759-27769-1-PB.pdf> accessed 30 September 2017.

⁴³⁵ *ibid.*

⁴³⁶ Brazilian Copyright Law (No 5,988) 1973 (BR).

⁴³⁷ Brazilian Copyright and Neighbouring Rights Law 1998 (BR).

⁴³⁸ *ibid* arts 46-48, 99.

⁴³⁹ Minister of Culture from January 2003 to July 2008.

(1) and to produce a draft for a new and modern law on author's rights in the country (2). As an example, Gilberto Gil promoted a National Forum of Copyright in 2007. In 2010, the Ministry of Culture, at the time led by Juca Ferreira⁴⁴⁰, submitted the draft to public consultation⁴⁴¹. Meanwhile, former President Lula signed a law in Brazil creating the National Cultural Plan with goals for the next 10 years.⁴⁴² Among the objectives of the Law, it stated the urge to revise Copyright Law⁴⁴³ as well as its limitations and exceptions, which no longer suited current stages of technology and communication.⁴⁴⁴ Moreover, the bill incorporated changes at the current chapter of limitations, to become a user-friendly law.

The Brazilian project to reform copyright laws faced several drawbacks. Since the beginning, the proposal has faced strong opposition from the music industry lobby. The first substantial challenge arose after the Brazilian presidential election of 2010, which led Dilma Rousseff's access to power. The president's choice to nominate Ana de Hollanda for the Ministry of Justice highlighted a sensible change of policy towards author's rights. So far, previous Ministers, Gilberto Gil and Juca Ferreira, supported copyright reform. However, this new Minister of Justice had a close relation with ECAD, private CMO, and the music industry. It is worth emphasizing that the private CMO and the music industry were the biggest opponents to a pro-user change. During her period of Ministry, Ana de Hollanda took anti-reform measures such as: removing the creative

⁴⁴⁰ Minister of Culture from July 2008 to December 2010, in the second term of President Luiz Inácio Lula da Silva. And from January 2015 to May 2016.

⁴⁴¹ It took almost 3 months and resulted in 'more than 80 sectoral meetings were organized throughout Brazil, six national seminars and one international, which involved more than 10,000 interested parties and the study of legislation in more than 30 countries'.
<www2.cultura.gov.br/consultadireitoautoral/tag/revisao-da-lei-de-direitos-autorais/> accessed 18 October 2017.

⁴⁴² Brazilian Law No 12,343 (Creates the National Plan of Culture, creates the National System of Information and Cultural Indicators and gives other measures) 2010 (BR).

⁴⁴³ *ibid* 1.9.2 Annexe National Plan of Culture: Guidelines, Strategies and Actions, Law (BR).

⁴⁴⁴ *ibid*. 1.9.4.

commons logo from the website of the Ministry of Justice and firing Marcos Souza, who was key to the project of reforming Brazilian Copyright Law, from the board of the Intellectual Rights Committee.⁴⁴⁵ After those unpopular measures, the Minister was berated by several critics and received vast disapproval from the artistic community. In an attempt to safeguard her position, she proposed a revision to the Bill's draft in 2011. However, this political move failed to recover her reputation; therefore, a substitute for the position was inevitable.⁴⁴⁶ The new Minister of Justice, Marta Suplicy, rehired Marcos Souza. Such action gave genuine expectations to Brazilian citizens of finally witnessing a conclusion to the project which would lead to the next step (submitting the Bill to the Congress). Following this, the draft was further modified. Nevertheless, closure was not reached either by Marta or those who succeeded her. Thus, the several changes of Ministers of Culture became another barrier to the project's development. In fact, since January 2001 to date, Brazil has nominated six Ministers of Culture.⁴⁴⁷

In 2014, Brazilian copyright reform encountered another challenging situation delaying even more the project's course. The Ministry of Culture embraced a different project in 2009, which overshadowed copyright reform. This other project introduced a new law named the Brazilian Internet Law⁴⁴⁸ (Marco Civil⁴⁴⁹, in Portuguese), which regulated rights and obligations within the digital environment. This was necessary as

⁴⁴⁵ Alexandre Bazzan, Beatriz Macruz, 'Ministra barra a reforma da Lei do Direito Autoral' (Minister blocks Copyright Law reform) (2011) *Jornal Laboratório do Curso de Jornalismo* <<https://revistas.pucsp.br/index.php/contraponto/article/download/9726/7235>> accessed 18 October 2017.

⁴⁴⁶ The situation became more problematic after Ana de Hollanda sent a letter to the Ministry of Planning criticizing the reduction on the Ministry of Culture's budget.

⁴⁴⁷ As an example, Ana Cristina Wanzeler (from November to December 2014) and Joao Batista de Andrade (May to June 2017).

⁴⁴⁸ Also referred as The Civil Rights Framework for the Internet and Brazil's Internet Bill of Rights.

⁴⁴⁹ Brazilian Internet Law (Law No 12,965) 2014 (BR).

there were already cases of misconduct in the cybernetic environment.⁴⁵⁰ Addressing those events, a Brazilian Congressman, Luiz Piauhyllino, presented a Bill in 1999 to the Chamber of Deputies addressing criminal liability on the Internet. It took more than 13 years for Congress to approve it.⁴⁵¹ Brazilian experience from the dictatorial period added to a recent re-democratization, which had received popular execration. This was overturned because the Bill regulating criminal liability on the Internet was approved before the one regulating rights and obligations within the digital environment. At the same time, Edward Snowden's case aggravated the concerns of virtual security.

The former president of Brazil, Lula, gave a speech during the 10th edition of the International Forum of Free Software (Forum Internacional de Software Livre, in Portuguese) assigning the Ministry of Culture accountable to resolve the issue. In response, the Office of Legislative Matters (Secretaria de Assuntos Legislativos, in Portuguese) from the Ministry of Justice in partnership with the Centre of Technology and Society (Centro de Tecnologia e Sociedade, in Portuguese) promoted public consultations in 2009 and 2010 to discuss a code of conduct for use on the Internet in Brazil. The Ministry of Culture used the findings of from the Copyright reform consultations to conclude the Marco Civil Law. Between 2010 and 2012, the Intellectual Rights Committee (Diretoria de Direitos Intelectuais, in Portuguese) conducted further public consultations aimed at reforming Copyright Law. However, the Brazilian

⁴⁵⁰ Cicarelli's Case Agravo de Instrumento No 472.738.4, (TJSP) 2006 For the full decision See *Jornal Jurid*, 'Daniella Cicarelli. Pedido de Antecipação de Sentença por Violação do Direito à Imagem, Privacidade, Intimidade e Honra de Pessoas Fotografadas e Filmadas em Posições Amorosas em Areia e Mar Espanhóis' (*Jornal Jurid*, 3 October 2006) <<https://www.jornaljurid.com.br/print/noticias/daniella-cicarelli-pedido-de-antecipacao-de-sentenca-por-violacao-do-direito-a-imagem-privacidade-intimidade-e-honra-de-pessoas-fotografadas-e-filmadas-em-posicoes-amorosas-em-areia-e-mar-espanhois>> accessed 10 July 2018.

⁴⁵¹ Bill No 84 1999 turned into Law No 12,735 2012 after a public commotion when a Brazilian actress, Carolina Dickmann, had nude photos stolen from her personal computer. The law is also referred as Carolina Dickmann's Law (BR).

presidential election of 2014 proved to be another drawback to reform. During this campaign, candidates avoided addressing controversial issues, such as the copyright reform. And thus, the copyright reform lost importance.

The most recent blow to the Copyright Law reform in Brazil happened during the approval of a Bill further regulating collective management of author's rights. In 2013, a separate initiative covering CMOs amended the national Copyright Statute. This amendment to Brazilian Copyright Law inserted and modified some articles which exclusively addressed CMOs and the ECAD⁴⁵². It is worth noting that the ECAD is a civil society that belongs to the private sector and has a non-economic and non-profit status. Additionally, it is responsible for the collection and distribution of royalties from public performance rights in Brazil.⁴⁵³ This initiative was derived from a public investigation in 2011, which targeted the ECAD. The CPI investigated claims of irregularity and crimes practiced by the CMO. The investigation resulted in public repercussion, which made authors complain and pressure the Government to introduce more transparency. As a result, a Bill was submitted by the Senate and later the Copyright Law amendment was approved. Collective management of author's rights was one of the strongest points leading the discussions and pushing the movement forward. Gilberto Gil's proposal to reform copyright law already outlined plans for tougher inspections to private collective management organizations, such as the ECAD. In 2013, a law was approved further regulating CMOs and the ECAD.⁴⁵⁴

Another attempt to reform the law was made in 2012 by a Brazilian Congressman.

⁴⁵² ECAD was created by the Brazilian Copyright Law (No 5,988) 1973 (BR).

⁴⁵³ ECAD's Statute, art 1 <www.ecad.org.br/pt/direito-autoral/Legislacao/Paginas/Estatuto-do-Ecad.aspx> accessed 10 February 2016.

⁴⁵⁴ Brazilian Copyright and Neighbouring Rights Law (amended by the Law n. 12,853 of 2013) 1998 (BR).

This Bill was presented to the Chamber of Deputies⁴⁵⁵ with further proposals for reforming Brazilian Copyright Law. This Bill aimed at expanding educational, didactic and informational purpose rights, as well as research and creative resources usage, and to provide appropriate exceptions for personal use.⁴⁵⁶ It also proposed full integration of legislation with the digital world. After many formal procedures within the Chamber of Deputies, the Bill was archived in January 2015. The latest information using the online search tool of the Chamber of Deputies shows however that in March of the same year (2015), the Bill was removed from the archives. This does not provide any real clarification on whether the Bill will be revised at congress or not. As the official website of the Chamber of Deputies does not show any further developments in this matter between March 2015 and September 2017.

The Brazilian copyright system does not truly reflect its social and cultural conditions, especially when taking into consideration the list of limitations on copyright that there are. Brazilian law has a compressed list of limitations to copyright when compared with other countries. Brazil has incorporated part of the list of limitations from the Berne Convention. This Law establishes such high standards of protection that in effect it leads to the mass criminalization of its citizens.⁴⁵⁷ The current law on this matter is inadequate and obsolete as when compared with the previous law of 1973, it is found to be more restrictive.⁴⁵⁸ In 2010, a report evaluated consumer's protection in several

⁴⁵⁵ The Brazilian Legislative branch is named National Congress, which is equivalent to the British Parliament, composed by Chamber of Deputies and Federal Senate.

⁴⁵⁶ Bill No 3,133 (amends, updates and consolidates copyright legislation and makes other provisions) 2012 from the Chambers of Deputies (BR).

⁴⁵⁷ Monica Guise Rosina, 'A Urgente Reforma da Lei de Direitos Autorais Brasileira: Somos Todos Infratores?' (2014) <www.ictsd.org/bridges-news/pontes/news/a-urgente-reforma-da-lei-de-direitos-autorais-brasileira-somos-todos> accessed 30 September 2017.

⁴⁵⁸ João Carlos de Camargo Eboli, 'Direito Autoral - Limites À Proteção' (2007) <www.buscalegis.ufsc.br/revistas/files/anexos/27759-27769-1-PB.pdf> accessed 30 September 2017.

jurisdictions ranking copyright legislations.⁴⁵⁹ Brazilian copyright law had one of the worst performances, scoring just ‘C-’. The report showed a lack of correlation between stronger copyright protection and development. In fact, countries which adopted longer terms of protection were in the worst places. Further, the report showed higher consumer protection is positively correlated to flexible laws.⁴⁶⁰ Based on these findings, Brazilian Copyright Law needs to be studied and reformed.

Unsurprisingly, Brazilian Congress approved an amendment to Copyright Law which exclusively covered CMOs in 2013, despite the fact that these there are preceding initiatives awaiting reform to Copyright Law which still have no closure. However, as a result of the public scandal in 2011 involving the ECAD’s activities, this amendment was approved in record time. What is truly remarkable about these facts is the posture of Brazilian Congressmen, as Congress still prevents the reform from being put forward. Instead, it shows unprecedented efficiency when there is a case of public commotion menacing its prestige. In fact, the most recent version of the draft initiated by the Ministry of Justice brings new forms of limitation, more freedom to users regarding digital files and indicates that a general clause could be inserted within the system, such as the one in America.⁴⁶¹ If it were to be concluded, this document would provide greater alignment of the Brazilian copyright list of limitations with the examples presented by the Berne Convention. Brazil is experiencing an unprecedented period in Copyright history. The reform has the capacity of promoting Brazil to a leading position in terms of L&Es and

⁴⁵⁹ Consumers International, 2010 IP Watchlist Report (2010).

⁴⁶⁰ Tatiana de Mello Dias, ‘Brasil: Uma das Piores Legislações de Direitos Autorais do Mundo’ (2010) <<http://link.estadao.com.br/noticias/geral,brasil-uma-das-piores-legislacao-de-direitos-autorais-do-mundo,10000044383>> accessed 30 September 2017.

⁴⁶¹ Monica Guise Rosina, ‘A urgente reforma da Lei de Direitos Autorais Brasileira: somos todos infratores?’ (2014) <www.ictsd.org/bridges-news/pontes/news/a-urgente-reforma-da-lei-de-direitos-autorais-brasileira-somos-todos> accessed 30 September 2017.

would make it a prime example for other nations, with emphasis on developing countries.⁴⁶² For this reason, a new and modern Copyright Law in Brazil should be encouraged. This study also strongly supports the insertion of more flexibility within Brazilian Copyright legislation.

3.4.3 Hybrid system

A system is hybrid when it embodies aspects from both open-list and closed-system approaches. This doctrine provides a two-fold protection to copyright limitations; a predefined list of non-infringement uses and a general clause of interpretation. A hybrid system type of approach to copyright limitations embodies the previous two approaches (open-list and closed list). It is a hybrid system which consists of legitimate certain uses of copyrighted material that has been adopted in several countries including the: United Kingdom⁴⁶³, Canada⁴⁶⁴, Australia⁴⁶⁵ and Taiwan⁴⁶⁶. In order to provide further consideration of the hybrid approach, this study focuses in the next sections on the UK fair dealing system and Canadian fair dealing system concluding by presenting its weakness. The Taiwanese and Australian systems are briefly discussed in this section as follows. Taiwanese Copyright Law provides a fixed system of interpretation from a numerated list of permitted acts from Articles 44-63 and provides flexibility to third-party uses by general provision in Article 65(2), which allows non-enumerated acts.⁴⁶⁷

⁴⁶² Bernt Hugenholtz, 'Flexible Copyright: Can the EU Author's Rights Accommodate Fair Use?' in Ruth L Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University press 2017) 275-280.

⁴⁶³ CDPA1988, ch III, Acts Permitted in relation to Copyright Works.

⁴⁶⁴ Canadian Copyright Act (RSC, 1985, c C-42) arts 29-32 (CA).

⁴⁶⁵ Australian Copyright Act 1968 (consolidated as of June 27, 2015) division 3, Acts not constituting infringements of copyright in works (AU).

⁴⁶⁶ Taiwanese Copyright Act has a numerated list of permitted acts on arts 44-63 and a general provision on art 65(2), which allows non-enumerated acts (TW).

⁴⁶⁷ Jerry Jie Hua, *Toward A More Balanced Approach: Rethinking and Readjusting Copyright Systems in the Digital Network Era* (Springer 2014) 164.

Australian copyright law has a list of fair dealing clauses in Article 40 (3) on fair dealing while also provides flexibility for third-party uses under the general provision as given in 40 (2).⁴⁶⁸

3.4.3.1 UK “Fair Dealing”

The UK adopts a fair dealing system of limitations to copyright. The CDPA presents a list of qualified uses of fair dealing including: ‘research or private study’⁴⁶⁹, ‘criticism or review’⁴⁷⁰, ‘reporting current events’⁴⁷¹, ‘quotation’⁴⁷² and ‘caricature, parody and pastiche’⁴⁷³. Despite these listed acts, there are no statutory definition for the expression ‘fair dealing’. The UK fair dealing system compromises predictability, however it compensates for this within the system by increasing flexibility. In this sense, fair dealing allows interpretations according to the circumstances of each given case.⁴⁷⁴ Due to a recent modification of the law, on the 1st October 2014, the UK government introduced a private copying exception in the CDPA.⁴⁷⁵ The exception allowed for works provided in a certain format (CD) to be copied to another format (MP3), provided that the former work was obtained legally and restricted to personal use. The introduction of the private use exception legitimated format-shifting which is a very common practice. However, the Act did not provide a compensation scheme. This particular point fuelled complains from the music industry which resulted in a lawsuit. Afterwards, the High

⁴⁶⁸ Mark J. Davison, Ann L. Monotti and Leanne Wiseman, *Australian Intellectual Property Law* (Cambridge University Press 2008) 309-310, 317-320.

⁴⁶⁹ CDPA, s 29.

⁴⁷⁰ *ibid* s 30(1).

⁴⁷¹ *ibid* s 30(2).

⁴⁷² *ibid* s IZA.

⁴⁷³ *ibid* s 30A.

⁴⁷⁴ UK Government, ‘Guidance: exceptions to copyright’ < www.gov.uk/guidance/exceptions-to-copyright > accessed 30 September 2017.

⁴⁷⁵ CDPA, s 28B inserted (1 10 2014) by The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 (SI 2014/2361), regs. 1(1), 3(1) (with reg. 5).

Court's decision overruled the private use exception, which resulted in the quash of Section 28B of the CDPA.⁴⁷⁶ Consequently, this made format-shifting illegal. Regardless of merit, not fair compensation, this decision underlined the power of big lobbyists pressuring the UK to adopt fewer limitations to copyright. It is worth noting that the mass criminalization of common practices inevitably contributes to the weak enforcement of copyright laws.

Regarding copyright subject matter, the United Kingdom adopts the closed list approach. A closed-list approach defendant can base his argument on fair dealing only if his act relates to at least one of the uses mentioned above.⁴⁷⁷ On the other hand, this method provides greater security to users and right-holders, who are less powerful. Compared with the American system, the list is self-contained and does not accept other uses apart from the ones expressively mentioned by the law. According to *Hubbard v. Vosper*, this legal approach is impossible to define.⁴⁷⁸ This case suggests that fair dealing needs to be analysed case by case. The hybrid system can also operate as an open-list system, when it adopts a broader interpretation that involves categorising, such items as computer programs as literary works⁴⁷⁹ and cinematographic works as dramatic works⁴⁸⁰.

The UK Fair dealing approach, restricts some exceptions⁴⁸¹ for cases where the use is considered to be fair dealing. Based on legal arguments provided by previous court's decisions, it becomes easier to qualify a use as fair dealing if the impact of the use

⁴⁷⁶ s 28B of the CDPA was quashed with prospective effect by the High Court in the case of *R (British Academy of Songwriters, Composers and Authors and others) v Secretary of State for Business, Innovation and Skills* [2015] EWHC 2041 (Admin), 17 July 2015).

⁴⁷⁷ Tanya Aplin and Jennifer Davis, *Intellectual Property Law: Text, Cases and Materials* (3rd edn, Oxford University Press 2013) 230-321.

⁴⁷⁸ *Hubbard v Vosper* [1972] 2 WLR 389, [1971] 1 All ER 1023 CA, [1972] 2 QB 84.

⁴⁷⁹ *SAS Institute Inc v World Programming Limited* [2013] EWCA Civ 1482.

⁴⁸⁰ *Norowzian v Arks Ltd & Anor* (No. 2) [1999] EWCA Civ 3014.

⁴⁸¹ Such as exceptions relating to research and private study, criticism or review, or news reporting.

implies little or no economic loss to the market for the original work. It is however advisable to be prudent; regarding the amount of loss, the lesser the better. Where there is evidence of the relevance of the original work to the use, and the use can be justified, it is possible to support the need to use the original work. These factors vary in importance depending on the case and the type of dealing.⁴⁸²

3.4.3.2 Canadian “Fair Dealing”

Canada adopts a fair dealing approach of limitations to copyright. Canadian copyright law has faced historical changes during the last decades. Those modifications were incorporated within the Legislative and Judicial systems. Canada is leading a progressive view over users broad list of limitations to copyright. The Canadian experience diverges from blocking further laws to narrow user’s permitted acts instead; it encouraged pro-user modification within the law.⁴⁸³ Canadian copyright law states that a work can be copied under the fair dealing use if it is for the purpose of research or private study⁴⁸⁴, criticism or review⁴⁸⁵ and news reporting⁴⁸⁶. In 2012, the Supreme Court of Canada ruled on five copyright decisions.⁴⁸⁷ These rulings were taken before the approval of the Bill C11.⁴⁸⁸ The Supreme Court of Canada has established a two-part

⁴⁸² UK Government, ‘Guidance: exceptions to copyright’ (2017) < www.gov.uk/guidance/exceptions-to-copyright > accessed 30 September 2017.

⁴⁸³ Michael Geist, ‘The Canadian Copyright Story: How Canada Improbably Became the World Leader on User’s Rights in Copyright Law’ in Ruth L. Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University press 2017) 169-174.

⁴⁸⁴ Canadian Copyright Act (RSC, 1985, c C-42), 29 (CA).

⁴⁸⁵ *ibid* 29.1.

⁴⁸⁶ *ibid* 29.2.

⁴⁸⁷ *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231 [Entertainment Software]; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283 [Rogers]; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326 [SOCAN]; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345 [CCLA]; *Re: Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38, [2012] 2 SCR 376 [Re: Sound] (CA).

⁴⁸⁸ Bill C 11 or Copyright Modernization Act received Royal Assent in 29th June of 2012 (CA).

test. The first test consists in proving the use. The defendant has to provide his reasons to prove that the act in dispute qualifies as one of the fair dealing discriminated uses. The Canadian Supreme Court pointed towards six elements that should be considered when analysing the fairness of dealing as is discussed in this following case.

According to the ruling provided by *CCH Canadian Ltd v. Law Society of Upper Canada*, a given case should consider six non-exhaustive factors to establish whether an act can be pled under fair dealing clauses. The first element is the purpose of the dealing. According to the Canadian Court ‘allowable purposes should not be given a restrictive interpretation, or this could result in the undue restriction of users’ rights’.⁴⁸⁹ The second element is the character of the dealing. In this matter, the Court decided that ‘one should ask whether there was a single copy or were multiple copies made. It may be relevant to look at industry standards’.⁴⁹⁰ The third element is the amount of the dealing. The Court stated that ‘both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness’.⁴⁹¹ Thus, the amount copied from the original work shall observe different guidelines depending on the type of the use. The fourth element is the alternatives to the dealing. The Court considered the question if a ‘non-copyrighted equivalent of the work’ is available?⁴⁹² The fifth element is the nature of the work. In this sense, the Court ruled that:

if a work has not been published, the dealing may be more fair, in that its reproduction with acknowledgement could lead to a wider public dissemination of the work – one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was

⁴⁸⁹ *CCH Canadian Ltd v Law Society of Upper Canada* (2004) 1 S.C.R. 339 (CA).

⁴⁹⁰ *ibid* 38.

⁴⁹¹ *ibid* 39.

⁴⁹² *ibid* 39.

unfair.⁴⁹³

The sixth element is the effect of the dealing on the work. The implication of the act of copying the original work on the market should be considered. The Court added that:

Although the effect of the dealing on the market of the copyright owner is an important factor, it is *neither the only factor nor the most important factor* that a court must consider in deciding if the dealing is fair. (emphasis given)⁴⁹⁴

The next section discusses L&E and moral rights.

3.5 L&Es and Moral Rights

The scope of copyright protection varies among jurisdictions. Regardless of those variances, copyright protection is addressed in two categories of rights: economic rights and moral rights.⁴⁹⁵ Economic rights secure copyright owners' interest to explore the work commercially.⁴⁹⁶ Moral rights give authors an exclusive control over certain acts, which relates to non-economic interests.⁴⁹⁷ Moral rights are mentioned in Article 6 (bis) of the Berne Convention.⁴⁹⁸ Interestingly, the UK adopted a modified version, which has been the target of criticism. In France, Moral rights are particularly strong.⁴⁹⁹ French law on authors' rights is particularly important. The law on authors' rights as arose in France has adopted a dualist approach with economic rights⁵⁰⁰ (property rights) and moral rights

⁴⁹³ *ibid* 40.

⁴⁹⁴ *ibid* 40.

⁴⁹⁵ Richard A Spinello and Maria Bottis, *A defence of Intellectual Property Rights* (Edward Elgar 2009) 81-82, 93-94.

⁴⁹⁶ WIPO, *Understanding Copyright and Related Rights* (first published 2005, 2nd edn, WIPO 2016)

⁴⁹⁷ *ibid*.

⁴⁹⁸ Berne Convention, art 6 (bis).

⁴⁹⁹ Martine Courant Rife, 'The Fair Use Doctrine: History, Application, and Implications for (New Media) Writing Teachers' (2007) 24(2) *Computers and Composition* 154, 159.

⁵⁰⁰ French Intellectual Property Code (consolidated at 17 March 2017), arts L122-1 and L122-12 (FR).

(personality rights) treated differently.⁵⁰¹ From the perspective of national authors' rights, it is the topic of moral rights that has the greatest degree of variance as per its legal framework.⁵⁰² The majority of countries from the European Union (EU) use the denomination of authors' rights, while only the UK and the Republic of Ireland use the term copyright to address the same subject matter.⁵⁰³ This expresses the importance of moral rights as being inalienable.

3.6 Conclusion

The scope of the application of Copyright law has its limitations. In this sense, L&Es are a form of restricting authors' rights. The legal nature of L&Es to copyright helps us to understand that limitations are a vital part of the copyright system. These mechanisms provide a fair balance to author's rights and user's rights. Hence, those flexibilities give oxygen to a system which has clearly revealed its flaws and restrictions as far as delivering better social-economic conditions, especially for those in developing countries and less developing nations. The limitations refer to a positive law regarding a user's legitimate desire to make use of copyrighted works. Users attempting to do this therefore have an objective right or a privilege to do so in the eyes of the law.⁵⁰⁴ It is therefore a delicate issue as often countries will decide to have different systems of Limitations regarding Copyright in line with the country's culture and other conflicting interests between authors and the public. This should be a relevant point for discussion

⁵⁰¹ *ibid* arts L121-1 and L121-9.

⁵⁰² Mike Holderness, 'Moral Rights and Authors' Rights: The Keys to the Information Age', (1998) *The Journal of Information, Law and Technology (JILT)*.

<http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_1/holderness/> accessed 02 February 2015

⁵⁰³ *ibid*.

⁵⁰⁴ Lucie M.C.R. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002) 7-14.

by legislators. There were some attempts to harmonize Copyright internationally, as in the TRIPs agreement, and in Europe too as per the Directive 2004/48/EC on the enforcement of IPRs. Countries' social and economic disparities and the variation of standards of protection among jurisdictions provide a challenge in the progress towards greater harmonization of IPR's and their flexibilities. Current discussions reconsider whether the principle of territorialism needs revision.

There are various forms of restricting author's rights. Brazil, alongside the UK, shares a similar approach towards the legislation of this issue, mainly through exemptions. Brazilian Law allows compulsory licenses exclusively on the field of patents. This study recommends the insertion of a compulsory license clause for copyrighted works. As with the form of limitations, any approach towards limitations, is based primarily on political preferences. While systems have their weaknesses, the hybrid system seems to incorporate the strongest points of both the closed and open systems. Nevertheless, there is room for variation within models, such as in fair dealing clauses used in both the UK and in Canada. Recent changes to Canadian Copyright Law provide valuable input for the incorporation of user-friendly frameworks. In recent years, there have been many discussions about how to reform Brazilian Copyright Law. Those attempts have faced several drawbacks. The amendment of Copyright Law after public discontent with the report on an investigation targeting the Central Office of Collection and Distribution (ECAD) in 2011, resulted in stricter rules and the creation of the mandatory collective management of all public music performances. In Brazil, the climate of political instability in which a president was impeached in 2016 has further delayed any development of these projects. Additionally, the Ministry of Justice undertook another project, which has overshadowed any plans for reform. Another

distraction driving people's attention away from the need for such reform occurred when Brazil hosted two major international events: The World Cup in 2014 and the Olympic Games in 2016. Despite all of these problems which Brazil has faced, there is still a fruitful environment to discuss those proposals. The current law which regulates authors' rights in Brazil is outdated and not suited to purpose due to the following reasons. First, it is outdated simply because the Bill which created this law sat dormant, making no progress at all for a long period in the Congress, and by the time it finally got approved, it failed to reflect the demands emerging from a digital era. Additionally, the document of 1988 was neither discussed properly nor attended to societies' need to insert more user-friendly clauses. Second, the current law uses very general terms, a practice often used in common law countries, as strategically this defines great scope for flexibility. For instance, enabling emphasis to be placed on matters pertaining to the smallest components of a work. Third, Brazil has a TRIPs plus framework towards copyright, and its limitations in a society where knowledge is a private resource, makes it detrimental to the majority of the population who has to comply with such standards of protection. Brazil inserts intellectual property among other constitutional rights, however it does not state its purposes for doing so. Apparently, what may sound unnecessary, fixing IP goals is key to interpreting copyright. This study encourages the modernization of a Copyright Law which incorporates greater flexibility. Mass criminalization is far less beneficial to IPR's enforcement than a user-friendly framework.

CHAPTER 4: Brazilian system of Limitations and Exceptions to Copyright

4.1 Introduction

This Chapter focuses on the Brazilian system of L&Es in order to address one of the research objectives set out in section 1.2. As previously discussed in Chapter 1, there are many flaws in the Brazilian system of L&Es and thus there is a need to properly revise this system and propose changes to it.

In order to render a consistent contribution to legal literature, it aims to deliver critical analyses of Brazilian copyright legislation under the lens of L&Es. This study uses as a methodology the comparative legal research method.⁵⁰⁵ Based on this, it explores the Brazilian framework and surveys other jurisdictions. In this light, some of the comparisons will revisit international treaties of which Brazil is a member.⁵⁰⁶

Intellectual property laws are designed to promote activities considered to be beneficial to society by stimulating creativity and technological progress.⁵⁰⁷ In order to achieve these ends, according to the utilitarian perspective, a copyright system provides monetary reward to authors as a form to compensate them for labour employed. The

⁵⁰⁵ Yntema, H, 'Comparative Legal Research: Some Remarks on Looking out of the Cave' (1956) 54(7) Michigan Law Review 899, 890; Ames Gordley, 'Comparative Legal Research: Its Function in the Development of Harmonized Law' (1995) 43 The American Journal of Comparative Law 555, 566-567; Harold Cooke Gutteridge, *Comparative Law: An Introduction to The Comparative Method of Legal Study and Research* (Cambridge University Press 2015) 1-10.

⁵⁰⁶ Brazil is a member of The World Intellectual Property Organization (WIPO) since 1975. Among the treaties administrated by WIPO Brazil is a member of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) and The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonograms Convention) both since 1961; the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh VIP Treaty) since 2013. However, it not a contracting party of WIPO Copyright Treaty (WCT) nor the WIPO Performances and Phonograms Treaty (WPPT). Brazil was a signatory country of the extinct GATT since 1948 which was then replaced by the World Trade Organization (WTO). In fact, Brazil is a signatory country of the WTO since its begging in 1995; this implies that Brazil is also bounded by the TRIPs Agreement.

⁵⁰⁷ Pierre N Leval, 'Toward a Fair Use Standard' (1990) 103(5) Harvard Law Review 1105, 1107.

rationality of these rights is supported by many theories such as natural rights and utilitarianism. Currently, these rights became stronger during a trend to secure authors' rights, which unbalanced relations with their users. Considering both the importance of authors (the producers of works) and the demand of users, it was necessary to create a new system within the already established copyright system. In this sense, the system of Exceptions and Limitations (E&L) has been designed and inspired by the social and economic background of a given country to find where alternatively the law can better suit its needs.⁵⁰⁸ International treaties recognize the fact that countries' disparities influence the way that it offers general terms of applications and leaves applications to the discretion of each nation. Thus, this system offers a venue to re-establish the 'fair balance' within these forces that can be conflictual, especially when contrasted to fundamental rights.⁵⁰⁹ The objective is to introduce flexibilities to situations authorized by law where an author's economic right is restricted. It provides greater usage for protected works. The law provides a list of works that can be covered by authors' rights, which are not restricted to the rights mentioned in that law.⁵¹⁰

Brazilian Copyright and Neighbouring Rights Law was constructed by the owner-perspective,⁵¹¹ and it is one of the strictest of its kind.⁵¹² Unfortunately, in Brazil, users' rights are not as preserved as they should be. Brazilian Copyright system of L&Es addresses users' rights using mainly three pieces of legislation: The Copyright and

⁵⁰⁸ WIPO, Limitations and Exceptions (WIPO) <www.wipo.int/copyright/en/limitations/> accessed 20 December 2017.

⁵⁰⁹ Christophe Geiger, Jonathan Griffiths, Martin Senftleben, Lionel Bently and Raquel Xalabarder, 'Case Comment Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union: Opinion of the European Copyright Society on the CJEU Ruling in Case C-201/13 Deckmyn' (2015) 46(1) EIPR 93, 94.

⁵¹⁰ Brazilian Copyright and Neighbouring Rights Law 1998, art 7 (BR).

⁵¹¹ Maristela Basso and Maristela Basso Tamagno, *Intellectual Property Law in Brazil* (Wolters Kluwer Law and Business 2010) 5-10.

⁵¹² Leonardo Macedo Poli, *Direito Autoral: Parte Geral* (Del Rey 2008) 21.

Neighbouring Rights Law⁵¹³ (Copyright Law) from 1998 (1), the Penal Code of 1940 altered by the Law No 10,695 from 2003 (2) and the Law on the Protection of Intellectual Property of Software, its Commercialization in the Country, and Other Provisions⁵¹⁴ (Software Law) in 1998 (3). For didactic purposes, this study follows the classification of a previous work,⁵¹⁵ which proposes that Brazilian L&Es are divided into three groups: partial or full reproduction (1), derivative works (2) and performing rights (3).⁵¹⁶ The Brazilian view of the L&E system states that it has to be strictly interpreted, and although the system of L&E was inspired by the Berne Convention, the three-step test was not expressly mentioned by national laws.

In recent decades, countries which are members of the European Union (EU) are being challenged to combine efforts in order to discuss the harmonization of copyright exceptions and limitations. It is noteworthy that the digital revolution has affected the process of constructing government policies. This issue is notably complex within the context of negotiating greater harmonization of L&Es of copyright. There is a good reason to suspect that organisations and individuals advocating in favour of author's rights are a burden to suppress the development of these negotiations. By doing so, these agents safeguard their rights and thus keep profits at a maximum level. Another legitimate concern remains on the disparity evidenced among jurisdiction regarding which exceptions should be recognized and how they should be applied. So far, EU copyright legislation leaves room for its member states to decide on which copyright

⁵¹³ Brazilian Copyright and Neighbouring Rights Law 1998 (BR).

⁵¹⁴ Brazilian Software Law 1998 (BR).

⁵¹⁵ Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, 'Exceptions and Limitations to Copyright in Brazil: A Call for Reform', in Lea Shaver (ed), *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 78.

⁵¹⁶ *ibid.*

exceptions will be inserted on national law.⁵¹⁷ In other words, L&Es on EU are mainly made of ‘pick and choose’ clauses.⁵¹⁸ The Berne Convention approaches this issue under three perspectives: copyright exceptions, outright exceptions and compulsory licenses. The first rationality is illustrated by the permissive of a report on current events⁵¹⁹ and the quotation right⁵²⁰. Apart from these two, L&Es to copyright are not a harmonized space; countries are free to opt for their adoption.

It is worth noting that counterweighting IPRs is particularly beneficial to countries which did not achieved a desirable level of economic development. Copyright fees might be unfeasible to some and requiring a licensing might jeopardize the scarce resources available for negotiation. Thus, in order to address the research objective of this thesis, this chapter explores in detail the Brazilian system of L&Es.

The structure of this chapter is as follows. Section 4.2 deals with the exceptions and limitations regarding partial or full reproduction of the work. There are several topics that fall within this category: news, public speeches, portraits, visually impaired, private copy for personal use, quotation rights, student notes, judicial and administrative proof, work that is not the subject matter, private copies of computer programs as well as partial citation of computer copies. Section 4.3 describes the limitations related to performing rights, which addresses the use of protected works for demonstration purposes, theatrical and musical performances as well as similarity of computer programs. Section 4.4 presents the limitations related to derivative works, which covers the use of paraphrases

⁵¹⁷ Berne Convention, art 9, (2) and TRIPs Agreement, art 13.

⁵¹⁸ Estelle Derclaye, *Research Handbook on the Future of EU Copyright* (Edward Elgar Publishing Ltd 2009); Mireille van Eechoud, P. Bernt Hugenholtz, Stef van Gompel, Lucie Guibault and Natali Helberge, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Kluwer Law International 2011) 104; and Paul Pedley, *Practical Copyright for Library and Information Professionals* (Facet Publishing 2015) 17-18, 35-39.

⁵¹⁹ Berne Convention, art 2 (8).

⁵²⁰ Berne Convention, art 10 (1).

and parodies, material which is open for public inspection as well as software integration. Section 4.5 deals with copyright exceptions for text and data mining and section 4.6 concludes.

4.2 Partial or full reproduction

This is the first part of a three-division approach selected by this work to study the Brazilian L&Es system. It is worth noting knowing that this is the most extensive part among all sections. It covers L&Es related to partial or full reproduction of works.

Brazilian Copyright legislation safeguards the right of reproduction.⁵²¹ In other words, copyright holders have the right over any reproduction (full or partial) of their works.⁵²² In this sense, the reproduction of protected works without the prior authorization of the copyright holder is a copyright infringement. Nevertheless, the Brazilian Copyright and Neighbouring Rights Law allows, under some conditions, the partial or full reproduction of protected works to third-parties regardless of the copyright holder's permission.⁵²³ Those conditions are known as limitations and exceptions.⁵²⁴ Another limitation to authors' exclusive reproduction right is a legal restriction derived from the interpretation of Article 30 (1):

where the reproduction is temporary and done for the sole purposes of making the work, phonogram or performance perceptible by means of an electronic

⁵²¹ Brazilian Copyright and Neighbouring Rights Law 1998, art 5, VI (BR).

⁵²² *ibid* art 29, I.

⁵²³ *ibid* art 46, I-II.

⁵²⁴ Martin Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-step Test in International and EC Copyright Law*, vol 13 (Kluwer Law International, 2004) 34-40; Thomas Dreier, 'Regulating Competition by way of Copyright Limitations and Exceptions' in Paul Torremans (ed), *Copyright Law: A Handbook of Contemporary Research* (Research Handbooks in Intellectual Property Series) (Edward Elgar Publishing Ltd 2009) 235; Pamela Samuelson, 'Justifications for Copyright Limitations and Exceptions' in Ruth L. Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017) 12, 45.

medium (1) and where it is transitory or incidental, provided that it is done in the course of the use of the work that has been duly authorized by the owner (2).⁵²⁵

This provision is a reflection found in international legal literature as an exception for the making of temporary copies. In the UK context,⁵²⁶ the Berne Article 9 (2) limits the exclusive reproduction right. However, there is no expressive written provision for this type of exception. This exception is mentioned by the EU Directive of 2001.⁵²⁷ In the following subsections, this study addresses the Brazilian L&Es relating to reproduction rights.

4.2.1 News or informative articles

Under the Brazilian Copyright and Neighbouring Rights law, the reproduction is not treated as a violation of authors' rights⁵²⁸:

in the daily or periodical press of news or informative articles, from newspapers or magazines, with a mention of the name of the author, if they are signed, and of the publication from which they have been taken.⁵²⁹

There is an international correspondent law for this exception, namely the Article 10 *bis* (1) of the Berne Convention, which allows partial or full reproduction of 'newspaper and periodical articles by the media'.⁵³⁰ As such, reproductions under this

⁵²⁵ Brazilian Copyright and Neighbouring Rights Law 1998, art 30, 1 (BR).

⁵²⁶ CDDA 1988, 28A.

⁵²⁷ Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc), (33).

⁵²⁸ Leonardo Macedo Poli, *Direito autoral: parte geral* (Del Rey 2008) 69; Elizabeth Roxana Mass Araya and Silvana Aparecida Borsetti Gregorio Vidotti, *Criação, proteção e uso legal de informação em ambientes da World Wide Web* (UNESP 2010) 80; Renata Furtado de Barros, Paula Maria Tecles Lara and Juliana Maria Matos Ferreira (Orgs), *Justiça e Democracia: as Novas Perspectivas da Hermenêutica Constitucional*, vol II (Lulu Publishing 2013) 9.

⁵²⁹ Brazilian Copyright and Neighbouring Rights Law 1998, art 46, I, a (BR).

⁵³⁰ Berne Convention, Article 10*bis* 1. See also Jörg Reinbothe and Silke von Lewinski, *The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT, and the BTAP* (Oxford University Press) 161.

scope must mention the name of the authors. This exception is mentioned in the EU Directive of 2001.⁵³¹ It is worth mentioning that the Brazilian exception reflects Berne's.

4.2.2 Public Speeches

Under the Brazilian Copyright and Neighbouring Rights law, the partial or full reproduction 'in newspapers or magazines of speeches given at public meetings of any kind'⁵³² is not a violation of authors' rights. In this light, the Berne Convention limits authors' reproduction rights relating to 'political speeches and speeches delivered in the course of legal proceedings'.⁵³³ In fact, The EU Directive 2001/29 used very similar words from the ones found on the Berne Convention.⁵³⁴ In alignment with Berne's Article 2bis (2)⁵³⁵, the Brazilian exception employs a broader definition for the term 'public speeches'. However, an author's 'exclusive right of making a collection of his works' remains protected under Copyright.⁵³⁶ In the UK, a case in point is a landmark ruling by the House of Lords in *Walter v Lane*⁵³⁷, where it firmly declared for legal protection of public speeches.⁵³⁸ Thus, this is a point of diversion between Brazilian Law and UK Law.

4.2.3 Portraits or visual works made for hire

Brazilian Law safeguards the use of photographic works.⁵³⁹ In general, copyright law protection commences from the moment that the work is created and externalized in

⁵³¹ InfoSoc Directive 2001/29/EC, 2 (c).

⁵³² Brazilian Copyright and Neighbouring Rights Law 1998, art 46, I, b (BR).

⁵³³ Berne Convention, art 2bis (1).

⁵³⁴ InfoSoc Directive 2001/29/EC, art 5, 3, (f).

⁵³⁵ Berne Convention, art 2bis (2).

⁵³⁶ *ibid.*

⁵³⁷ *Walter v Lane* (1899) 2 Ch. 749; [1990] AC 539.

⁵³⁸ Barbara Annabelle Casey Lauriat, 'Walter v Lane (1900)' in Jose Bellido (ed), *Landmark Cases in Intellectual Property Law* (Hart Publishing 2017) 149-150.

⁵³⁹ Brazilian Copyright and Neighbouring Rights Law 1998, art 79, *chapeau* (BR). See also Leonardo Macedo Poli, *Direito autoral: parte geral* (Del Rey 2008) 69, 139; Elizabeth Roxana Mass Araya and

a tangible fixed form.⁵⁴⁰ However, this based principle of copyright does not apply to work made from hire. In the US, the term ‘made from hire’ means:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas (...).⁵⁴¹

The Brazilian L&Es system allows for the reproduction of these works⁵⁴², regardless of prior authorization by the copyright holder, under certain conditions. In this sense, the Brazilian Copyright and Neighbouring Rights Law state that there is no violation of copyright holders’ rights in the case of the reproduction:

of portraits or other forms of representation of a likeness, produced on commission, where the reproduction is done by the owner of the commissioned subject matter and the person represented or his heirs have no objection to it.⁵⁴³

Later, there is another legal requirement that has to be observed in cases where the reproduction has been made by a third party, it has to ‘legibly mention the name of its author’. Additionally, it highlights that visual works that are ‘not perfectly true to the original’ would be subject to a previous authorization from the author. In other works, Brazilian congressmen restricted the scope of this exception by only including ‘perfect

Silvana Aparecida Borsetti Gregorio Vidotti, *Criação, proteção e uso legal de informação em ambientes da World Wide Web* (UNESP 2010) 80; Renata Furtado de Barros, Paula Maria Tecles Lara and Juliana Maria Matos Ferreira (Orgs), *Justiça e Democracia: as Novas Perspectivas da Hermenêutica Constitucional*, vol II (Lulu Publishing 2013) 9.

⁵⁴⁰ US Code, t 17, s 101 (US). See also Stephen M McJohn, *Copyright: Examples and Explanations* (5th edn, Wolters Kluwer 2018) 1-10.

⁵⁴¹ US Code, t 17, s 101 (US).

⁵⁴² In Brazil, this exception is recognized since the Copyright Law of 1898.

⁵⁴³ Brazilian Copyright and Neighbouring Rights Law 1998, art 46, I, c (BR).

true' copies of protected works. There is not much evidence in Brazilian history to justify this exception, the presumption is that congressmen seek to protect free speech and educational use.⁵⁴⁴ This provision has no correspondence in International law. As such, UK Law does not offer an exception applied to works made for hire.⁵⁴⁵ When put under strict scrutiny of legal theory of L&Es, it seems that this exception is unnecessary and has little scope for application. Thus, the poor choice of words underlying this exception, added to strict conditions makes this part of Brazilian L&Es fairly dispensable.

4.2.4 Visually impaired

Much has been written about the copyright exceptions for the visually impaired. This great degree of interest is clearly related to international debates about the Marrakesh Treaty.⁵⁴⁶ The treaty aims to enable individuals with print disability to have access to copyrighted works. Each member of the Treaty commits to insert this exception into their national law.⁵⁴⁷ There are various concepts regarding this issue, which makes its implementation quite challenging. Legal documents vary according to who qualifies as beneficiaries of those rights⁵⁴⁸, which types of accessible copies are covered⁵⁴⁹. Additionally, countries' different economic and social conditions, and legal references

⁵⁴⁴ Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, 'Exceptions and Limitations to Copyright in Brazil: A Call for Reform' in Lea Shaver (ed), *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 79.

⁵⁴⁵ For lawsuits covering this issue, See *Marvel Characters Inc. v. Kirby*, 726 F.3d 119 (2d. Cir. 2013); *Siegel v. Warner Bros. Entertainment Inc.*, 542 F. Supp. 2d 1098, 1112 (C.D. Cal. 2008); and *Fifty-Six Hope Road Music Ltd. v. UMG Recordings, Inc.*, No. 08 Civ. 6143 (DLC) (S.D.N.Y. September 10, 2010).

⁵⁴⁶ Annette Kurr, 'From Minimum standards to Maximum Rules' in Hanns Ullrich, Reto M. Hilty, Matthias Lamping and Josef Drexler (eds) *TRIPS plus 20: From Trade Rules to Market Principles* (Springer 2016) 140-141, 154-157.

⁵⁴⁷ Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford University Press, 4th edn, 2014) 250-252.

⁵⁴⁸ Marrakesh VIP Treaty, art 3.

⁵⁴⁹ *ibid* art 4.

of medical terms also affect the implementation of those rights. Taking this into account, national laws also have to define legal procedures and who is entitled in the advocating and materializing of those rights. In some jurisdictions, this task is entrusted to a specific group of people and in other cases to organizations.⁵⁵⁰ This point does not apply to a ‘one size fits all’ approach. While implementing exceptions for the visually impaired, countries have many possibilities to operationalize this right. As such, one method of application might not attend the purposes of the law. Each member state should have the right to draft laws based on a strategy that would work for it. This is particularly evident in the conditions that a country chooses when introducing this exception into national law. As an example, the US addresses restrictions of authors’ rights for the benefit of the visually impaired on performing rights⁵⁵¹ and reproduction rights.⁵⁵²

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh VIP Treaty) was adopted at The WIPO Conference of 27 June 2013.⁵⁵³ Based on an initiative of Brazil alongside Chile, Nicaragua and Uruguay, the WIPO Standing Committee on Copyright And Related Rights (SCCR) joined a constant programme within the organization.⁵⁵⁴ In 2008, the SCCR addressed a project submitted by the World Blind Union.⁵⁵⁵ In 2009,

⁵⁵⁰ According to the US Code, t 17, s 121(D) (1), those rights are advocated by authorized entities which are defined by the law (US).

⁵⁵¹ US Code, t 17, s 110, (8) and (9) (US).

⁵⁵² *ibid* s 121 (A) (US).

⁵⁵³ Susan Isiko Štrba, *International Copyright Law and Access to Education in Developing Countries* (Martinus Nijhoff Publishers 2012) 216; Annette Kurr, ‘From Minimum standards to Maximum Rules’ in Hanns Ullrich, Reto M. Hilty, Matthias Lamping and Josef Drexl (eds) *TRIPS plus 20: From Trade Rules to Market Principles* (Springer 2016) 140-141, 154-157.

⁵⁵⁴ Tshimanga Kongolo, *African Contributions in Shaping the Worldwide Intellectual Property System* (Routledge 2013) 4, 274.

⁵⁵⁵ Tshimanga Kongolo, *African Contributions in Shaping the Worldwide Intellectual Property System* (Routledge 2013) 250-251, 298; Laurence R. Helfer, Molly K. Land, Ruth L. Okediji and Jerome H. Reichman, *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals* (Oxford University Press 2017) 1-4.

Brazil, Ecuador and Paraguay submitted a project entitled as ‘WIPO Treaty for improved access for blind, visually impaired and other reading disabled persons’.⁵⁵⁶ In June 2010, the African Group submitted the ‘WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archived Centers’, inspired by the South American.⁵⁵⁷ The SCCR also addressed the African Treaty revision in June 2011.⁵⁵⁸ After many debates, and a 5 year-period of negotiation the Marrakesh Treaty was finally concluded.⁵⁵⁹

The next step was to collect enough members to become enforceable. The treaty requires a minimum of 20 signatory countries to become enforceable.⁵⁶⁰ This condition was fulfilled on the 30th of September of 2016, when Canada became the 20th nation to ratify the treaty. Brazil and the UK ratified the Marrakesh Treaty on 28th June 2013.

In Brazil, the copyright exception for the visually impaired provides new formats for copyrighted material, which otherwise would not be suitable to people with certain disabilities.⁵⁶¹ In this sense, The Brazilian L&Es system includes an exception for partial or full reproduction in cases:

⁵⁵⁶ SCCR, ‘Background Paper by Brazil, Ecuador and Paraguay on a “WIPO Treaty for Improved Access for Blind, Visually Impaired and Other Reading Disabled Persons” (WIPO Doc. SCCR/19/13 Corr., Oct. 23, 2008) <www.wipo.int/edocs/mdocs/copyright/en/sccr_18/sccr_18_5.pdf> accessed 10 December 2017.

⁵⁵⁷ SCCR, ‘Draft Paper proposed by the African Group on “WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives” (Sess., June 3, 2011, WIPO Doc. SCCR/22/12) <www.wipo.int/meetings/en/doc_details.jsp?doc_id=169397> accessed 10 December 2017.

⁵⁵⁸ Tshimanga Kongolo, *African Contributions in Shaping the Worldwide Intellectual Property System* (Routledge 2013) 4, 274, 277.

⁵⁵⁹ Tshimanga Kongolo, *African Contributions in Shaping the Worldwide Intellectual Property System* (Routledge 2013) 298; Annette Kurr, ‘From Minimum standards to Maximum Rules’ in Hanns Ullrich, Reto M. Hilty, Matthias Lamping and Josef Drexl (eds) *TRIPS plus 20: From Trade Rules to Market Principles* (Springer 2016) 154-157; Laurence R. Helfer, Molly K. Land, Ruth L. Okediji, Jerome H. Reichman, *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals* (Oxford University Press 2017) 1-4.

⁵⁶⁰ Marrakesh VIP Treaty, art 18.

⁵⁶¹ Leonardo Macedo Poli, *Direito autoral: parte geral* (Del Rey 2008) 70; Elizabeth Roxana Mass Araya and Silvana Aparecida Borsetti Gregorio Vidotti, *Criação, proteção e uso legal de informação em ambientes da World Wide Web* (UNESP 2010) 80; Renata Furtado de Barros, Paula Maria Tecles Lara

of literary, artistic or scientific works for the exclusive use of the visually handicapped, provided that the reproduction is done without gainful intent, either in Braille or by means of another process using a medium designed for such users.⁵⁶²

In Brazil, the beneficiary people are those individuals who are visually handicapped. Unfortunately, Brazilian Congressmen opted to use strict terms to define the scope of this law. The Brazilian exception follows the general trend of restricting this activity to nonprofit means. There are different types of disability. Another weakness of the Brazilian exception for the visually impaired is that it is extremely concise. It is also rather vague in that it does not define key terms, such as visually handicapped.

UK Copyright Law has a section covering permissible use of protected works in the context of a disability.⁵⁶³ Compared to the CDPA, the Brazilian exception for the visually impaired restricts only to address this. The UK has two exceptions to copyright in order to aid people with physical or mental disabilities when these disabilities prevent the user from getting access to copyright protected materials. The first exception allows the disabled user or a person acting on his behalf to make a copy of the material, possibly transforming its format if this helps the disabled person to better access the material. One of the examples of copyright exception is if you make a copy of a book and translate it into Braille, if you have a visual disability. Second, similar to the first one, it allows educational organizations to make copies and change the format of the work on behalf

and Juliana Maria Matos Ferreira (Orgs), *Justiça e Democracia: as Novas Perspectivas da Hermenêutica Constitucional*, vol II (Lulu Publishing 2013) 9.

⁵⁶² Brazilian Copyright and Neighbouring Rights Law, art 46, I, d (BR).

⁵⁶³ UK Intellectual Property Office, Exceptions to copyright Accessible Formats for disabled people (2014)

<www.gov.uk/government/uploads/system/uploads/attachment_data/file/375952/Accessible_formats_for_disabled_people.pdf> accessed 20 December 2017.

of people with disabilities.⁵⁶⁴ These include, but are not limited to: translating books into Braille, adding subtitles to movies to help deaf people, and others. Nevertheless, this exception only applies to protected works, which lack an accessible format available for purchase.⁵⁶⁵

The InfoSoc Directive provides some useful insights related to these exceptions for the visually impaired. The copyright reproduction or communication to the public has an exception for people with disabilities in its Article 5 (3) b, which requires non-commercial use, which must be confined to the needs of the disabled person. This Directive left vast room for flexibility for each country to decide what to adopt according to their own culture and their own legislation. The purpose of this exception is to promote equal treatment among copyright consumers. This implies that all users should have access to copyrighted material regardless of any physical disadvantage. Thus, this exception should provide similar conditions among users with disabilities in order for the copyrighted material to be provided at the same time and with no extra costs.⁵⁶⁶ Thus, The InfoSoc Directive seeks to avoid that a disabled person from any country is discriminated.

This exception has to be carefully implemented as the possible outcomes of inadequate protection could encourage misuse and may not reach the intended beneficiaries. A dissimilar enforcement could threaten the non-discriminatory principle of the EC Treaty. There is not an easy, nor a unique way to solve this problem; and

⁵⁶⁴ CDPA 1988, s 32, 1, (A) ‘the copy is made by the disabled person or by a person acting on behalf of the disabled person’.

⁵⁶⁵ UK Intellectual Property Office, Guidance: Exceptions to Copyright <www.gov.uk/guidance/exceptions-to-copyright accessed 12 December 2017.

⁵⁶⁶ Arpi Abovyan, *Challenges of Copyright in the Digital Age: Comparison of the Implementation of the EU Legislation in Germany and Armenia* (Utz Verlag GmbH 2014) 39.

copyright is not the only point that must be considered.⁵⁶⁷ This exception is ‘complex and emotive’ and is reflected in many areas of law such as IP and human rights.⁵⁶⁸ Currently, it has 33 contracting parties. What is truly remarkable about the Marrakesh Treaty is that it is a piece of legislation entirely focusing on users’ rights. It seems that this type of exception heavily relies on international cooperation. In fact, it dedicates one article exclusively to address the cross-border exchange of materials in accessible formats.⁵⁶⁹ With these insights in mind, Brazilian Law should provide clearer and better draft provision for this exception. In particular, it could benefit from the structure used by the CDPA regarding this issue.

4.2.5 Private copy for personal use

The Brazilian system of L&Es to copyright addresses in two pieces of legislation the private copying exception for personal use, one in Article 46, II of the Copyright and Neighbouring Rights Law, and the other in Article 184 of The Penal Code.⁵⁷⁰ However, Brazilian congressmen did not intend to create two private copying exceptions. Under the Copyright and Neighbouring Rights Law, it permits ‘the reproduction in one copy of short extracts from a work for the private use of the copier, provided that it is done by him and without gainful intent’.⁵⁷¹ In other words, the reproduction of a single copy does not infringe copyright (1) provided that the copy was made by the copyst (2), of short fragments of a work (3) if the copy is for his private use (4) and for no profit purposes

⁵⁶⁷ Priya R Pillai, ‘Accessible Copies of Copyright Work for the Visually Impaired Persons in India’ (2012) 3(6) *Creative Education* 1060, 1061.

⁵⁶⁸ Jingui Li, ‘Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled – The Gap Between National Laws and the Standards Required by the Marrakesh Treaty’ (2014) 45(7) *International Review of Intellectual Property and Competition Law* 740, 740-741.

⁵⁶⁹ Marrakesh VIP Treaty, art 9.

⁵⁷⁰ Brazilian Copyright and Neighbouring Rights Law 1998, art 46, II; Brazilian Penal Code 1998, art 184, §4 (BR).

⁵⁷¹ Brazilian Copyright and Neighbouring Rights Law 1998, art 46, II (BR).

(5). The Law restricts the number of copies (1), who can make the copy (2), the extent of what can be copied (3), the type of use (4) and the purpose (5). Surprisingly, the private copy exception from the Copyright Law of 1998 is stricter than the previous Copyright Laws of 1973⁵⁷² and 1916⁵⁷³. The private copy exception was one of the few sensible modifications taken on board by the enactment of Brazilian Copyright Law in 1998.⁵⁷⁴ And, arguably one of the most controversial changes regarding Brazilian L&Es to copyright.⁵⁷⁵ The second case of private copy derives from the interpretation of Brazilian Penal Code of 1940. This code, while it legislates over criminal liabilities related to IPRs also reinforces the exception of authors' reproduction rights in cases of private copying for personal use.⁵⁷⁶ According to the Penal Code, a person acting under one of the L&Es of authors' rights would not incur any criminal offense.⁵⁷⁷ It also expressly addresses private copies use of intellectual works and phonograms. Moreover, there are two further conditions: it only covers one copy of the work and is further restricted to cases where the copy does not result in direct nor indirect financial advantage. Comparing the two pieces of legislation, the interpretation from the Copyright Law is overly strict.

It is worth pointing out that the private copying exception provided in the Copyright Law covers only cases in which the copy is made by the copyist, whereas the

⁵⁷² Brazilian Copyright Law 1973, art 49, II allowed full copies for private use conditioned that it was limited to a single copy and for non-profit purposes.

⁵⁷³ Brazilian Civil Code 1916, art 666, VI authorized full copies of any work, restricted to for non-profit purposes and limited to copy done by hand. Later, the Brazilian Copyright 1973 waived any technological restrictions.

⁵⁷⁴ There are not much changes on the chapter of limitations to copyright. Most of its structure kept the same. See more Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, 'Exceptions and Limitations to Copyright in Brazil: A Call for Reform' in Lea Shaver (ed), *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 79.

⁵⁷⁵ Previous exceptions for private use were more flexible than the current one. In this sense, The Copyright Law 1998 goes in the opposite direction of Brazilian history of L&Es.

⁵⁷⁶ Penal Code 1998, art 184, §4 (BR).

⁵⁷⁷ *ibid chapeau* (BR).

Penal Code does not require any technical constraint relating to who has the permission to make the copy. Based on this, one can suggest that the words chosen for the Penal Code allow copies made from the copyist and copies made from a third-person. One point of converge remains for the purpose of the use and the quantity of copies allowed. Indeed, both pieces of legislation address copies for private use restricted to non-profit purposes and limited by only a single copy. However, the criminal clause seems to be more restrictive over the copies' purpose because it covers both direct and indirect gains.

This exemption is the focus of criticism. On one hand, private copying is a form to optimise an 'existing consumer behaviour' which is already included by the right holders when calculating the price of goods.⁵⁷⁸ On the other hand, the private copy exception encourages users' behaviours such as in the culture of 'private sharing'. Despite arguments in both directions, a well drafted exception is beneficial to cultural development. This exception permits users to copy only a small fraction of the work. Considering that Brazil is a civil-law country with a closed-list approach to L&Es to copyright, open terms such as 'small fraction' are not suitable within this rationality. This restriction is not compatible nor feasible in the Brazilian context.⁵⁷⁹ This approach is particularly harmful to both developing and less-developed countries.

In Brazil, the Ministry of Culture and the Copyright Department are responsible for implementing copyright policies. In a recent initiative, the former Brazilian Ministry of Culture, Gilberto Gil, proposed a bill to reform Copyright Law.⁵⁸⁰ This Bill aimed to

⁵⁷⁸ Alec Cameron, 'Copyright Exception for The Digital Age: New Rights of Private Copying, Parody and Quotation' (2014) 9(12) *Journal of Intellectual Property Law & Practice* 1002, 1003.

⁵⁷⁹ Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, 'Exceptions and Limitations to Copyright in Brazil: A Call for Reform', in Lea Shaver (ed), *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 88-89.

⁵⁸⁰ Allan Rocha de Souza, 'Brazil' in Reto M Hilty and Sylvie Nérissou (eds), *Balancing Copyright - A Survey of National Approaches* (Springer 2012) 194; 213.

modernize Copyright and, in particular, reshape Brazilian L&Es.⁵⁸¹ This Bill had public consultation. This Bill aimed to reform and modernize Brazilian copyright law. What is truly remarkable in this initiative is its ability to engage with public opinion and specialist's inputs. This initiative is a prime example to Brazil and other democratic societies of the benefits of public engagement prior to creating new laws. The Bill proposed crucial changes, such as inserting a new article 52-B to authorize non-voluntary licenses for out of print works and orphan works. Based on article 98-B, it also proposed a modification on the Central Office of Collection and Distribution (ECAD) structure, which would result in greater transparency and efficiency. This Bill was strongly opposed by the Brazilian Reprographic Rights Association (ABDR) and ECAD. Unfortunately, this initiative has not achieved closure as yet in Brazil. Despite the frustrations over the Ministry of Justice's attempt to reform Copyright Law, ECAD is under stricter rules. Due to a public investigation in 2011, the prestige of ECAD, which has been the centre of many public investigations⁵⁸², was deeply affected.⁵⁸³ This institution has a monopoly over public performances of music in Brazil.⁵⁸⁴

The United Kingdom used to have an exception for a personal copy for private

⁵⁸¹ For more details, See Pedro Mizukami, 'Copyright Week: What Happened to The Brazilian Copyright Reform?' (InfoJustice, 20 Jan 2014) <<http://infojustice.org/archives/31993>> accessed 20 December 2017.

⁵⁸² 'At the Senate an investigation in 1995/96 and three in the Legislative Assemblies: of Mato Grosso do Sul (2005), São Paulo (2009) and Rio de Janeiro (2011)' Pedro Belchior, Mariana Valente and Eduardo Magrani, The Reform of Collective Management of Music in Brazil Digital Rights (LAC, 17 JULY 2013) <www.digitalrightslac.net/en/la-reforma-de-la-gestion-colectiva-de-la-musica-en-brasil/> Accessed 10 October 2017.

⁵⁸³ Law n 12,853 of 2013 amending arts 97 to 100-B of the Copyright Law (BR)

⁵⁸⁴ Pedro Belchior, Mariana Valente and Eduardo Magrani, The Reform of Collective Management of Music in Brazil Digital Rights(LAC, 17 JULY 2013) <www.digitalrightslac.net/en/la-reforma-de-la-gestion-colectiva-de-la-musica-en-brasil/> Accessed 10 October 2017.

use.⁵⁸⁵ However, the private use exception was overruled by a High Court decision.⁵⁸⁶ After this decision, Section 28 of CDPA became inapplicable and the UK no longer permits private copying. The private copying exception allows format-shifting⁵⁸⁷, under these two conditions: namely that the work to be copied had been legally acquired and would only be applied for personal use. Unfortunately, the Brazilian private copy for personal use exception does not permit format-shifting. This aspect of the Brazilian law seems outdated by current standards; format-shifting is a common practice of many users. As such, it would be constructive to Brazilian L&Es if they included this practice. Considering its implementations, Lawmakers' best strategy might not be to use exceptions, but to consider other forms of limitation to authors' rights. The music industry has a strong impact within Brazilian congress, which will certainly pressure Brazilian congressmen, in a similar or even worse manner to what happened in the private copy exception in the UK. It is not advisable to encourage decisions which result in mass criminalization. In fact, this only serves to weaken Copyright Laws and their enforcement.

4.2.6 The quotation right

The quotation right is a prime example of mandatory adoption in the field of L&Es, and it is perhaps the 'most important limitation'.⁵⁸⁸ It is worth noting that it is an

⁵⁸⁵ CDPA, s 28B inserted (1 10 2014) by The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 (SI 2014/2361), regs. 1(1), 3(1) (with reg. 5).

⁵⁸⁶ CDPA s 28B was quashed with prospective effect by the High Court in the case of *R (British Academy of Songwriters, Composers and Authors and others) v Secretary of State for Business, Innovation and Skills* [2015] EWHC 2041 (Admin), 17 July 2015).

⁵⁸⁷ Based on this, a work from a certain format could be copied in another format without infringing copyright law.

⁵⁸⁸ Pedro Pina, 'Between Scylla and Charybdis: The Balance Between Copyright, Digital Rights Management and Freedom of Expression' in Irene Maria Portela and Maria Manuela Cruz-Cunha (eds), *Information Communication Technology Law, Protection and Access Rights: Global Approaches and Issues: Global Approaches and Issues* (Idea Group Inc 2010) 208.

exceptional case of the general permissive nature of L&Es.⁵⁸⁹ The act of quoting was first recognized internationally in 1928⁵⁹⁰, which stated that ‘analyses, short textual quotations of published literary works for the purposes of criticism, polemical discussion or teaching’ were permitted. At this stage, the quotation right was restricted in scope to ‘published literary works’, which implied that quoting scientific and artistic works was considered a copyright infringement. In 1948, quotation right became mandatory to all signatory countries.⁵⁹¹ Interestingly, Brazilian law has safeguarded quotation right since 1898.⁵⁹²

In Brazil, the quotation right is protected by national legislation since its first law on Copyright.⁵⁹³ According to the Brazilian Association of Technical Standards (ABNT) - NBR10520 – ‘citation is a mention of an information extracted from another source to clarify, illustrate or support the subject presented’.⁵⁹⁴ Another definition, is provided by the Brazilian Writing Standards (NBR, in Portuguese) citing it as a ‘literal transcription of a part of a work’.⁵⁹⁵

The Brazilian Author’s Right Act, Article 46, III states that:

The quotation in books, newspapers, magazines or any other medium of communication of passages from a work *for the purposes of study, criticism or*

⁵⁸⁹ Daniel J Gervais, ‘Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations’ (2008) 5(1&2) University of Ottawa Law & Technology Journal 1, 7.

⁵⁹⁰ Berne Convention (Rome 1928). In Brazil, this treaty was signed in 2nd June of 1928 and came into fore in June 1st June 1933.

⁵⁹¹ The quotation right became mandatory to signatory countries since The Berne Convention (Brussels) 1948.

⁵⁹² Brazilian Copyright Law and Neighbouring Rights Law 1898, art 22, 4 (BR).

⁵⁹³ Brazilian Copyright Law and Neighbouring Rights Law 1898, art 22, 4; Civil Code 1916 art 666, V; Copyright Law 1973, art 49, III (BR).

⁵⁹⁴ Brazilian Association of Technical Standards (ABNT) - NBR10520- 3.1 See more Luzia Fernandes Bertholino; *Manual de normalização bibliográfica para trabalhos científicos* (UEPG 2009) 32-39; Júnia Lessa França and Ana Cristina Vasconcellos, *Manual Para Normalização de Publicações Técnico-Científicas* (UFMG, 9th edn, 2013) 20.

⁵⁹⁵ *ibid.*

debate, to the extent justified by the purpose, provided that the author is named, and the source of the quotation is given. (emphasis added)⁵⁹⁶

The quotation right cannot be used as a way to take advantage of someone's work.⁵⁹⁷ Brazilian jurisprudence has been deciding that a quotation is permissible under the law if the resourced material is still valuable by itself, even if the quotations made are removed from the text. Hence, the quote has to be a supplementary part of the resourced material, not harming any economic right of the author and cannot be a substitute for the work.⁵⁹⁸ Another important point is that the quote must not harm the reputation of the author. Hence, the quotation right aims to propagate authors' thoughts among works as long as this right does not imply any harm. Quotation is particularly helpful to authors of scientific works; it can be a powerful tool for different purposes supporting an argument and making them stronger. It could also be the base of a new theory.⁵⁹⁹ Prior to 1998, full copies of didactic works were a common practice in Brazil due to the open interpretation of Article 666, I. The quotation right legislated by the Law No 9,610 cleared up this confusion.⁶⁰⁰ By the new law, didactic works are also restricted by the quotation right. Another point that is still unclear is the rights of quotation of music and audio-visual works.

Currently, this right is regulated by the Berne Convention, in Article 10 (1):

⁵⁹⁶ Brazilian Copyright Law and Neighbouring Rights Law 1898, art 46, III (BR).

⁵⁹⁷ Daniel Rocha, *Direito do Autor* (Irmãos Vitale S.A. Indústria e Comercio 2001) 65-66; Elisângela Dias Menezes, *Curso de Direito Autoral* (Del Rey 2007) 100-101.

⁵⁹⁸ Daniel Rocha, *Direito do autor* (Irmãos Vitale S.A. Indústria e Comercio 2001) 66; Plínio Cabral, *A nova lei de direitos autorais* (Sagra 1998) 16.

⁵⁹⁹ Bruno Jorge Hammes, *Elementos Básicos do Direito de Autor Brasileiro* (Unisinos 1988) 31-33; Bruno Jorge Hammes and André Alberto, *Curso de Direito Autoral* (1984) 195-198; Bruno Jorge Hammes, *O Direito de Propriedade Intelectual* (3th edn, Unisinos 2002) 18-19.

⁶⁰⁰ Bruno Jorge Hammes, *O Direito de Propriedade Intelectual* (3th edn, Unisinos 2002) 23.

It shall be permissible to make *quotations* from a work which has *already been lawfully made available to the public*, provided that their making is *compatible with fair practice*, and *their extent does not exceed that justified by the purpose*, including quotations from newspaper articles and periodicals in the form of press summaries. (emphasis added)⁶⁰¹

In general, the limitations and exceptions presented by the Berne Convention have a permissible nature, each signatory country has the option to adopt them.⁶⁰² However, the quotation right is the only one which is mandatory.⁶⁰³ It means that, each member state is required to make this right applicable in national law.⁶⁰⁴ Regarding the right itself, the Convention does not provide a definition of quotation. Consequently, there are no limitations to adopt only reproduction right, it allows an interpretation inclusive to all forms of usage. The article is also open to interpretations regarding the length of the material quoted. However, quotations generally suggest that the amount taken is less than the work which was quoted. The Convention provides a general guideline, that the quote must respect ‘fair practices’, but it seems to leave this issue to an analysis covering case by case.

⁶⁰¹ Berne Convention, art 10 (1)

⁶⁰² Newton Silveira, *A Propriedade Intelectual e as Novas Leis Autorais* (2nd edn, Saraiva 1998) 20-25; José Carlos Costa Netto, *Direito Autoral no Brasil*. (FDT, 1998) 78-82; Paul Goldstein and P Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice* (3rd edn, Oxford University Press 2013) 159, 876; Denis Borges Barbosa, *Propriedade intelectual: Direitos Autorais, Direitos Conexos e Software* (Lumen Júris, 2003) 127.

⁶⁰³ Ricketson and Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol 1 (OUP Oxford, 2nd edn, 2006) 213, 876; Zohar Efroni, *Access-Right: The Future of Digital Copyright Law* (Oxford University Press 2010) 329-336; Annette Kur, ‘Limitations and Exceptions Under The Three-Step Test – how much room to walk the middle ground?’ in Annette Kur (ed), *Intellectual Property Rights in a Fair World Trade System: Proposals for Reform of Trips* (Edward Elgar Publishing 2011) 209, 217.

⁶⁰⁴ Megan Richardson and Sam Ricketson, *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar Publishing 2017) 38, 40-42.

The scope regarding the types of work permitted is broad, subjected to the condition that they were ‘lawfully made available to the public’. This requirement is more inclusive than the concept of ‘published work’ that includes printable works, because it comprises works that were made available by other venues like broadcasting. In conjunction with this approach, it seems coherent to infer that the quotation right should be interpreted alongside the right of translation.⁶⁰⁵ Further, Article 10 (1) was silent on remuneration, member states, when introducing this limitation can decide whether to subject the right to quote to a remuneration scheme, determined on a basis of the legal license. The quotation right in Brazil seems to adopt a stricter approach than the Berne Convention, since it insists that quotation usage must properly acknowledge the author.

Following this, it is also observing how the treatment of the quotation right is managed under Information Society Directive (InfoSoc).⁶⁰⁶ In Europe, the quotation right is based on Article 5(3)(d), which states that:

Quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been *lawfully made available to the public*, that, unless this turns out to be impossible, the source, including the

⁶⁰⁵ Ricketson and Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol 1 (OUP Oxford, 2nd edn, 2006) 14, 475.

⁶⁰⁶ Pedro Pina, ‘Between Scylla and Charybdis: The Balance Between Copyright, Digital Rights Management and Freedom of Expression’ in Irene Maria Portela and Maria Manuela Cruz-Cunha (eds), *Information Communication Technology Law, Protection and Access Rights: Global Approaches and Issues: Global Approaches and Issues* (Idea Group Inc 2010) 206-208; Pedro Pina, ‘Between Scylla and Charybdis: The Balance Between Copyright, Digital Rights Management and Freedom of Expression’ in Management Association (ed), *Information Resources, Digital Rights Management: Concepts, Methodologies, Tools, and Applications: Concepts, Methodologies, Tools, and Applications* (IGI Global 2012) 1361-1363; Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford University Press, 4th edn, 2014) 250-252.

author's name, is indicated, and that their use is in *accordance with fair practice*, and to the extent required by the specific purpose. (emphasis added)⁶⁰⁷

The InfoSoc uses similar language to the Berne Convention. Both texts mention that the work has to be 'made available to the public' and that the quotation has to be made 'in accordance with fair practices'. In Berne, the quotation is a mandatory right. However, the quotation right is permissible to the directive.

In the UK Context, the quotation right⁶⁰⁸ is protected for the purposes of criticism and review.⁶⁰⁹ The UK adopts the fair dealing procedure to judge any quotation from any type of copyright work.⁶¹⁰ However, the fair dealing procedure is not allowed for reporting current events in the case of a photo. This is to prevent the case of newspapers reproducing the competitor's photo in their own journal. In all other cases, there is the need to acknowledge the authors.⁶¹¹ There are not main distinctions among jurisdictions on quotation right, this relates to the fact that this is a well-established exception and adoption is mandatory in many countries. Based on this, it recommends the least possible variations among jurisdictions.

4.2.7 Student's notes from lessons

Brazilian Law protects copyright ownership for those materials prepared within the context of teaching; the person who holds the copyright of those protected works is

⁶⁰⁷ InfoSoc Directive 2001/29/EC, art 5(3)(d).

⁶⁰⁸ CDPA 1988, 30 (1ZA).

⁶⁰⁹ Tanya Frances Aplin and Jennifer Davis, *Intellectual Property Law: Text, Cases, and Materials* (3rd edn, Oxford University Press 2017) 230-231; James Boyle, '(When) Is Copyright Reform Possible?' in Ruth L. Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017) 221.

⁶¹⁰ *The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014* (SI 2014/2353) which introduced fair dealing for 30 (1ZA) quotation and (30A) caricature, parody and pastiche.

⁶¹¹ UK Intellectual Property Office, *Guidance: Exceptions to Copyright* <www.gov.uk/guidance/exceptions-to-copyright> accessed 10 December 2017.

the one who taught the lessons. Unsurprisingly, those rights were the first authors' rights recognized by a Brazilian Law.⁶¹² It is worth noting that those works which became protected by copyright in 1827 were fairly limited.⁶¹³ According to Article 46, IV of the Copyright and Neighbouring Rights Law:

notes taken in the course of lessons given *in teaching establishments by the persons for whom they are intended*, provided that *their complete or partial publication is prohibited without the express prior authorization of the person who gave the lessons*. (emphasis added)⁶¹⁴

This exception from the Brazilian system of L&Es seems to foment uses for educational purposes. However, Brazilian Congressmen created severe inconsistency in this section of Copyright Law.⁶¹⁵ According to what is written, the reproduction of those materials is conditioned to the 'express prior authorization' of the copyright holder. It is a basic notion of legal literature that one of the most striking features of exceptions is the permission to use authors' right without prior authorization or a license from the copyright owner.⁶¹⁶ Thus, this exception uses terms, which highly restrict its scope. Despite this the exception only refer to reproduction by annotation and it is possible to infer from this, that this exception would also include copies made by audio or video recording. This subsection of the work explores failed attempts in Brazilian legislation

⁶¹² The earliest mention of authors' rights in the Brazilian legal system was in 1827.

⁶¹³ For further insight on this issue See Section 2.3.1 Author's right during the Imperium (1822-1889).

⁶¹⁴ Brazilian Copyright and Neighbouring Rights Law 1998, art 46, IV (BR).

⁶¹⁵ Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, 'Exceptions and Limitations to Copyright in Brazil: A Call for Reform' in Lea Shaver (ed), *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 79.

⁶¹⁶ WIPO, *Introduction to Intellectual Property, Theory and Practice* (Kluwer Law International 1997) 165; WIPO, Limitations and Exceptions <www.wipo.int/copyright/en/limitations/> accessed 25 December 2017; Nina Elkin-Koren, 'Copyright in a Digital Ecosystem' in Ruth L. Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017) 150.

to insert a miscellaneous type of private copy. There is no international correspondence with this exception in international law.⁶¹⁷ So, a comparative analysis is not applicable to this subsection of the work.

4.2.8 Judicial and administrative evidence

There is an exception for the purposes of administrative, parliamentary or judicial proceedings.⁶¹⁸ This exception allows the partial or full reproduction of protected works for the purposes of administrative and judicial proceedings.⁶¹⁹ The Brazilian exception covers the ‘use of literary, artistic or scientific works’ when these works are evidence in judicial or administrative proceedings.⁶²⁰

Despite one study arguing that this limitation does not share an international source,⁶²¹ correspondent exception is found in UK Copyright Law and in the InfoSoc Directive. In the UK context, the following does not qualify as a copyright infringement: ‘anything done for the purposes of parliamentary or judicial proceedings’,⁶²² nor ‘anything done for the purposes of reporting such proceedings, but this shall not be construed as authorising the copying of a work which is itself a published report of the

⁶¹⁷ The art 5, 3(f) of the InfoSoc mentions a limitation to authors’ rights using the term ‘public lectures’, however the exception on Brazilian law does not intend to reach this scope. It intends to limit to lectures given in ‘teaching establishments’.

⁶¹⁸ Catherine Saville, EU Intellectual Property Law and Policy (Edward Elgar Publishing 2009) 78; Arpi Abovyan, *Challenges of Copyright in the Digital Age: Comparison of the Implementation of the EU Legislation in Germany and Armenia* (Herbert Utz Verlag 2014), 31-33.

⁶¹⁹ Leonardo Macedo Poli, *Direito autoral: parte geral* (Del Rey 2008) 73; Elizabeth Roxana Mass Araya and Silvana Aparecida Borsetti Gregorio Vidotti, *Criação, proteção e uso legal de informação em ambientes da World Wide Web* (UNESP 2010) 80-81; Renata Furtado de Barros, Paula Maria Teclas Lara and Juliana Maria Matos Ferreira (Orgs), *Justiça e Democracia: as Novas Perspectivas da Hermenêutica Constitucional*, vol II (Lulu Publishing 2013) 9.

⁶²⁰ Brazilian Copyright and Neighbouring Rights Law 1998, art 46, VII (BR).

⁶²¹ Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, ‘Exceptions and Limitations to Copyright in Brazil: A Call for Reform’ in Lea Shaver (ed), *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 81.

⁶²² CDPA 1988, s 45 (1).

proceedings'.⁶²³ Compared with the Brazilian exception, the CDPA provides a much more flexible interpretation. In this light, the Brazilian exception has a strict scope which only applies to cases in which the protected work provides evidence for those proceedings. In contrast, the CDPA provides an exception which covers anything done: for the purpose of those proceedings and for the purpose of reporting those proceedings.

A correspondent exception is found in the InfoSoc Directive:

Member States should be given the option of providing for certain exceptions or limitations (...) *for uses in administrative and judicial proceedings*⁶²⁴ and Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: (...) use for the purposes of public security or *to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings*. (emphasis given)⁶²⁵

The InfoSoc points out the significance of this exception by stating that it promotes a proper performance or reporting of, which would result in better administration of justice within those branches of power.⁶²⁶ In this sense, the UK exception, alongside the InfoSoc exception, seems to offer a better approach when compared with the Brazilian exception by clearly presenting the purposes intended in this exception. This exception seeks to make sure that the system works properly. Unfortunately, the Brazilian law do not take full advantage of this exception. In this light,

⁶²³ CDPA 1988, s 45 (2).

⁶²⁴ InfoSoc Directive 2001/29/EC, (34).

⁶²⁵ *ibid* art 5.3(e).

⁶²⁶ For more of administration of justice, See John W. Cairns, Adam Smith and the Role of the Courts in Securing Justice and Liberty in R.P. Malloy and J. Evensky (eds), Adam Smith and the Philosophy of Law and Economics (Springer Science & Business Media 2012) 31-55; City Law School (London, England), Nigel Duncan, Oliver Hanmer and Robert McPeake (ed) Professional Ethics (17th edn, Oxford University Press 2016) 6-12.

this study recommends modifying the Brazilian exception to create a similar structure to that used by the UK.

4.2.9 Reproduction within the context of a larger work

In Brazilian L&Es system, copyright is not infringed by the reproduction of a protected work within the context of a larger work or in cases where the copyrighted work is not the subject matter.⁶²⁷ Brazilian Copyright Law states that:

the reproduction in *any work* of *short extracts* from existing works, regardless of their nature, or of *the whole work* in the case of a work of three-dimensional art, on condition that the reproduction is *not in itself the main subject matter of the new work* and *does not jeopardize the normal exploitation of the work reproduced or unjustifiably prejudice the author's legitimate interests*. (emphasis given)⁶²⁸

The Brazilian exception permits the use of copyrighted works in part, regardless of their nature or in full, restricted to the three-dimensional art. The latter is further restricted by two conditions: the reproduction is not in itself the subject matter for the later work and neither does it conflict with its normal exploitation nor 'unjustifiably' prejudice authors' interests. A study argues that this limitation does not share an international source.⁶²⁹ There are similar clauses under UK Copyright Law and the InfoSoc Directive. The UK has an exception for incidental inclusion of copyright

⁶²⁷ Leonardo Macedo Poli, *Direito autoral: parte geral* (Del Rey 2008) 73; Elizabeth Roxana Mass Araya and Silvana Aparecida Borsetti Gregorio Vidotti, *Criação, proteção e uso legal de informação em ambientes da World Wide Web* (UNESP 2010) 80; Renata Furtado de Barros, Paula Maria Tecles Lara and Juliana Maria Matos Ferreira (Orgs), *Justiça e Democracia: as Novas Perspectivas da Hermenêutica Constitucional*, vol II (Lulu Publishing 2013) 9.

⁶²⁸ Brazilian Copyright and Neighbouring Rights Law 1998, art 46, VIII (BR).

⁶²⁹ Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, 'Exceptions and Limitations to Copyright in Brazil: A Call for Reform' in Lea Shaver (ed), *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 81.

material.⁶³⁰ The UK provides an exception which it regards as incidental inclusion ‘in an artistic work, sound recording, film or broadcast’,⁶³¹ ‘by the issue to the public of copies, or the playing, showing or communication to the public, of anything whose making was, by virtue of subsection (1), not an infringement of the copyright’.⁶³² The CDPA also prevents the misuse of this exception when related to music:

a musical work, words spoken or sung with music, or so much of a sound recording or broadcast as includes a musical work or such words, shall not be regarded as incidentally included in another work *if it is deliberately included*.
(emphasis given)⁶³³

The InfoSoc covers authors rights’ exceptions for ‘incidental inclusion of a work or other subject-matter in other material’.⁶³⁴ Based on the words that this exception was written in Brazilian legislation, it seems that it was inspired by international sources. Nevertheless, it resulted in a miscellaneous exception for incidental inclusion of copyrighted material. So, Copyright law combined some elements from the exception for incidental inclusion of copyright material and some elements of the three-step test. As such Brazilian exception could be re-shaped to reflect international trends. This study also suggests the removal of the two last conditions (does not conflict with the normal exploitation nor ‘unjustifiably’ prejudice authors’ interests). If needed, Brazilian Copyright could add an expressly written text of the three-step test.

⁶³⁰ CDPA 1988, 31.

⁶³¹ *ibid* 31(1).

⁶³² *ibid* 31 (2).

⁶³³ *ibid* 31 (3).

⁶³⁴ InfoSoc Directive 2001/29/EC, art 5, 3(i).

4.2.10 Private copies of Computer programs

Brazilian Law addresses four exceptions regarding computer programs.⁶³⁵ In contrast to previous exceptions, Brazilian exceptions related to computer programs are protected by Brazilian Software Law. The first three exceptions are related to reproduction rights,⁶³⁶ whereas the fourth exception is related to derivative works.⁶³⁷ This subsection covers the partial or full reproduction of private copies of computer programs. According to the Brazilian Software Law:

the reproduction, in *one single copy*, of a *legitimately purchased copy*, provided the copy is intended as *backup copy or electronic storage*, in which case the copy shall be used as a backup copy. (emphases given)⁶³⁸

Despite one study arguing that this limitation does not share an international source,⁶³⁹ there are international sources in the UK and in the EU Directive 2009/24/EC. The UK Law has an exception for the purposes of backup.⁶⁴⁰ According to the CDPA, ‘it is not an infringement of copyright for a lawful user of a copy of a computer program to make any backup copy of it which it is necessary for him to have for the purposes of his lawful use’.⁶⁴¹ It also addresses the definition of ‘lawful user’ in the context of computer programs⁶⁴²; and elucidates when this exception is applicable, regardless of the existence of a ‘term or condition in an agreement which purports to prohibit or restrict

⁶³⁵ Newton Silveira, *Propriedade Intelectual: Propriedade Industrial, Direito de Autor, Software, Cultivares, Nome Empresarial, Abuso de Patentes* (5th edn, Manole 2014) 1-5; Denis Borges Barbosa, *Novos Estudos em Propriedade Intelectual 2011-2013*, vol I (IBPI 2015) 194.

⁶³⁶ Brazilian Software Law 1998, art 6, I, II, III (BR).

⁶³⁷ *ibid* art 6, IV.

⁶³⁸ *ibid* I.

⁶³⁹ Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, ‘Exceptions and Limitations to Copyright in Brazil: A Call for Reform’ in Lea Shaver (ed), *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 81.

⁶⁴⁰ Stanley Lai, *The copyright protection of computer software in the United Kingdom* (Oxford 2000) 22

⁶⁴¹ CDPA 1988, 50(A)1 (UK).

⁶⁴² *ibid* 50(A)2.

the act’.⁶⁴³ When compared with Brazil, the UK concentrates this exception within the CDPA. Furthermore, the Brazilian legislation points out that this exception only applies to a ‘legitimately purchased copy’. However, there is no definition to cover the term ‘lawful user’, which is key for interpreting the law. According to the EU Directive ‘the making of a back-up copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use’.⁶⁴⁴ In fact, The Brazilian exception of private copies of Computer programs⁶⁴⁵ is inspired by the EU Council Directive EU Directive 2009/24/EC of 23th April of 2009.⁶⁴⁶

The exception for private copies on computer programs is well-drafted in UK Law. In this light, this study proposes an amendment to Brazilian Software Law to purposefully insert a definition of lawful users. As well substituting the part, which states ‘provided the copy is intended as *backup copy or electronic storage*, in which case the copy shall be used as a backup copy’, for a clear direction such as the ones used in the CDPA and in the EU Directive. It could change this to ‘copy of it which it is necessary for him to have for the purposes of his lawful use’.

4.2.11 Partial quotation of computer programs

The partial citation of computer programs is the second exception of Brazilian L&Es related to reproduction rights.⁶⁴⁷ Brazilian law allows partial citation of computer

⁶⁴³ *ibid* 50(A)3.

⁶⁴⁴ EU Council Directive (EC) 2009/24 on the Legal Protection of Computer Programs [2009] OJ L111/16, (Computer Programs’), arts 5, 2.

⁶⁴⁵ Brazilian Software Act 1998, art 6, I (BR).

⁶⁴⁶ Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, ‘Exceptions and Limitations to Copyright in Brazil: A Call for Reform’ in Lea Shaver (ed), *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 81.

⁶⁴⁷ Newton Silveira, *Propriedade intelectual: propriedade industrial, direito de autor, software, cultivares, nome empresarial, abuso de patentes* (5th edn, Manole 2014) 1-5; Denis Borges Barbosa, *Novos estudos em Propriedade Intelectual 2011-2013*, vol I (IBPI 2015) 194, 267.

programs. This subsection focuses on the partial quotation of computer programs. According to Brazilian Software Law, it does not infringe copyright ‘partial quotes of the program, for teaching purposes, provided the program and the title-holder of the respective rights are duly identified’.⁶⁴⁸ Directive 91/250/ECC has a general guideline for exceptions regarding computer programs, which states that ‘in the absence of specific contractual provisions, the acts referred to in Article 4 (a) and (b) shall not require authorization by the right holder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction’.⁶⁴⁹

The partial quotation of computer programs in Brazil applies only to teaching purposes. In the context of the UK, the law provides exceptions regarding computer programs for observing, testing and studying purposes.⁶⁵⁰ To clear some possible misinterpretations of rights, the CDPA expressly addresses that fair dealing exceptions for research and private study do not apply to computer programs.⁶⁵¹ The Brazilian exception for partial quotation of computer programs applies to teaching purposes, whereas the UK exception applies to observing, testing and studying purposes. The exception from the CDPA seems applicable to more purposes than the Brazilian one. It is worth pointing out the following part of the Directive 91/250/EEC which states: ‘a person having a right to use a computer program should not be prevented from performing acts necessary to observe, study or test the functioning of the program, provided that these acts do not infringe the copyright in the program’. Thus, this study embraces the approach of the EU Directive with respect to this issue. In this light, the CDPA has a better drafted exception

⁶⁴⁸ Brazilian Software Law 1998, art 6, II (BR).

⁶⁴⁹ Computer Programs’ Directive, art 5, 1.

⁶⁵⁰ CDPA 1988, 50BA.

⁶⁵¹ *ibid* 29 (4A).

for reproduction rights related to computer programs. As such, this study suggests an amendment to Brazilian Software Law to include more types of uses such as the ones pointed out in UK legislation and the EU Directive.

4.2.12 Similarity of Computer Programs

The Brazilian system of L&Es is mainly concentrated in Copyright and Neighbouring Rights Law, however the exceptions related to computer programs are protected by Brazilian Software Law. This subsection covers the exception of similarity of programs.⁶⁵² According to Brazilian Software Law, ‘the integration of a program, maintaining its essential characteristics, with an application or operational system, technically indispensable for user needs, provided it be for the exclusive use of the person who effected it’⁶⁵³ does not infringe copyright. In other words, it is not an offence to copyright if a computer program, share similar features of a previous computer program, when the similarity is due to functional characteristics of its application, observance of normative and technical precepts, or limitation alternatively for its expression.⁶⁵⁴ These exceptions cover computer programs that have similar functions; or if to resolve a particular issue, it is necessary to use the same source code as in prior-software; or a technical standard necessitates programmers to use a similar code.⁶⁵⁵ The UK provides general guidelines for the exception relating to computer programs. The Brazilian exception of similarity of computer programs may be covered by the CDPA, which

⁶⁵² Denis Borges Barbosa, *Novos estudos em Propriedade Intelectual* 2011-2013, vol I (IBPI 2015) 267; Newton Silveira, *Propriedade intelectual: propriedade industrial, direito de autor, software, cultivares, nome empresarial, abuso de patentes* (5th edn, Manole 2014) 1-5.

⁶⁵³ Brazilian Software Law 1998, 6, III (BR)

⁶⁵⁴ *ibid.*

⁶⁵⁵ Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, ‘Exceptions and Limitations to Copyright in Brazil: A Call for Reform’ in Lea Shaver (ed), *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 81.

permits a copy or adaptation which is necessary for its lawful use.⁶⁵⁶ The Brazilian exception seems to cover similarities among computer programs, which appear to be inevitable or indispensable. This part of Brazilian L&Es to copyright could be re-drafted to make a clearer definition of its scope.

4.3 Limitations related to performing rights

This is the second part of a three-division approach selected by this work to study the Brazilian L&Es system. This part covers L&Es related to performing rights. Brazilian Copyright legislation safeguards authors' rights 'to perform' or the right to publicly perform a copyrighted work.⁶⁵⁷ For this reason, one infringes authors' exclusive right by performing protected works without an authorization of the copyright holder. Nonetheless, the Brazilian Copyright and Neighbouring Rights Law allows, conditional to certain cases, a third-party the right to perform protected works regardless of the copyright holder's permission. It is worth knowing that performances of music prior submit ECAD.⁶⁵⁸ In contrast with the section concerning 'partial or full reproduction', there are only three types of exception in Brazilian Law which limit performers' rights⁶⁵⁹: use of protected works for demonstration purposes⁶⁶⁰, theatrical and musical performances⁶⁶¹, and similarity of computer programs⁶⁶².

⁶⁵⁶ CDPA 1988, 50(c)(1).

⁶⁵⁷ Brazilian Copyright and Neighbouring Rights Law 1998, art 68, *chapeau* (BR).

⁶⁵⁸ *ibid* art 68, § 4º.

⁶⁵⁹ *ibid* Introductory Provisions XIII definition of performers.

⁶⁶⁰ *ibid* art 46, V.

⁶⁶¹ *ibid* art 46, VI.

⁶⁶² Brazilian Software Act 1998, art 6, III (BR).

4.3.1 Use of protected works for demonstration purposes

The Brazilian Copyright and Neighbouring Rights Law allows the use of protected works for demonstration purposes. In this light, Brazilian L&Es includes:

*the use of literary, artistic or scientific works, phonograms and radio and television broadcasts in commercial establishments for the sole purpose of demonstration to customers, provided that the said establishments market the materials or equipment that make such use possible. (emphases given)*⁶⁶³

The Brazilian exception has a broad scope which includes several types of works. However, it restricts the application of these works only to demonstration purposes. The UK has a similar exception for the advertisement of sale of artistic work. According to the CDPA 'It is not an infringement of copyright in an artistic work to copy it, or to issue copies to the public, for the purpose of advertising the sale of the work'.⁶⁶⁴ Comparing these two pieces of legislation, it could be observed that the UK exception is stricter in its scope. In fact, Brazilian Law covers a variety of works, whereas the CDPA only covers artistic works. This exception is also found in the InfoSoc Directive 2001/29/EC, which states the use of protected works for the purposes of 'demonstration or repair of equipment'.⁶⁶⁵ This study suggests that Brazilian law should include the repair of equipment under this exception. Similarly, it also encourages the adoption of repair of equipment in UK legislation. This study also proposes that it could be advantageous if the inclusion of non-artistic works within the scope of this exception were included in UK legislation as well.

⁶⁶³ Brazilian Copyright and Neighbouring Rights Law 1998, art 46, (v) (BR).

⁶⁶⁴ CDPA 1988, 63 (1).

⁶⁶⁵ InfoSoc Directive 2001/29/EC, art 5, 3 (l).

4.3.2 Theatrical and musical performances

Brazilian Law protects authors' rights in relation to performances.⁶⁶⁶ Nevertheless, the law permits 'stage and musical performance, when carried out in the family circle or for exclusively teaching purposes in educational establishments, and when devoid of any profit-making purpose'.⁶⁶⁷ In other words, theatrical and musical performances do not infringe copyright provided that their purpose is for non-profit activities only. It permits performances carried out in private family environment or in educational establishments, provided that this is solely for teaching purposes. This exception includes activities such as school's annual performances.⁶⁶⁸

In this light, the UK has a similar exception to performance right.⁶⁶⁹ According to the CDPA exception, 'the performance of a literary, dramatic or musical work before an audience consisting of teachers and pupils at an educational establishment and other persons directly connected with the activities of the establishment' does not infringe copyright.⁶⁷⁰ UK legislation covers performances and plays for educational purposes. That is, a University or a school can show copyrighted materials but only when the audience is limited to teachers and students.⁶⁷¹ Considering this point, Brazilian Law seems to have a broader scope. According to the CDPA, this exception solely applies to performances attended by teachers and students, whereas the Brazilian exceptions permits, for example, that parents attend those performances. The CDPA also has an

⁶⁶⁶ Brazilian Copyright and Neighbouring Rights Law 1998, art 68, *chapeau* (BR).

⁶⁶⁷ *ibid* art 46, VI.

⁶⁶⁸ Leonardo Macedo Poli, *Direito autoral: parte geral* (Del Rey 2008) 72; Elizabeth Roxana Mass Araya and Silvana Aparecida Borsetti Gregorio Vidotti, *Criação, proteção e uso legal de informação em ambientes da World Wide Web* (UNESP 2010) 80; Renata Furtado de Barros, Paula Maria Tecles Lara and Juliana Maria Matos Ferreira (Orgs), *Justiça e Democracia: as Novas Perspectivas da Hermenêutica Constitucional*, vol II (Lulu Publishing 2013) 9.

⁶⁶⁹ It is a copyright infringement to perform, show or play a work in public, See CDPA 1988, 19.

⁶⁷⁰ CDPA 1988, 34 (1).

⁶⁷¹ UK Intellectual Property Office, Guidance: Exceptions to Copyright
<www.gov.uk/guidance/exceptions-to-copyright accessed 12 December 2017.

exception for free public showing or playing of broadcast.⁶⁷² Another similar exception from the Directive 2001/29/EC⁶⁷³ provides that ‘in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the right holders receive fair compensation’. Comparing those legal sources, the Brazilian exception seems stricter. Although the UK exception for performing, playing or showing work during the course of the activities of an educational establishment appears to be restricted to teachers and students, the CDPA also has a further exception which allows for free public showing or playing of broadcasts. The Brazilian system of L&Es does not have an exception similar to the InfoSoc. Thus, this study suggests that Brazilian Law should also include an exception similar to Directive 2001/29/EC, Article 5, 2(e).

4.4 Limitations related to Derivative works

This is the third and last part of the three-divisional approach selected by this work to study the Brazilian L&Es system. This part covers L&Es related to derivative works. It can be argued that derivative works are the most problematic section of all L&Es.⁶⁷⁴ This argument is particularly applicable to the Brazilian context.⁶⁷⁵ In the UK, courts seem to raise copyright standards when facing derivative works,⁶⁷⁶ and there is a good reason to suspect that Brazilian courts operate in a similar way.⁶⁷⁷ In this light,

⁶⁷² CDPA 1988, 72 (1).

⁶⁷³ InfoSoc Directive 2001/29/EC, art 5, 2(e).

⁶⁷⁴ Gary W. Matkin, *Institutional Changes in Transdisciplinary Research and Learning in Gertrude Hirsch Hardon, Unity of Knowledge*, vol II (EOLSS Publishers Co Ltd 2008) 156.

⁶⁷⁵ Eliana Michaelchin Bezerra and Rádio e Televisão Record S/A v Cid Moreira; Gilmar Mendes v Paulo Henrique Amorim’ Rede Pura Comunicação LTDA and others v Beta Shows Produções e Entretenimentos Voltados Para Rádio e Tv Ltda and others.

⁶⁷⁶ Ursula Smartt, *Media and Entertainment Law* (3rd edn, Routledge 2017) 115-120.

⁶⁷⁷ In this context, ECAD has a high rate of success in disputes involving payment of royals due to public performances. For more insights regarding this argument, See Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, ‘Exceptions and Limitations to Copyright in Brazil: A Call for Reform’ in Lea Shaver (ed), *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 85-86.

many scholars have proposed to study the difference between original works and derivative works.⁶⁷⁸ Despite those efforts, there is not a straightforward way to solve this impasse. In practice, this task has been proven to be more arduous than what one may expect. Unfortunately, there is still much lack of clarity in the legal literature regarding this issue. In order to tackle this problem, Chapter 5 surveys some cases involving the use of parody to critically analyze and establish which criteria Brazilian Courts use when facing this type of work. Going back to the discussion of L&Es related to derivative works, the term derivative work under Brazilian Law means ‘(...) (works) that which, while constituting a new intellectual creation, is the result of the transformation of an original work’.⁶⁷⁹ From another definition, derivative work means:

a work based upon one or more pre-existing works, (...) or any other form in which a work may be recast, transformed, or adapted (...) A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work’.⁶⁸⁰

Brazilian Copyright and Neighbouring Rights Law permits certain types of use relating to derivative works regardless of the copyright holder’s permission. The following subsections cover Brazilian L&Es related to derivative works: paraphrases and parodies⁶⁸¹, material opened to public inspection⁶⁸², and software integration⁶⁸³.

⁶⁷⁸ Christine Wallace, ‘Overlapping Interests in Derivative Works and Compilations’ (1984) 35 Case Western Reserve Law Review 103, 111; Daniel Scardino, ‘Derivative Works, Compilations and Joint Works’ in Laura Lee Stapleton, *E-copyright Law Handbook* (Aspen Law & Business 2002) 7-10; Marshall A Leaffer, *Understanding Copyright Law* (LexisNexis, 6th edn, 2014) 15-20.

⁶⁷⁹ Brazilian Copyright and Neighbouring Rights Law 1998, 5, VIII, (g) (BR).

⁶⁸⁰ US Code, t 17, s 101 (US).

⁶⁸¹ Brazilian Copyright and Neighbouring Rights Law 1998, art 47 (BR).

⁶⁸² *ibid* art 48.

⁶⁸³ *ibid* art 6, IV.

4.4.1 Paraphrases and Parodies

Paraphrases and parodies are permitted under the Brazilian system of L&Es. Paraphrases represent a re-phrasing of a protected work maintaining the same ideas.⁶⁸⁴ Parody is a derivative work which impersonates a target work resulting in a humorous effect⁶⁸⁵. Paraphrases contrast with parodies in at least two ways. First, paraphrases are not humorous and have a commitment to maintain the interpretation of the work as closely as possible. Second, parodies always have a humorous effect and are not limited to the terms in the work, they can provide free reinterpretations. Depending on the regime adopted toward parody, it can be inserted as an exception or limitation. In the Brazilian case, parody is treated within the ‘Limitations to Authors’ Rights’ section.⁶⁸⁶

According to Brazilian Copyright and Neighbouring Rights Law ‘paraphrases and parodies shall be free where they are not truly reproductions of the original work and not in any way provoke any harm’.⁶⁸⁷ The legal concept of parody is strict, in a sense parody is a form of art that plays with the seriousness of the sourced work, and can cause a certain level of discredit. Consequently, the concept of parody can foment greater censorship and encourage solely ‘tamed parodies’.⁶⁸⁸ Furthermore, Brazilian legislation does not distinguish between weapon parodies and target parodies. In England, the

⁶⁸⁴ Affonso Romano de Sant’Anna, *Paródia, Paráfrase & Cia* (first published 1985, 8th edn, Ática 2007) 1-5.

⁶⁸⁵ Linda Hutcheon, *A Theory of Parody: The Teachings of Twentieth-Century Art Forms* (University of Illinois Press, 2000) 35-37; Parody: *The New Critical Idiom* (Routledge 2000) 9, 15; Robert Chambers, *Parody: The Art That Plays with Art* (Studies in Literary Criticism and Theory) (Peter Lang Publishing Inc, 2010) 225-228.

⁶⁸⁶ Leonardo Macedo Poli, *Direito autoral: parte geral* (Del Rey 2008) 73-74; Elizabeth Roxana Mass Araya and Silvana Aparecida Borsetti Gregorio Vidotti, *Criação, proteção e uso legal de informação em ambientes da World Wide Web* (UNESP 2010) 132; Renata Furtado de Barros, Paula Maria Tecles Lara and Juliana Maria Matos Ferreira (Orgs), *Justiça e Democracia: as Novas Perspectivas da Hermenêutica Constitucional*, vol II (Lulu Publishing 2013) 10-14.

⁶⁸⁷ Brazilian Copyright and Neighbouring Rights Law 1998, art 47 (BR).

⁶⁸⁸ Pedro Nicoletti Mizukami, Ronaldo Lemos, Bruno Magrani and Carlos Affonso Pereira De Souza, ‘Exceptions and Limitations to Copyright in Brazil: A Call for Reform’ in Lea Shaver (ed), *Access to Knowledge in Brazil: New Research on Intellectual Property, Innovation and Development* (Bloomsbury Academic 2010) 85.

copyright limitation of parody is among the fair dealing permitted acts. In the case of Britain, the provision from the CDPA also includes caricature and pastiche.⁶⁸⁹ In another context, the German Copyright Act requires that lawful parodies pass the general requirements of free use.⁶⁹⁰ In Brazil, this limitation applies solely to paraphrases and parodies. This study suggests the insertion of a copyright exception to caricature and pastiche. These points of discussion will be addressed in Chapter 5.

4.4.2 Material open to public inspection

Brazilian Law allows for the representation of works on public display. In this light, The Copyright and Neighbouring Rights Law permits that: ‘works permanently located in public places may be freely represented by painting, drawing, photography and audio-visual processes’.⁶⁹¹ The law allows derivative works when the copyrighted source is available for public display, however it does not have a definition of the term public space expressly written. In this light, UNESCO defines this term as:

an area or place that is open and accessible to all peoples, regardless of gender, race, ethnicity, age or socio-economic level. These are public gathering spaces such as plazas, squares and parks. Connecting spaces, such as sidewalks and streets, are also public spaces.⁶⁹²

⁶⁸⁹ Emily MacKintosh, ‘The Development of the Parody Exception to The Copyright Infringement’ (FieldFisher, 08 Jan 2015) <www.fieldfisher.com/publications/2015/01/the-development-of-the-parody-exception-to-copyright-infringement#sthash.tZJNCAQ4.dpuf> accessed 20 December 2017.

⁶⁹⁰ Copyright Act of 9 September 1965 (Federal Law Gazette Part I, p. 1273), as last amended by art 8 of the Act of 1 October 2013 (Federal Law Gazette Part I, p. 3714) German copyright Act: art 24 Free use ‘(1) An independent work created in the free use of the work of another person may be published or exploited without the consent of the author of the work used. (2) Paragraph (1) shall not apply to the use of a musical work in which a melody is recognisably taken from the work and used as the basis for a new work’ (DE).

⁶⁹¹ Brazilian Copyright and Neighbouring Rights Law 1998, art 48 (BR).

⁶⁹² UNESCO, Inclusion Through Access to Public Space <www.unesco.org/new/en/social-and-human-sciences/themes/urban-development/migrants-inclusion-in-cities/good-practices/inclusion-through-access-to-public-space/> accessed 19 December 2017.

The law permits the representation by any means of registration or fixation of the work mechanically or manually. However, this limitation does not imply that the reproduction of a work of art is permitted by another identical form because it would not depict a representation but rather a literal copy of the work, which requires the authorization of the author.⁶⁹³ Viewed from a different perspective, this limitation seems not to cover a reproduction which implies a literal copy, when destined for commercial purposes.⁶⁹⁴ It is worth noting that, the law is silent regarding which types of posterior use can be affected. Despite its lack of clarity, it seems to at least cover copies that are intended for personal use. With these insights in mind, this matter remains unresolved. Some authors affirm that when the posterior use is for commercial purposes, the owner of the intellectual property cannot object to the use. Others defending that law, claim it did not restrict this limitation for sole commercial purpose, thus, if the reproduction maintains the essence of the original work, the public should benefit from it in full. Because this topic is debatable, it is advisable to request an authorization from the intellectual property owner.⁶⁹⁵ The EC Directive addresses this exception as not infringing copyright, which states ‘use of works, such as works of architecture or sculpture, made to be located permanently in public places’.⁶⁹⁶

This exemption is also applied in jurisdictions, as for example in Germany and the Netherlands. It requires that the work is located permanently in a public space.⁶⁹⁷ A case regarding this point is a landmark ruling made by The Federal Supreme Court of Germany in a well-known case, namely *Reichstag wrapped*. This case involves the

⁶⁹³ Elisangela D Menezes, *Curso de Direito Autoral* (Del Rey 2007) 107-108.

⁶⁹⁴ Plínio Cabral, *Direito Autoral - Dívidas e Controvérsias* (Harbra Direito 2000) 5-10.

⁶⁹⁵ Elisangela D Menezes, *Curso de Direito Autoral* (Del Rey 2007) 107-108.

⁶⁹⁶ InfoSoc Directive, art 5, 3(h).

⁶⁹⁷ ‘Wrapped Reichstag’ Federal Supreme Court, January 24, 2002, Case I ZR 102/99, 34 I.I.C. 570 (2003).

exception of material open to public inspection which came to court in June/July 1995. The artists Christo and Jeanne-Claude had produced an art project called the 'Reichstag Wrapped'. The lawsuit came to court when the artists prosecuted a postcard publishing company that had sold postcards containing their artistic work. The defendant, however, argued that it was his right to use the image of the art project due to the Copyright Act which states that 'images of works located permanently on public spaces, such as streets, squares and others can be distributed without the authors' consent'.⁶⁹⁸ Nevertheless, the Court ruled in favour of the artists stating that the art project was only being temporally displayed, and was not a permanent feature. Thus, this did not guarantee the defendant's continuous access to the panoramic view. Nevertheless, images for personal use were allowed.⁶⁹⁹ This case provides a significant example on posterior use for commercial purposes to Brazilian jurisprudence. So, the exception in Brazilian law should not permit derivative works of protected material on public spaces for the purpose of profit.

In the UK, this exception is greater detailed, especially when compared with Brazilian Law. The CDPA states that:

Where material is open to public inspection pursuant to a statutory requirement, or is on a statutory register, any copyright in the material as a literary work is not infringed by the copying of so much of the material as contains factual information of any description, by or with the authority of the appropriate person, for a purpose which does not involve the issuing of copies to the public.⁷⁰⁰

⁶⁹⁸ German Copyright Act (amended 16 July 1998) 1965, art 59 (DE).

⁶⁹⁹ Andrea Muller, 'Reichstag Wrapped' (Law Web Saarbrücken, 16 Dec 2016) <<http://archiv.jura.uni-saarland.de/lawweb/pressreleases/reichstag.html>> accessed 16 december 2016.

⁷⁰⁰ CDPA 1988, 47 (1).

Unlike the Brazilian exception, the CDPA seems to adopt a much clearer delimitation of the exception relating to materials open to public inspection. In this sense, the posterior use for a commercial purpose is not allowed. This study supports this approach to restrict this exception to non-profit activities. This solution provides users' interest and copyright holders balancing rights.

4.4.3 Software integration

As mentioned previously, Brazilian exceptions are mainly confined in the Copyright and Neighbouring Rights Law, however the exceptions related to computer programs are also covered by the Brazilian Software Law. This subsection covers exceptions regarding software integration.⁷⁰¹ According to Brazilian Software Law: 'the integration of a program, maintaining its essential characteristics, with an application or operational system, technically indispensable for users' needs, provided it being for the exclusive use of the person who effected it'.⁷⁰² This exception seems to be inspired by the EU Directive 91/250/ECC. Brazilian Law provides an exception fairly similar to the de-compilation exception from Article 6 which states that 'the authorization of the right holder shall not be required when the reproduction of the code and translation of its form provided that they are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs (Article 4 (a) and (b))'.⁷⁰³ Under the UK legislation, the exception allows de-compilation of computer programs under the following conditions:

⁷⁰¹ Newton Silveira, *Propriedade intelectual: propriedade industrial, direito de autor, software, cultivares, nome empresarial, abuso de patentes* (5th edn, Manole 2014) 1-5; Denis Borges Barbosa, *Novos estudos em Propriedade Intelectual* 2011-2013, vol I (IBPI 2015) 267.

⁷⁰² Brazilian Software Law, art 6 (v).

⁷⁰³ Computer Programs' Directive (EC) 2009/24, art 6, I.

it is necessary to decompile the program to obtain the information necessary to create an independent program which can be operated with the program decompiled or with another program ('the permitted objective'); and (b) the information so obtained is not used for any purpose other than the permitted objective.⁷⁰⁴

The Brazilian exception of software integration is applicable in a very similar form to the UK law. Both pieces are similar and closely follow the EU Directive. Thus, this study does not recommend any specific changes to Brazilian Law in this matter.

The next section presents the conclusions of this chapter.

4.5 Copyright exception related to text and data mining

The concept of 'big data' is one of the most confusing concepts in the 21st century. It comprehends a combination of a variety of data that were not initially intended to be grouped together. 'Big data' is a concept generated due to the advancement of technology, and that currently brings several implications for the parties involved. That is, consumers, firms, governments, policy makers and international forums. The term big data comprises of a large amount of data that contains different information. For instance, the data that businesses keep from their clients when they complete a purchase or a business transaction. In such a case, this information may be used by the company without express permission from their clients. The techniques or tools required in this process are referred to as 'data mining'. Therefore, data mining can be described as an algorithm or a tool to extract valuable knowledge from a set of information in order to get inferences from it. These inferences can result in benefits or advantages such as to boost sales performance by identifying trends in a business environment. Moreover, in a

⁷⁰⁴ CDPA 1988, 50B (2).

government and national security context, it could be employed to identify and overlook the list of phone calls, messages and webpages that users have accessed. Currently, the latter example illustrates a common international phenomenon as the world lives amid attempts of violation of international safety due to the expansion of terrorism activities. In the business context, it is certain that activities, such as using clients' personal data to increase the performance of a company and governments engaging in espionage activities to protect national security, materialised much earlier than the legal texts covering databases. Google and Amazon are good examples of companies that have benefited from big data and data mining technologies in order to increase the value of their businesses.

In order to address the evolution of these concepts in Brazilian law, this section first describes what Brazilian Law defines as a database and its copyright. Afterwards, this section addresses the issues related to copyright of databases regarding personal data as well as how this topic relates to big data and data mining.

In relation to database's copyright, the only regulation covering this matter in Brazil is law No 9,610 of 1998, which is the law of authors' rights. Article 87 states that the owner of the database has an exclusive right with regard to the form of the structure of the database, as allowed or forbidden by the following cases: (i) article 87(1): its total or partial reproduction through any process; (ii) article 87(2): its translation, adaption, organization or any other modification; and (iii) article 87(3): its distribution from the original or copies to a third party or the public.⁷⁰⁵

The law is clear in specifying how the rights of the owner of the database applies in respect of its structure and reproduction, which grants the right of reproduction or not

⁷⁰⁵ Brazilian Copyright and Neighbouring Rights Law 1998, art 87 (1), (2) and (3) (BR).

by the owner. However, it does not cover the content of the database. In particular, if this content consists of people's personal data. As such, this leaves business and governments that compile such database from clients or citizens without proper jurisdiction.

The related issues that involves big data and data mining are relatively new in the Brazilian scenario. The first law to address a related issue involving the use of internet and the safeguard of the users' personal data was the Law No 12,965/14.⁷⁰⁶ It brings several improvements to the protection of personal data and its usage. Nevertheless, it is only applicable to the context of internet and data connection providers. The main features of this law are as follows. Article 7 (1) states that it is inviolable to the intimacy and private life of a citizen, and secures his protection and monetary penalties due to the material or moral damages due to the violation of this right.⁷⁰⁷ Article 7 (2) states that it is inviolable and private the communication messages of a user of the internet, unless requested by a judicial order.⁷⁰⁸ Article 7 (3) argues that it is inviolable the privacy of stored private communications, except if requested by a judicial order.⁷⁰⁹ Article 7 (8) establishes that there must be clear and complete information regarding the collection, in terms of the usage and storage, treatment and processing of a user's personal data. Moreover, it adds that this information could only be used as a result of activities that a) justify the collection of the information, b) are not forbidden under the current legislation, c) specify clearly in the contract of service by the internet provider or in the usage terms of the internet applications.⁷¹⁰ Article 7 (9) requires the internet provider to request express consent of their users regarding the collection, usage, storage, and treatment of

⁷⁰⁶ Law No 12,965 2014 (BR).

⁷⁰⁷ *ibid* art 7 (1) (BR).

⁷⁰⁸ *ibid* art 7, (2).

⁷⁰⁹ *ibid* art 7, (3).

⁷¹⁰ *ibid* art 7, (8).

their personal data.⁷¹¹ Article 7 (10) defines that the personal data of the users of the service should be definitively excluded, in the case of a personal request by the user, at the end of the business contract between the parties. There are exceptions regarding the cases in which it is mandatory to store this data (these cases are also presented in the law 12,965/14).⁷¹² Article 7 (13) defines that legislation regarding the protection and defence of the consumer should be used in transactions performed over the internet.⁷¹³ Another interesting article is number 8, which safeguards the right of privacy and freedom of expression in communications over the internet. Article 8 (1) adds that contractual clauses that breach the inviolability and privacy of private communications performed over the internet will be considered null.⁷¹⁴

Although this law is very comprehensive in protecting a user's personal data, it does not address the issue regarding the use of a citizen's personal information by either the government or any other types of business. This law relates to the Brazilian Federal Constitution of 1988 that assures the protection of personal identity as a citizen's right. Article 5 of the Federal Constitution of 1988 states that a citizen's privacy is an inviolable right.⁷¹⁵

This entails different interpretations for the holders of these data. For business users, the Civil Code of 2002 and the Consumer's Code of 1990 also provide rules regarding the use of personal data of business clients. It is worth noting that the law No 12,965/14 only applies to businesses that provide data connectivity. Thus, it is only applicable to internet providers, which store clients' information in their systems in order

⁷¹¹ *ibid* art 7, (9).

⁷¹² *ibid* art 7, (10).

⁷¹³ *ibid* art 7, (13).

⁷¹⁴ *ibid* art 8, (1).

⁷¹⁵ Brazilian Constitution 1988, art 8 (BR).

to be able to provide the connection service. The law No 8,078/90 enacted the Brazilian Consumer's Code, but it addresses the issue of personal data in a sole article.⁷¹⁶ Article 43, however, fails to determine the scope in which businesses can use the personal data of its clients. This article states that the information of the consumer falls into the public domain, and as such, anyone can consult this information to evaluate credit ratings. It is common practice in Brazil for companies to present payment options depending on an individual consumer's records. Thus, in order to allow a payment by instalments, the company assess whether a consumer has had a good or a bad credit performance over the last 5 years. If there is any inconsistency in this report, the company may refrain from selling the good to the consumer. In such a situation, the consumer is only allowed to pay for the good upfront in cash. Thus, there is still uncertainty regarding the data that businesses store about their clients. The Consumer's Code does not rule regarding the way this data should be stored, protected or used.

Under law No 12,965/14, in order for a business to disseminate or transfer a user's information to a third party, it is mandatory to have the user's express permission. Without a proper emitted consent, users' data needs to be safeguarded. The only other way that the user would have his personal data accessed is through a judicial order to instruct criminal cases and other matters. The latest case with regard to this issue was in May 2016 when the Federal Judge Marcel Montalvão, requested information of conversations on 'Whatsapp' from a man in order to further clarify a criminal case with the police. As the Facebook group which owns Whatsapp failed to fulfil the judge's request, this also entailed a block of 72 hours of 'Whatsapp' in Brazil.

⁷¹⁶ Law No 8,078 1990 (BR).

A recent enactment is the Decree No 8,771/16⁷¹⁷ which regulates the requirements for storage of personal information by data connection providers. Article 11 (2) treats as personal information all that data which is regarding the parents of the individual, including their address, their professional qualification, their education, their name and marital status. Additionally, Article 14 defines personal data as any data related to the citizen that covers his identity or that would possibly lead to his identity. Moreover, any reproduction, processing, distribution, archival, deletion or extraction of this information that is also related to the personal data and its treatment.

A business should keep the client's data for a maximum period of 6 months. Moreover, data must be deleted in the following circumstances: after the period of 6 months and when it loses its finality.

In summary, one can note that this topic is a very recent one in Brazil and there are no laws regarding the use of databases either for general business or for the government. That is the *sui generis* protection of the database is not discussed in Brazilian law. It is worth noting that Brazil did not sign the WIPO Copyright treaty of 1996.⁷¹⁸

Next, this study presents some relevant cases involving this topic in Brazil.

4.5.1 Cases involving database copyright exceptions and related issues in Brazil

Since Brazilian law does not cover database copyright and exceptions, in particular regarding businesses, there are limited cases regarding this issue. This study

⁷¹⁷ Decree No 8,771 2016 (BR).

⁷¹⁸ WIPO Copyright Treat 1996.

presents a case that consists of database copyright, but due to the lack of specific legislation, the case was ruled following consumer and intellectual property laws in the context of an internet service provider. The first case within this framework, involves an infringement of personal data that happened in 2010 when the department for the protection and defence of the consumer sued the company TNL PCS S/A (Oi) for abusive practices, which violated the principle of good faith and the right to users' privacy under the administrative process n. 08012.003471/2010-22.⁷¹⁹

This was a historical and innovative case, and it was only ruled on 23rd July 2014, when the company was convicted to pay 3.5 million Brazilian reais for the alleged infringements.

'The Department for the Protection and Defence of consumers in Brazil' accused the company 'TNL PCS S/A (Oi)' of alleged using the information of their consumers without their previous consent and knowledge. This company is one of the greatest providers of internet connection of Brazil. Whenever a user from this company connected to a web page, a tool of data mining under the DNS (Domain Name System) of 'a.oix.net' started to monitor the user's activity without his knowledge and previous consent. Using this tool, the company created a database of its users and their preferred searches, products and other market trends. Based on this big data, the company then used a data mining tool to present advertisements in those webpages accessed by the users that would most likely suit their interests. Thus, every time users accessed these advertisements, they were redirected to a third-party website that would profit should the users buy anything from their website. The company 'TNL PCS S/A (Oi)' made profits every time that its users accessed these advertisements.

⁷¹⁹ *Department for the protection and defence of the consumer v TNL PCS S/A (Oi) BR (2010).*

This ruling set a precedent in Brazil because there are no clear laws regarding these issues, but the interpretation of the jurisprudence culminated in the conviction of the company. It is worth noting that the law of authors' rights in Brazil does not have the scope to rule regarding the content of a database, specifically it does not determine any legislation with regard to users' personal data. Additionally, as the law does not specify the database copyright exceptions, *sui generis* protection of the database and its scope in Brazil, the ruling consisted in consumer and internet laws. The ruling was based on the interpretation that the company had fooled several thousand customers throughout the country in order to take economic advantage. The jurisprudence takes its grounds from article 6 (4) of the Consumer's Protection Code 1990, which states as a basic right of the consumer: 'the protection against abusive and fooling advertisement, coercive or unfair commercial methods, as well as practices and abusive statements imposed in the provision of goods or services'.⁷²⁰ Moreover, it relies on article 7 paragraphs 1 and 2 of law 12,965 of 2014, which defines the scope that internet service providers must follow to safeguard their users. Article 7 (1) states that it is inviolable the intimacy and private life of a citizen whereas article 7 (2) states that it is inviolable and private the communication messages of a user of the internet, unless requested to instruct administration of justice.⁷²¹

Brazilian law points out some guidelines regarding data protection under a consumer's perspective. Article 57 of law No 8,078 of 1990 (the Civil Code of Consumer), which was updated by Law No 8,656 of 1993⁷²² as well as the article 25 and

⁷²⁰ Consumer's Protection Code 1990, art 6 (BR).

⁷²¹ Law No 12,965 2014, art 7, (1) and (2) (BR).

⁷²² Law No 8,656 1993 (BR).

26 of the Decree No 2,187/97,⁷²³ which were updated by Decree No 7,738 of 2012 states the type of punishment (condemnation) and the fine related to consumer's breach of information.⁷²⁴ Article 57 establishes the penalty of a fee that depends on the extent of the gravity of the harmful act against the consumer. Articles 25 and 26 of Decree No 2,187/97 as well as Law No 7,347⁷²⁵ of 1985 confers that the payment has to be made to the Federal Union of Brazil.

This lawsuit draws some lines on the understanding of misappropriation of personal information. Nonetheless, the ruling applies only to internet connection providers and in cases of users' data without prior express authorization. The plaintiffs of this dispute were represented by a public institution, the Department of the Protection and Defence Consumers, entitled to advocate in the benefit of individuals in contractual disadvantage. In general, the compensation goes to a specific group, however the law restricts the payment to the Country's Federal Union.

In summary, data protection is a rather unexplored area of study in Brazil. As a result, there is not many scholars who attempted to tackle this issue. There is still much to be discussed prior adopting a 'sui generis' protection on databases in Brazil.

4.6 Conclusion

Unfortunately, Brazilian Copyright legislation takes on the perspective of the copyright holders. This study encourages a change of copyright to better address users' 'rights perspective' (end-users). In this sense, the term access-right seems more appropriate to the purpose of copyright in the digital era.

⁷²³ Decree No 2,187 1997 (BR)

⁷²⁴ Decree No 7,738 2012 (BR).

⁷²⁵ Law No 7,347 1985 (BR).

Brazilian legislation has not explicitly written the three-step test as stated in Article 9(2) from the Berne Convention. Although, it is not necessary to include these criteria in national law, one would expect this to improve the overall interpretation of L&Es, particularly relating to exceptions in reproduction rights.

Another point of discussion is with regards to the Brazilian exception for teaching purposes, which is applied to illustrations used in lessons and partial quotation from computer programs. The use for teaching purposes from the Berne Convention in Article 10 (2) permits a larger application, which is not adopted by the Brazilian system of L&Es. Brazil should include at least two of the exceptions provided by Directive 2001/29/EC: the 5, 3 (g) regarding the use during religious celebrations or official celebrations organised by a public authority; and 5, 2(e) ‘in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the right holders receive fair compensation.’ It shall also include rights for orphan works.

Regarding exceptions of text and data mining, it is necessary to delimitate the scope of the ‘sui generis’ of a database protecting its content. Brazilian law does not provide any regulation regarding this issue, whereas since 1996 three important treaties have started to discuss this issue: the European Union Directive 96/9/EC,⁷²⁶ the Database Investment and Anti-Piracy Act of the US⁷²⁷ and the WIPO Copyright Treaty (WCT)⁷²⁸. Following the need of a ‘sui generis’ protection, this study argues that it is necessary to create a law that focuses on the protection of the personal data of the citizens, which is not only required for data connection providers as illustrated in the Decree

⁷²⁶ Directive 96/9/EC of 11 March 1996 on the legal protection of databases [1996] OJ L77/20.

⁷²⁷ US Government, ‘The Database Investment and Anti Piracy Act of the U.S’ (1996)

<<https://www.congress.gov/104/bills/hr3531/BILLS-104hr3531ih.pdf>> accessed 18 November 2016.

⁷²⁸ WIPO Copyright Treaty. (1996).

8,776/16,⁷²⁹ but also required for other business and governments. Here, the governments that this study refers to involves the three spheres of government of Brazil: local (city), counties (estates) and federal (country). Moreover, it is necessary to delimitate the scope of this protection. For instance, data that should be protected to cover for individuals or data that should not be protected as it is considered anonymous, and therefore inferences related to the latter do not violate an individual's right. Consider a case of a business that has a pool of users as clients. In this case, businesses should be allowed to discover trends or associations regarding the preference of their clients in order to add value to that business. In fact, most businesses already do this, but this is not expressly a right of businesses under the current Brazilian legal system. A possible future policy that is issued against this trend would have to overcome several problems in order to be fully enacted and would certainly result in a number of lawsuits arising against business and entrepreneurs. Therefore, this is certainly not the best way for the Brazilian system to move forward. Nevertheless, the user should have the right to be asked whether his data can be used anonymously or not. This is consistent with the principle of intimacy and privacy covered under art. 5 of the Brazilian Federal Constitution of 1988.⁷³⁰ Moreover, this study suggests amendments to the Brazilian Civil Code of Consumers with regard to defining the protection of clients' personal data in business and trade transactions. The European Union has legislated regarding this matter since 2004, namely with the enactment of the EC n. 2006.⁷³¹ A similar approach could be adopted in Brazil, towards

⁷²⁹ Decree No 8,776 2016 (BR).

⁷³⁰ Brazilian Constitution 1988, art 5 (BR).

⁷³¹ Council Regulation (EC) 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) [2004] OJ L364/1.

the creation of a federal database in which each county could request to access this database in order to resolve consumer and business conflicts.

This is not only interesting for businesses, entrepreneurs and consumers, but also for government. For government, enacting a policy to regulate the usage of personal data under the scope of big data would benefit the population because it would enable the government to better implement public policies for the population. Moreover, it would also help in matters of national security in the ongoing fight against terrorism and it could join worldwide efforts toward international safety. It is worth noting that the EU Directive, article 9 (c) already allows as an exception the use of a database by the government in matters of national security. Unfortunately, the Brazilian judicial system fails to provide a similar ruling, which needs to be addressed by future policies.

Brazilian Law could also benefit from the example followed by the EU according to the Directive 2009/136/EC, which provides a clear definition of ‘data breach’ and violations in transmitting, storing and processing a user’s personal data. This chapter highlights some problems that Brazilian law has which justify why the country performed poorly on the Consumers International IP Watchlist⁷³². In fact, the country’s law was poorly written presenting several incongruences with regard to many exceptions such as: private copy for personal use, portraits of visual works made for hire, religious works. Additionally, the Brazilian system of L&Es is very restricted regarding the use of copyright work with educational and social ends. Thus, it has little room to facilitate the use of copyrighted work for social ends such as in prisons. Brazilian law seems to become more restrictive rather than more inclusive over the years. For instance, in private copies where the legislation is so restrictive that it has reduced dramatically its use.

⁷³² Consumers International, 2010 IP Watchlist Report (2010).

It is unpleasant that the law seems to ignore the advancements of technology. Regarding this matter the law should include an exception of format and space shifting which is already common in Brazil. It is disproportionate to require a person to have an original DVD of a movie and not allow the citizen to change its format in order to create a personal copy. For instance, to convert the movie into a cell phone format. In addition, the law also criminalizes this attitude of the user. Thus, if the limitations and exceptions to copyright do not cover the advancements of technology they will have a decorative approach rather than a useful approach. Another suggestion is to create an exception for the visually impaired. The law needs to be more inclusive and not to be restricted only to visual problems but also need to accommodate people with other health problems that also affect the use of such copyrighted works.

The law leaves a problematic situation for libraries seeking to preserve works as they cannot digitalize the contents of the books for instance in order to safeguard its integrity for longevity. This is even worse in case of books that are imminently being lost due to the use or the passing of time. Even if they try to 'save' a book in such conditions they can be prosecuted. Thus, it is necessary to create exceptions for these works to be properly preserved and safeguarded for future generations.

There is no exception regarding out of printed works. Thus, actually, if a citizen comes to a library and the work is not being printed anymore and thus the citizen cannot buy the work, he would be discouraged to acquire the work following legal ways as this work is not being commercialized anymore. Thus, these citizens should not be punished as they are a victim of only being able to use the works which are currently being commercialized.

CHAPTER 5: Parody

5.1 Introduction

This chapter aims to explore ‘parody’ from a legal perspective. Parody is one of the earliest exceptions to be regulated under Brazilian law, especially in comparison to the timing which the UK legislated regarding this matter. Brazilian law first addressed parody in 1973⁷³³, whereas it was not until 2014 that the same happened in The United Kingdom⁷³⁴. Thus, it is expected that Brazilian law is more mature regarding this exception. As a parody is a derivative work, it has not the need to be completely independent of other works. Parody is closely related to another preceding work, and thus it can be said as been more inclusive by the public in contrast with books and other works that require much more creativity. Thus, considering Brazilian economic and social condition, parody comes to the fore as one of the greatest ways of expressing people’s opinion as it is less demanding intellectually speaking in comparison to more creative works. According to Chapter 2, Brazil had a dictatorial period and recently passed through a democratization period. Thus, parody appears as a key tool of representing people’s freedom of opinion in a democratic environment. Being a key method of expression, it is also important to highlight at least three reasons why it is important to review this exception in detail. First, Brazilian law is not clear and consistent regarding parody. Furthermore, the law is based on terms that are very broad that allow different interpretations, which in some situations can lead to censorship ideas (it cannot imply discredit). Additionally, Brazilian criminal law states that any infringement to copyright, e.g. to the authors’ right is treated as a criminal offence, and thus need to be

⁷³³ Brazilian Copyright Law (No 5,988) 1973 (BR)

⁷³⁴ The Copyright and Rights in Performances (Quotation and Parody) Regulations SI 2014 No 2356, S30A.

reviewed. Second, the fact that Brazil was influenced by the French position which has a very protective view regarding author's right and moral rights has led to an environment in which there is an unbalance between the author's rights (more protected) in comparison with the rights of the parodists. Third, as Brazil is a code law country, the laws have supremacy in comparison to other sources of justice, and the jurisprudence although having its power, it does not have the same power as in common law countries such as the UK. Thus, considering that this exception is not properly defined, it is not entirely clear, and is subject to several criminal offences, there is a need to revisit this exception and propose changes to it.

In order to illustrate the discussed, a case from 2010 regarding a parody in which the author created a website called 'Falha de Sao Paulo' which published fake news and alerted the customers about whether or not they could trust the real website called 'Folha de Sao Paulo' which published Brazilian news. The website has been offline since 2010, and it was only in 2017 that the decision came forward supporting the parodist. Thus, it took 7 years for a ruling to be made, and this was due to some points of the law that are not clear and were responsible for this delay.⁷³⁵ Thus, this chapter explores parody under Brazilian law in order to provide policy suggestions.

The legislation regarding parodies often relies on mechanisms covered by copyright legislation. Unsurprisingly, Brazil assigns parody protection to the scope of Copyright Law. It is worth noting that, under some jurisdictions, parodies can be treated as a limitation or an exception to copyright. In the US context, parody is addressed as an

⁷³⁵ Conjur, 'Legislação brasileira protege a paródia, diz STJ ao liberar *Falha de S.Paulo*' (2017) <<https://www.conjur.com.br/2017-jun-21/legislacao-protege-parodia-stj-liberar-falha-spaulo>> accessed 11 September 2018.

affirmative defence of the fair use doctrine against claims of copyright infringement.⁷³⁶

Although there is much lack of clarity around this topic, scholars seem to agree that parodies have two salient characteristics: parody needs to refer to an original work (the target work) and it has an humorous effect.⁷³⁷ Therefore, parody can harm an author's material and moral rights. This is because parodies can potentially violate two main author's rights: the paternity right (1) and the integrity right (2). In the first case, a parody which does not acknowledge the previous work may raise grounds as a copyright infringement. In the second case, a parody in which the impersonation undertaken by the parodist damages and discredits the referenced material may also raise grounds to a copyright infringement.

Parody is a literary term within the group of 'transformative uses'.⁷³⁸ In the context of the US's fair use, there are two types of uses: 'personal use' and 'transformative use'. Personal use is associated with an 'enjoyment of a work' which is 'uncommunicative', whereas transformative use involves 'recommunicating the work' and invokes 'defendant's authorship'.⁷³⁹ Under the same perspective, transformative use is one of the four statutory assessments applied in determining whether X is a fair use.⁷⁴⁰ In this sense, parodies are derivative works⁷⁴¹, protected by copyright work and are

⁷³⁶ Lisa M Babiskin, 'Oh, Pretty Parody: Music, Inc' (1994) 8(1) Harvard Journal of Law & Technology 193, 198; Nels Jacobson, 'Faith Hope & Parody: Campbell v Acuff-Rose, "Oh Pretty Woman," and Parodists' Rights' (1994) 31(3) Houston Law Review 955, 994; Andrew Buckland, 'Rap, Parody, and Fair Use Luther R Campbell aka Luke Skywalker, et al v Acuff-Rose Music, Inc' (1995) 17(4) Sydney Law Review 599, 600; Alexandra George, *Constructing Intellectual Property* (Cambridge University Press 2012) 106-107.

⁷³⁷ Margaret A. Rose, *Parody: Ancient, Modern and Post-modern* (Cambridge University Press 1993) 51; Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge University Press 2005).

⁷³⁸ Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (rev edn, Stanford Law and Politics 2003) 27; Richard L. Schur, *Parodies of Ownership: Hip-Hop Aesthetics and Intellectual Property Law* (University of Michigan Press 2009) 139.

⁷³⁹ Abraham Drassinower, *What's Wrong with Copying?* (Harvard University Press 2015) 182-186.

⁷⁴⁰ Transformative use was raised in the case of *Campbell v Acuff-Rose Music*, 510 US 569 (1994) (US)

⁷⁴¹ In fact, the US Code, t 17, s 101 defines this term (US).

significantly different from their target works. With this background in mind, a fine line separates permissible parodies and copyright infringements. Additionally, transformative uses can conflict with ownership rights and moral rights, so for this reason, the law must provide a fair balance to accommodate both interests.

This chapter also relies on case law debate in order to draw conclusions regarding this exception. It is important to compare cases from different jurisdictions in order to learn from previous decisions and avoid unclear or broad definitions that could affect the implications and judgement of future cases. This is also a key tool to rely when proposing policy implications to the literature as it is based on previous experiences and solid evidence. Thus, this chapter compares Brazilian cases with international key cases in the literature such as the Deckmyn's case.⁷⁴²

The contributions of this study are as follows. First, this study contributes to the literature by summarizing current laws across jurisdictions. Second, it suggests some guidelines to be taken by law makers and practitioners on how national law can benefit from parody's full potential. In this sense, it outlines some criteria that aims to avoid contradictory decisions among signature countries members of the TRIPs Agreement.

With time, 'transformative uses' are being explored further and have become more relevant as authors and intellectual property' owners in general have had their rights solidified over the years. The next step of the evolution of IP is exemplified by the appearance of another group of interested users (the producers and consumers of materials). The relationship of these rights to democratic society have often provided citizens with an effective way of complaining and relating political issues. For example,

⁷⁴² *Johan Deckmyn v Helena Vandersteen and others*, Case C 201/13 EU:C:2014:2132 (Deckmyn's Case).

a politician may mislead citizens with false promises in order to be elected; however, citizens can utilize public documents and announcements to complain. Moreover, transformative uses play an important role in securing the right to freedom of expression; however recently it has been suggested that these may conflict with other rights (i.e. intellectual property and moral rights). Therefore, this study recommends an objective position where the situation involving both rights needs can be examined.

It is worth noting that parody is recognized in the Brazilian law as an exception to Copyright. Therefore, certain acts do not infringe copyright, and creating a parody about another work does not necessarily depend upon previous authorization of the copyright holder. Accordingly, this study advocates that citizens can also benefit more from parody in a more open approach considering that it is a very common way of expressing satisfaction generally with politics.

The structure of this chapter is as follows. Section 5.2 reviews the historical background of parody in the context of surveying the evolution of the concept. Section 5.3 presents other literary genres (pastiche, caricature and satire) often studied alongside parody. In order to render the distinction clear, it highlights the main elements of these that differ from parody as a genre. Section 5.4. focuses on the study of parody in Brazil. Section 5.5 surveys the treatment of parody in several jurisdictions and the implications of this in terms of an international theory on parody. Section 5.6 concludes by comparing Brazilian law to other jurisdictions in order to take a critical position over the lack of clarity of national laws and international forums.

5.2 Concepts of parody (from Greek to post modernity)

Parodies have had a complex history ever since their creation.⁷⁴³ Parody is a rare example of a literary term that originated during the ancient Greek period which remains active and relevant right up until modern times. The epistemology of the word ‘parody’ comes from the term *parōidia*, which is the junction of the prefix ‘para’ (parallel, alteration) and the noun ‘ode’ (poem, song).⁷⁴⁴ Based on the etymology, the prefix ‘para’ raises dubious meanings. On one hand, it means a song which is side-by-side (i.e. aligned in idea) to another song. On the other hand, it means a song which opposes or conflicts with another song. In other words, there are two types of parodies, one, which maintains the same idea of the target work, and the other which confronts the idea supported in the original work. For the first meaning, take as an example the *Leibovitz v. Paramount Pictures Corp.* case from the US.⁷⁴⁵ The target work is Demi Moore’s pregnant picture for the cover of *Vanity Fair Magazine*, and the parody is a picture of Leslie Nielsen’s face on a piece very similar to the target work. By doing this, it has introduced a humorous effect to the target work, without actually attacking it. For the second meaning, take as an example the *Northland Family Planning Clinic v. Center for Bio-Ethical Reform* case from the US.⁷⁴⁶ The target work is a video defending a woman’s right to interrupt a pregnancy (pro-choice). Meanwhile, the parody is a video made by a pro-life institution borrowing elements from the target work and inserting clips of real cases of abortion to send out the opposite message. With this background in mind, it is extremely

⁷⁴³ Robert Chambers, *Parody: The Art That Plays with Art* (Peter Lang Publishing Inc 2010) 55.

⁷⁴⁴ Linda Hutcheon, *A Theory of Parody: The Teachings of Twentieth-Century Art Forms* (University of Illinois Press 2000) 32; Simon Dentith, *Parody: The New Critical Idiom* (Routledge 2000) 37.

⁷⁴⁵ *Leibovitz v Paramount Pictures Corp.*, 137 F3d 109 (2nd Cir NY 1998) (US).

⁷⁴⁶ *Northland Family Planning Clinic v Center for Bio-Ethical Reform*, No SACV 11-731 JVS (CD Cal JUNE 15 2012) (US).

important to delimitate the scope of parody and one way of doing this is by drafting a clear concept.

Over recent centuries, the concept of parody has become more complex and popular as a form of expression.⁷⁴⁷ This is because parody is a communication between genres in its essence, which raises complicated issues between the original work and the parallel of the work (referred to as parody). It is worth noting that a parody fails if the public cannot recognize the referenced work that it originated from. In this sense, parody varies within a range: it cannot incur in duplicity of the original work; however, it must have a degree of reference because otherwise, the public will not be able to identify which work the parody refers to.⁷⁴⁸ This is because, if the material has too many new elements in comparison to its genre, it will not be treated as a parody, but as a new work. However, it must clearly refer in a certain degree to any original work in order to be treated as a parody. Thus, it must be sufficiently distinct in order not to be confused as being another work of a higher standard of creativity. It is worth noting that the parody is within this aforesaid range, as the balance between an original work and a referred work is unique.

Parody is a type of derivative work, which is constructed by the process of appropriation and recreation. As a consequence, the limits between a parody and the original work have been frequently discussed as it often raises concerns of being philosophically ambiguous and a risk to IPR's and to intellectual creativeness.⁷⁴⁹ The parody requires sufficient features in order to be recognized as a reformed piece, which

⁷⁴⁷ Margaret A Rose, *Parody: Ancient, Modern and Post-modern* (Cambridge University Press 1993) 748; UK IPO, 'Exceptions to Copyright: Guidance for creators and copyright owners' (2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/448274/Exceptions_to_copyright_-_Guidance_for_creators_and_copyright_owners.pdf> assessed 12 January 2018 6-7.

⁷⁴⁹ Linda Hutcheon, *A Theory of Parody: The Teachings of Twentieth-Century Art Forms* (University of Illinois Press 2000) 51.

needs to be distinct from the former work.⁷⁵⁰ Moreover, a parody is both inspired by a known and trackable source and satisfactorily different so as not to be taken in place of the previous work.⁷⁵¹ A parodist can incorporate some features of an original work in order to produce his own parody. These features could be the style (format), or the content of the original work.⁷⁵²

The success of a parody often relies on how best the original work is acclaimed by the general public. The prestige of the precursor work attracts publicity to the parodist. It is noteworthy that the parody can have a tremendous amplitude in the ways that the parodist chooses to write his work. For instance, the parodist that produces a parody describing a soap opera could choose to criticize a particular soap opera, or the entire genre of soap operas. Regarding lyric songs, the parodist could choose to draw an argument based on the entire song, or only in parts of it. Therefore, the parodist has a huge room to produce his parody in accordance with the original work.

This study presents the evolution of parody in the next section according to three stages: ancient, modern and post-modern.⁷⁵³

5.2.1 Ancient period

Parody emerged in ancient Greece. For this reason, it is extremely challenging to track parody during this period as most of the documents that have survived are just fragments. However, *The Battle of the frogs and mice* is the best-preserved parody.

The literature diverges from its precursor; there are indications pointing to

⁷⁵⁰ Richard Posner, 'When is Parody Fair Use' (1992) 21(1) *Journal of Legal Studies* 67, 68-69.

⁷⁵¹ Carina Gommers, 'The Autonomous Concept of Parody and Conflicting Fundamental Rights: A Balancing Act' (2014) 9(12) *Journal of Intellectual Property Law and Practice* 968, 968-969.

⁷⁵² Sheldon N Light, 'Parody, Burlesque, and The Economic Rationale for Copyright' (1979) 11(4) *Connecticut Law Review* 615, 625-626.

⁷⁵³ This methodology was inspired from previous literature such as: Margaret A Rose, *Parody//Metafiction: An analysis of parody as a critical mirror to the writing and reception of fiction* (Croom Helm 1979) 5-10.

Hipponax⁷⁵⁴ and Hegemon⁷⁵⁵. Hipponax from Ephesus was a poet who wrote *Margites* (700 B.C.E.), inspired by Homer's 'Odyssey' from Homer.⁷⁵⁶ This work was uncommon in relation to other works from of its period as it used satirical elements combined with comic features in its composition⁷⁵⁷. These elements represent a distinguished feature of this parody, which makes it difficult to be classified as a parody or any other type of work. However, this is often referred to in the literature as a parody.⁷⁵⁸ The protagonist of 'Margites' was a fictional mock-heroic character.⁷⁵⁹

Other literature indicates that the first parody ever created was from Hegemon of Thasos, author of *Battle of the Giants*. This is due to the evidential usage of the term 'parody' that appears in Aristotle's work⁷⁶⁰, which mentions that Hegemon was one of the first authors to write a parody. The style was of a 'narrative poem of moderate length, in epic meter, using epic vocabulary, and treating a light, satirical, or mock-heroic subject'.⁷⁶¹ At that stage, there were three common structural forms for parodies: (i) finished materials with modified structure of verses; (ii) reference from passages of previous works; and (iii) using punctual words to make the reference.⁷⁶² The first case

⁷⁵⁴ Guy Hedreen, *The Image of the Artist in Archaic and Classical Greece: Art, Poetry, and Subjectivity* (Cambridge University Press 2015), citing Polemon in (Athenaios 15.698 b), 107.

⁷⁵⁵ Margaret A. Rose, *Parody: Ancient, Modern and Post-modern* (Cambridge University Press 1993), citing Aristotles (in Poetics 384-322 B.C.E.) 250.

⁷⁵⁶ F J Lelièvre, 'The Basis of Ancient Parody' (1954) 1(2) *Greece and Rome* 66, 73.

⁷⁵⁷ Margaret A. Rose, *Parody: Ancient, Modern and Post-modern* (Cambridge University Press 1993), citing Aristotles (in Poetics 384-322 B.C.E.) 250.

⁷⁵⁸ Matron (of Pitana.), S. Douglas Olson and Alexander Sens, *Matro of Pitane and the Tradition of Epic Parody in the Fourth Century BCE: Text, Translation, and Commentary* (Scholars Press 1999), citing Polemon (in Athenaios 15.698 b), 5-12.

⁷⁵⁹ C A van Rooy, *Studies in Classical Satire and Related Literary Theory* (Leiden 1965) 94-95.

⁷⁶⁰ Aristotle had applied the word in his Poetics to Hegemon of Thasos Margaret A. Rose, *Parody: Ancient, Modern and Post-modern* (Cambridge University Press 1993), 11.

⁷⁶¹ Margaret A. Rose, *Parody: Ancient, Modern and Post-modern* (Cambridge University Press 1993), citing Fred W. Householder, Jr, *Classical Philology*, vol 39, No. 1 (Jan., 1944) 3.

⁷⁶² F W Householder, *Literary Quotation and Allusion in Lucian* (King's crown Press 1941).

Considers them in their probable historical sequence, we may say that the first use applies to complete works composed in a special style of verse; the second to the use of quotation and allusion; the third is concerned with single words. The first sense is rare, the third very rare, and the second quite common.

demands the most creativity, since it changes the original work in a unique way. The second one is merely composed of references to previous works and is not as creative as the first category. The third form often only utilises a few unique words, simply to underline the reference. It is worth noting that the third type was the most popular due to its simplicity.

In particular, the techniques applied in early parodies often consisted of changing a sung recitation of the hexameter to a non-sung, dialogue-styled presentation (quasi ‘against the song’). Among the different styles employed, the extension of copied material was fairly loose, with a twist to the objective used normally to express frivolous issues.⁷⁶³ At that time, there were competitions of literary works; however, the parody as a form of art was not particularly appreciated by the general public. In fact, in these competitions, the worst prizes were offered to the parodists.⁷⁶⁴

5.2.2 Modern (1960) and Post-Modern (From 1970-present)

This period can be classified as modern (after the renaissance) and late-modern (from 1960) stages. During the Modern period, parody received heavy criticism, for being parasitic and grotesque; these negative comments towards parody continued throughout the post-modern period as it was frequently stated that this was an ‘insane’ art form with low creativity, as it was almost a reproduction of the original work.⁷⁶⁵ The most popular works during the modern period were *Don Quixote*⁷⁶⁶ and *Tristram*

⁷⁶³ Lelièvre FJ, ‘The Basis of Ancient Parody’ (1954) 1 *Greece and Rome* 66.

⁷⁶⁴ William Grange, *A Primer in Theatre History: From the Greeks to the Spanish Golden Age* (University Press of America 2012) 37.

⁷⁶⁵ Margaret A. Rose, *Parody: Ancient, Modern and Post-modern* (Cambridge University Press 1993) 270, 282.

⁷⁶⁶ Howard Mancing, *Don Quixote: A Reference Guide* (Greenwood Publishing Group 2006) 94-103.

Shandy⁷⁶⁷.

The post-modern concept of parody embraces the comic features of this form of art. Indeed, the concept is also composed of meta fictional/intertextual aspects. Compared with the ancient view such theories added complexity as they mixed both ancient and modern aspects.⁷⁶⁸

The next section illustrates other types of work.

5.3 Other similar works

This section describes three types of works: pastiche, caricature and satire.

5.3.1 Pastiche, Caricature and Satire

Pastiche is a form of art which can evoke previous works, artists or periods. Many scholars seem to associate pastiche with forgery.⁷⁶⁹ This method blends various parts of an artistic work thus creating a medley of pieces that imitate various sources.⁷⁷⁰ It derives from the Italian term *pasticcio*⁷⁷¹, which reassembles the nature of this form of expression. The allusion of a pie is to illustrate the nature of pastiche, which is the result of a mix of elements, as pastiche is a technique, which compiles previous works. Moreover, pastiche is like a 'blank parody', because the humour is missing from it. Pastiche surged later than parody, and it requires neither the comic element nor the tragic. Another definition is that a pastiche is a musical or other type of composition, made up of selections from various sources or one that imitates the style of another artist or

⁷⁶⁷ Viktor Shklovsky, 'A Parodying Novel: Sterne's 'Tristram Shandy' in John Traugott (ed), W. George Isaak and Laurence Sterne (trs), *Laurence Sterne: A Collection of Critical Essays* (Prentice-Hall, 1968) 61-69.

⁷⁶⁸ Margaret A. Rose, *Parody: Ancient, Modern and Post-modern* (Cambridge University Press 1993), 282-283.

⁷⁶⁹ Peter Murray and Linda Murray, *A Dictionary of Art and Artists* (3th edn, Penguin 1959) 314.

⁷⁷⁰ Margaret A. Rose, *Parody: Ancient, Modern and Post-modern* (Cambridge University Press 1993) 72, 224-225.

⁷⁷¹ Anna Ursyn, *Computational Solutions for Knowledge, Art, and Entertainment: Information Exchange Beyond Text: Information Exchange Beyond Text* (IGI Global 2013) 36-37, 458.

period.⁷⁷²

Caricature portrays its subject in an exaggerated way, which may be insulting. It also can have a political purpose or be solely for entertainment.⁷⁷³ It highlights some characteristics to provoke humour. Satire is a method and a style, which can create polemic discussions. Its structure is flexible; it uses other literary compositions. In summary, pastiche can be illustrated in various ways whereas a caricature is often expressed in a visual form, and satire usually has a negative connotation.

5.4 Parody in the Brazilian law

Currently, IPRs in Brazil are regulated under two main legislations, which are: Industrial Property Law⁷⁷⁴ and Authors' Law⁷⁷⁵. This section explores the history of Brazilian author's rights and parody. Parody was first regulated in Brazil by Law No 5,988/1973⁷⁷⁶, under the scope of Constitution of 1969 or Constitution of 1967 amended in 1969⁷⁷⁷. This law did not reserve a special article for parody, instead it legislated the topic through a general article. Later, Brazilian Law No 9,610⁷⁷⁸ allocated parody in a separated article. Figure 2 illustrates the timeline of parody law in Brazil.

Figure 2: Parody law in Brazil.

⁷⁷² UK IPO, 'Exceptions to copyright: Guidance for Creators and Copyright Owners' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/448274/Exceptions_to_copyright_-_Guidance_for_creators_and_copyright_owners.pdf> assessed 12 January 2018 5-7.

⁷⁷³ *ibid.*

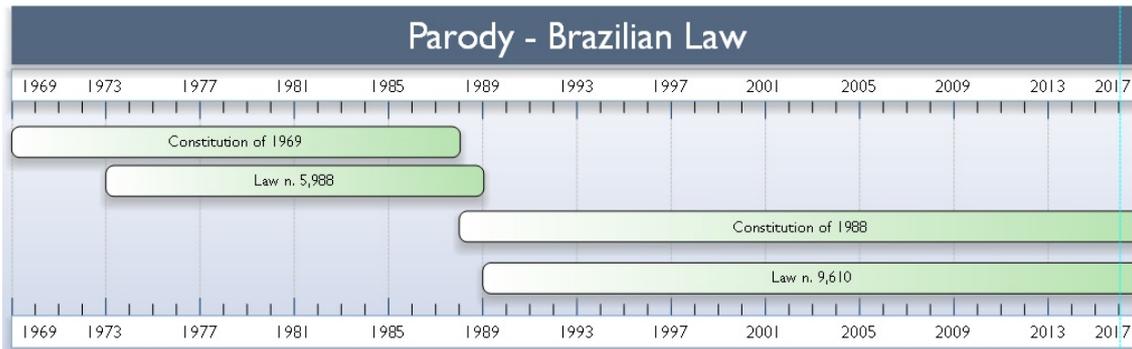
⁷⁷⁴ Brazilian Industrial Property Law 1996 (BR).

⁷⁷⁵ Brazilian Copyright and Neighbouring Rights Law 1998 (BR).

⁷⁷⁶ *ibid* art 50.

⁷⁷⁷ In this point, Brazilian legal literature diverges in two ways: there are scholars who defends the legitimacy of the alterations in 1969 and named as a new Constitution and there are other scholars recognized it as an amendment of the previous constitution.

⁷⁷⁸ Brazilian Copyright and Neighbouring Rights Law 1998, art 47 (BR).



Following the tradition established by previous laws, the text lacked a definition of parody; however, it stated some guidelines by mentioning that it must not be a ‘mere reproduction’ or ‘imply discredit’ to the original work.⁷⁷⁹ In Brazil, parody is treated as a limitation of the author’s right, which implies that it can be used without authors’ consent.

Regarding the level of imitation, the parody can present aspects of the referenced work, so people can base their work on it, without causing duplication. Another observed characteristic is that it must not imply discredit. That is, the law neither permits nor safeguards moral offenses. Brazilian law makers, instead of creating mechanisms to forsake the effectiveness of a rule, tend to create another more restricted norm. Moreover, the effectiveness of the law is not treated, the posterior law heirs the same problem of legitimacy.⁷⁸⁰

The next section illustrates some relevant parody cases in Brazil.

5.4.1 Parody Cases in Brazil

In this section, 3 cases are discussed, whereas a summary of the cases discussed, and others, is presented in Appendix 1.

⁷⁷⁹ *ibid.*

⁷⁸⁰ Leonardo Macedo Poli, *Direito Autoral: parte geral* (Del Rey 2008) 73-74.

*Case 1. Eliana Michaelchin Bezerra and Rádio e Televisão Record S/A v Cid Moreira*⁷⁸¹

The context of the case surrounds Eliana, a famous television hostess, during her show *Tudo e possível* translated as *All is possible*, in one of the sections *Prova de afinidade* translated as *Afinity test*. The tv show was live on the *Record channel*. It aimed to test how well a couple knew each other. Prior to the show, they asked some questions of each person separately about their relationship, and then they tested whether the other person provided the same answer as his partner during the show. If the other partner answered the question with the same response as his partner has provided, they would receive a certain amount of money. Otherwise, they received a punishment in terms of letting their partner receive a romantic gesture from another person. During the show, there was a foam puppet known as Mr. Cid Moreira, which resembled the plaintiff both in appearance and in voice. The doll used erotic phrases and gestures during the show, in addition to the inappropriate comment made by the television hostess, which was the cause that originated the case.

Cid Moreira, a journalist with a remarkable voice, requested a moral and material compensation for the misuse and use of his image without authorization. As a parameter for the compensation, the author requested the same amount that the owner of the channel would charge for advert time, calculated as the number of minutes in which his image was displayed on the television. This case was even worse because the plaintiff was responsible for doing a work in which he spoke parts of the bible. As such, it was argued this awkward television program could discredit him and harm his career. Moreover, it

⁷⁸¹ *Eliana Michaelchin Bezerra and Rádio e Televisão Record S/A v Cid Moreira* [2007] 3 (BR). For the decision in full, see *Expresso da Notícia*, ‘Eliana e Record Indenizarão Cid Moreira por Uso Indevido de Imagem’ (JusBrasil, 2008) <<https://expresso-noticia.jusbrasil.com.br/noticias/973148/eliana-e-record-indenizarao-cid-moreira-por-uso-indevido-de-imagem>> accessed 10 July 2018.

caused him humiliation, and would prevent him from being hired for similar jobs, as his image was no longer that of a serious and honest man.

The television hostess defended her case by stating that the plaintiff had allowed other artists to explore his image in a similarly comic way. As such, there were no grounds for him to complain about the use of his image because others had already been allowed to use it in a similar way. Moreover, it was argued the case was a parody with no intention to offend or make the plaintiff uncomfortable. Furthermore, it had no commercial purpose.

In the first instance, the Court ruled against the defendants, but the compensation was not based on the price of advertisement time, as suggested by the plaintiff. The Court considered this amount inadequate to the nature of the dispute. The purpose of the lawsuit was to provide a fair compensation in respect of the harm caused by the defendants, and not to deliver a decision by which the claimant could profit. Eliana appealed against the ruling in which she pleaded as not guilty. According to her defence, the dispute was not a case of misuse of image because she did not use a real image, but a doll. Alternatively, she required a reduction of the amount fixed by the first instance. However, the Court maintained the original decision. Thus, the Court stated that the inappropriate use of an image does not require the parodist to expressively use the figure of the person. In this case, the stuffed puppet was an instrument of the parody.

*Case 2. Gilmar Mendes v Paulo Henrique Amorim*⁷⁸²

In 2010, Paulo Henrique Amorin, a journalist and a television host of a television news program, posted in his blog *Conversa Afiada*, which can be translated as *Chat in*

⁷⁸² *Gilmar Mendes v Paulo Henrique Amorim* [2014] 1 (BR). For the decision in full, see Julinho Bittencourt, 'Condenação de 50 mil: Paulo Henrique Amorim derrota Gilmar Mendes na justiça' (Revista Forum, 7 December 2017) <<https://www.revistaforum.com.br/condenacao-de-50-mil-paulo-henrique-amorim-derrota-gilmar-mendes-na-justica/>> accessed 10 July 2018.

Detail, an image with one of the ministers (Gilmar Mendes) from the Superior Court of Justice (the highest Court in Brazil). The publication was a parody from the campaign of a well-known credit card company which suggested that Gilmar Mendes, the president of the Court at the time, was corrupt. That is, the minister gave privilege in its ruling to the banker Daniel Dantas. Daniel Dantas was being investigated by a police operation named Satiagraha. The police found evidence against him, and he was prosecuted. His lawsuit had one decision submitted to the jurisdiction of the minister of the Supreme Court, namely Gilmar Mendes. The ruling was criticized by the press, and based on this fact the defendant created the parody: 'Card Dantas Diamond. Buy a dossier - R\$ 25,000.00; Buy a journalist - from R\$ 7,000.00 to R\$ 15,000.00; Buy a chief police officer from the Federal Policy - R\$ 1,000,000.00; Being a crony of the president of the Supreme Court - Priceless'. The parody referred to several types of crimes and linked the decision of the Court with the fact that the banker and the minister had an agreement.

The decision from the first instance ruled against the defendants. The judge considered that the parody surpassed the limits of freedom of expression. This decision was appealed, but the Court of Justice maintained the decision defined by the first instance. The defendants contested the second decision to the Superior Court of Justice, which was again in disfavour with the demand.

In June 2014, another episode happened. The journalist posted a picture on the internet of the minister dressed in a Nazi uniform. Gilmar Mendes then sent an extrajudicial notification to the blogger asking him to remove the image from the platform. Although the defendant agreed with the minister's request, he published another post claiming to have been censored and suggested that the minister had a type of dementia. The claimant argued that his image was being associated with Nazism which

was prejudicial to him, particularly because of the duties involved in his profession. As a member of the Supreme Court, one of his purposes is to protect civil rights and democratic values, the opposite of what the ideology of Adolf Hitler preached.

In his defence, the blogger claimed that the texts and images did not offend the honour and reputation of the minister. He also claimed that the Constitution secured the right of freedom of expression. The journalist also argued that his posts were not making false accusations and that he did not impute any crime to the minister.

The judge of the case, Leandro Borges de Figueiredo, initiated the decision stressing the importance of the press to democratic societies. However, he pointed out that this right is not absolute and that it is not legal to use freedom of expression rights in cases where has been a lack of caution in the dissemination of information, or with the purpose of practicing persecution of any kind, whether political, religious, racial or personal. The Court ruled against the defendants; they were forced to pay a compensation for the moral harm and they had to post the lawsuit and the terms of the ruling on their blog site.

In this ruling, the Court used the proportionality test and concluded that parodies, regardless of whether or not they had a political purpose, cannot promote a legal venue for people to offend others.

*Case 3. Rede Pura Comunicação LTDA and others v Beta Shows Produções e Entretenimentos Voltados Para Rádio e Tv Ltda and Outros*⁷⁸³

Marcus Vinicius Vieira, a comedian, made a parody of a song entitled *Amar não é pecado* translated as *Love is not a sin* by a famous Brazilian singer Luan Santana. The comedian impersonated a character who had the same first name as the singer (Luan

⁷⁸³ *Rede Pura Comunicação LTDA and others v Beta Shows Produções e Entretenimentos Voltados Para Rádio e Tv Ltda and Outros* [2012] 67/69 (BR).

Sitting), but with a different surname and an inappropriate meaning. Additionally, the title of the song gained a vulgar connotation, it substituted love for a specific erotic term. The lyrics from the parody debated the sexual orientation of the singer.

It is a general provision of copyright laws to secure authors' exclusive right over their work. Brazilian copyright legislation fixed the same standards according to Article 29 of Law No 9.610/98; that is, in order to use a work, the person has to get prior express consent from the author. Furthermore, that law secures the author's moral rights to withdraw the work from circulation or suspend any form of use already authorized when the circulation or use implies an affront to his reputation and image, as seen from section VI of article 28 of Law 9.610/98. However, the law also establishes copyright limitations to that right guaranteed to the authors, allowing, under certain circumstances, the use of the work without the consent of the right holder. This is defined by art. 47 from the aforesaid law, which defines appropriate cases in which this is valid for parodies.

The case denoted the undisputed characteristic of a parody reproduction conveyed by comedian Marcus Vinicius Vieira, who, through the character *Luan Sitting*, mimicked the singer Luan Santana. He changed the nature of the song to a comedy, which was originally romantic. However, he imitated the singer in an unpleasant and questionable way, making fun of his sexuality.

The plaintiffs requested the materials to be removed from social media, and from the internet through a law procedure called anticipation of merit tutelage. Based on this legal provision, they requested that the circulation of the parody should cease prior to communicating the lawsuit to the defendants. The judge pointed out that the parody was in remarkable bad taste, but from the point of view of copyright protection and legal procedures, it was impossible to remove the content from the internet immediately. The

plaintiffs had to wait the normal time to hear the other side and proceed with the lawsuit. The court decided that both works were very different, because the defendants' material was much rougher than the original composition in which not even the original lyrics were repeated, apart from a few words.

The next section focuses on parody in the UK, in the EU and in the US. Afterwards a comparison among Brazil and these jurisdictions is presented.

5.5 Parody among jurisdictions

When the limits of a parody are to be treated as legitimate is still unclear, as Courts have been inconsistent with their decisions. The limits of what constitutes a parody without alleged infringement of other rights lacks a sustained theory basis, which relies upon a legal concept that does not define parody to its full extent⁷⁸⁴. This section discusses the stated in detail in the following.

5.5.1 United Kingdom

The first modern copyright legislation instituted in the world was the Statute of Anne⁷⁸⁵, a bill proposed in 1709 to the House of Commons and initially entitled as 'An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned'. This legislation reshaped theory⁷⁸⁶; it established fixed terms of protection and acknowledged authors as legitimate proprietaries of their work.⁷⁸⁷ Another action incorporated by this

⁷⁸⁴ Proposes an interpretation of parodies under the scope of literacy and law. Julie Bisceglia, *Parody and Copyright protection: turning the balancing act into a juggling act* in 34 ASCAP Copyright Law Symposium (1987).

⁷⁸⁵ Statute of Anne 1710.

⁷⁸⁶ *ibid.*

⁷⁸⁷ Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press 1993) 4, 47, 55. See also L.R. Patterson, *Copyright in Historical Perspective* (Vanderbilt University 1968) 143-150; J Feather, *Publishing, Piracy and Politics: an historical study of copyright in Britain* (Mansell 1994) 5; R. Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain, 1695-1775* (Hart Publishing 2004) 32-33.

rule conferred registration at the Stationers' Company as a mandatory step and constitutive to the nature of those rights. Thus, unregistered pieces were beyond the Statutes scope.⁷⁸⁸

The Statute of Anne influenced several countries' copyright rules, including the example of the Copyright Act of 1790 in the United States. According to this statute, an author that lived for fourteen years after the registration of his work, would be granted an extension of another fourteen years having his rights safeguarded by exclusive copyright protection.

5.5.1.1 Copyright Amendment Act of 1842

Following the Statute of Anne, several discussions took place in England. Names such as Thomas Noon Talfourd, a supporter of copyrights' modifications, and Thomas Babington Macaulay, who were opposed to these changes that would increase the copyright term of protection, culminated in Lord Mahon's Act of 1842.⁷⁸⁹ The first draft presented to parliament aimed to unify these legislations under a single scope. Progressively, further attempts sought to legislate domestic and international copyright. This Act modified the term of protection from 14 years, extendible for the same period, to until the author dies with the addition of seven years or a total of 42 years from the earliest publication of the work.⁷⁹⁰ Regarding the registration of works, the requirement was still applicable, but it turned from the deposit of 11 to five copies of each work to be safeguarded.⁷⁹¹

⁷⁸⁸ Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property: essays on the History of Copyright* (Open Book Publishers 2010) 351.

⁷⁸⁹ Catherine Seville, *Literary Copyright Reform in Early Victorian England: The Framing of the 1842 Copyright Act* (Cambridge University Press 1999) 59-61, 173-174.

⁷⁹⁰ Thomas Edward Scrutton, *The Law of Copyright* (first published 1903, 4th edn, The Lawbook Exchange 2007) 43-44.

⁷⁹¹ Prior to this act, a work needed to contain eleven copies distributed to selected public libraries. *Library Deposit Act* 1836.

The Royal Commission report⁷⁹² from 1878 entitled ‘to make Inquiry with regard to the Laws and Regulations relating to Home, Colonial and International Copyright’, issued some recommendations in order to specify guidelines for copyright rules. Among several provisions, it highlighted the need to introduce a systematic approach to existing rules, which were partially implemented.

Another event that motivated the new copyright act was the Berne Convention for the Protection of Literary and Artistic Works⁷⁹³, at an international level, and the International Copyright Act of 1886, which was a domestic procedure to enable the UK to ratify the Convention, which was followed by the Berlin Act of the Convention in 1908. After a year, the Gorell Committee sent a report to Parliament, which specially reinforced previous considerations outlined by the Royal Committee. These precedents derived the enactment of the Copyright Act of 1911⁷⁹⁴.

During the span regarding the Copyright Act of 1911 to 1956⁷⁹⁵, there were sensible changes that affected worldwide copyright and the way that society lives. For instance, the two world wars in 1930 and in 1945, alongside the establishment of films that featured audio for the first time in 1930, the introduction of the television in 1936, a new way to record media in 1948 and the first copier in 1949⁷⁹⁶. Although all these improvements had been made during this period, little improvement was made in the copyright legislation. Considering all these facts, a modernization of the copyright

⁷⁹² Ronan Deazley, Martin Kretschmer and Lionel Bently (eds), *Privilege and Property: essays on the History of Copyright* (Open Book Publishers 2010) 202-203, 311.

⁷⁹³ Berne Convention for the Protection of Literary and Artistic Works (signed on 9 September 1886, entered into force December 5, 1887, revised at Paris on 24 July 1971, and amended on 28 September 1979) (Berne Convention).

⁷⁹⁴ UK Copyright Act 1911

⁷⁹⁵ UK Copyright Act 1956

⁷⁹⁶ Richard Arnold, ‘The Need for a New Copyright Act: a Case Study in Law Reform’ (2015) 5(2) *Queen Mary Journal of Intellectual Property* 110, 116.

system was required in order for it to be aligned with current development in technology as the rules were outdated. As such, the Berne Convention was revised again in 1948 in Brussels⁷⁹⁷, which sought to re-examine national copyright law. The Gregory Committee analyzed the recommendations of the Berne Convention and issued further legal recommendations which were enacted in the 1956 Act.

It is worth noting that from the period of the Copyright Act of 1956 to 1988, several improvements in technology were made, such as the advancement of photocopiers, the development of new formats of recoding, the surge of new broadcast media, as well as the introduction of personal computers. During this period, several legislations were enacted: the Designs Copyright Act of 1968, the Copyright Act of 1982 (Amendment of the Copyright Act of 1956), the Copyright (Amendment) Act of 1983, the Cable and Broadcasting Act of 1984 and the Copyright (Computer Software) Amendment Act of 1985⁷⁹⁸.

5.5.1.2 Copyright, Design and Patent Act of 1988

The Copyright, Design and Patent Act of 1988 was derived from several previous events, which include the Whitford Committee report (1977) as well as other norms. The Government issued two Green Papers, entitled as: ‘Reform of the Law relating to Copyright’ (1981) and ‘Designs and Performers’ Protection and Property Rights and Innovation’ (1983); and one White Paper known as ‘Intellectual Property Rights and Innovation’ (1986). First, the Whitford Committee was responsible for reviewing and evaluating the changes presented in new norms. Additionally, it issued opinions regarding the Rome convention for the Protection of Performers, Producers of

⁷⁹⁷ Berne Convention (revised at Brussels on 26 June 1948).

⁷⁹⁸ Richard Arnold, ‘The need for a new Copyright Act: a case study in law reform’ (2015) 5(2) Queen Mary Journal of Intellectual Property 110, 117.

Phonograms and Broadcasting Organizations of 1961, the revisions of the Berne Convention in Stockholm and in Paris in 1967 and 1971, respectively, and the Universal Copyright Convention of 1971. These recommendations were described in the report of 1977, which influenced the enactment of the Copyright Act of 1988.

In 2005, Andrew Gowers was appointed by the Chancellor and the Secretaries of State for Trade and Industry and Culture, Media and Sport to provide a report of IP rights concerning business owners and customers. This was due to the continuous challenges that the UK faced about IP, and requested Mr. Gowers to point out the U.K.'s situation in this scenario of new technologies and issues for both clients and businesses. In 2006, Gowers provided a report stating that the concept of IP was not broadly discussed and not very clear as a concept to the population. He further observed that there was much room to grow still, and intellectual capital had proved to be much more valuable than physical capital. To summarize Gowers' reported that the UK system was fit for purpose but there was still room for improvement with which in mind he issued a number of recommendations in these areas. These can be summarized in three key points: to enhance the enforcement of IP rights, to reduce costs of registration and litigation of IP rights for large and small business; and to improve the balance and flexibility of IP rights in order to suit the needs of the diverse users of these rights. These referred to specific amendments to the Copyright Act of 1988, which were partially implemented.⁷⁹⁹

After Gowers' recommendations, in 2008, the Intellectual Property Office issued amendments to public performance exceptions in the Copyright Act of 1988. Following this, Mr. Hargreaves was appointed by the Prime Minister of the U.K to develop proposals as to how the UK's IP system could help the expansion of entrepreneurship,

⁷⁹⁹ Andrew Gowers, *Gowers Review of Intellectual Property* (Stationery Office Books 2006) 7-9, 61.

economic growth and innovation. Professor Hargreaves gathered a team of specialists and issued ten recommendations in 2011.⁸⁰⁰ In summary, many of these recommendations as suggested by Mr. Gowers have still not been implemented. He argued that the IP framework needed to be revisited and the statutory underpinning must be taken into consideration as it was necessary for this to suit the modern environment.

In 2013, the Enterprise and Regulatory Reform Act and the Intellectual Property Act of 2014 introduced further revisions to the Copyright Act of 1988. It is noteworthy that the Law Commission had never been asked to address copyright law issues.⁸⁰¹ Thus, this topic deserves attention, and law makers need recommendations if they are to be able to achieve the ambition of promoting economic growth and innovation.

The next section presents parody cases in the UK. This section is divided according to period: until 1960, and post-1960. This time frame has been chosen because of changes to how parodies are examined under UK jurisdiction.

5.5.1.3 Parody cases until 1960

This phase is characterised as a relaxed period because the extension under which works could be parodied were vast. The first case dates to 1894 where the Copyright Act of 1842 was still in force.⁸⁰²

The case of *Glyn v. Weston Feature Film Company* (1894)⁸⁰³ was brought to court in order to stop the alleged infringement of a cinematographic film of the plaintiff's

⁸⁰⁰ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (The Intellectual Property Office 2011) 98-100.

⁸⁰¹ Richard Arnold, 'The Need for a New Copyright Act: A Case Study in Law Reform' (2015) 5(2) *Queen Mary Journal of Intellectual Property* 110,117, 119-123.

⁸⁰² Dinusha Mendis and Martin Kretschmer, *The Treatment of Parodies under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles* (The Intellectual Property Office 2013) 10-11.

⁸⁰³ *Glyn v Weston Feature Film Co* [1916] 1 Ch 261.

copyrighted novel. It also intended to claim back damages and profits with regards to the cinematograph sales. Moreover, it was requested that the provoking film be sent to the plaintiff. This action concerned two defendants, George Black and Weston Feature Film Company. There were no charges against the first defendant as that case was settled within the course of the proceedings. However, the second defendant was sent to trial. The defendants alleged that the plaintiff was not entitled to any money from the sales of the film because they claimed that the film was a parody, under the fair-use defence.

The name of the novel under discussion is 'Three Weeks', which was published in 1907 and it had sold over one million copies. The book tells the dramatic story of a young Englishman's life, a man with a complex moral character due to the exceptional experiences he had survived. The book tells the story of a meeting at a luxury Swiss hotel between the English man and a lady. The young man was sent away by his parents in difficult circumstances after he had been embarrassed by his behaviour that was not regarded as fitting for a young nobleman at that time. While away he meets a young lady and have a troublesome relationship in which she gets pregnant. After some time, the lady returns to her original home, however when she gives birth to the child of the Englishman, her husband discovers it. As such, her husband, who is also a king, kills her but is soon assassinated by someone else who had a close relationship with his queen. Moreover, the infant is the only survivor able to take over the throne. In summary, the book focused on describing the environment and events that influenced the life of the protagonist, especially his three-week encounter with a mysterious lady.

The defendants' film, which is called 'Pimple's Three Weeks' is very vulgar. It tells the story of a male artist who is called 'Pimple' and he seems to be expert in the art of trickery at cheating women. The film is full of erotic content, and the endeavours of

Pimple prevail throughout the movie. It is worth noting that this is different from the story of the novel. Moreover, the film also relates Pimple's adventures with a lady who is extremely vulgar. As such, the defendant claimed that the two stories had few details in common, and so this could not be treated as a copyright infringement. The two stories are very general, and it is unusual for the author to claim any rights of authorship over a general story. Consistent with this view, Judge Younger held that there were not sufficient grounds to indicate this was a substantial copy of the book. Consequently, he ruled that there was no infringement of the plaintiff's copyright.

It is noteworthy that this decision did not consider the economic benefits from the exploration of the parody as an outcome, which is not an infringement of the copyright. Another contribution of this case to UK law was that the parody should be entitled to special treatment, because a parodist usually 'bestows' much labour upon his new work. Additionally, the subject matter of the parody was immoral and under the scope of public policy exclusion. Nevertheless, it is worth drawing attention to the fact that at that time, prior to the Act of 1911, literary copyright did not cover acting rights. Thus, due to a lack of copyright or enforcement, the film was not identified as being a desired way to foment creativity⁸⁰⁴.

The second case, *Joy Music Ltd v Sunday Pictorial Newspapers (1920) Ltd*,⁸⁰⁵ was a dispute over the literary rights of the song 'Rock-a-Billy' by Guy Michel and the potential harmfulness of a similar chorus as used in a newspaper article. Joy Music Ltd. stated that the chorus copied from the song was the central piece and that this caused notorious popularity and held considerable commercial value. The plaintiff set an

⁸⁰⁴ Lionel Bently and Brad Shermam, *Intellectual Property Law* (4th edn, Oxford University Press, 2014) 46, 250-252.

⁸⁰⁵ *Joy Music Ltd v Sunday Pictorial Newspapers Ltd (1920)* [1960] 2 QB 60.

injunction which argued that the article was used against the copyright owner's will, and demanded the suppression of the publication and compensation for the damages caused.

The Sunday Pictorial Newspaper was accused of inappropriate use of literary rights in one of their publications. The news presented a chorus clearly inspired by the plaintiff's song. The parody was concentrated in a few strophes; the other sentences were built independently. The suer detained the copyright of a hit rock song in the country, by Guy Mitchell. The parodied work was circulated in August of 1957 entitled 'Rock-a-Philip, Rock! Rock!' by Paul Boyle. The text exposed a correlation with the former work on the fraction where it states: 'So what? Give us a chord in 'G' and we'll sing Paul Boyle's version of "Rock-a-Billy" in support of the dashing Duke.' The litigant's article clearly targets Philip, Duke of Edinburgh, mentioning his involvement in recent polemic incidents. The piece also linked both works by acknowledging the song and the rights holder of the referenced material. The Newspaper disagreed that the article was a grosser copy and advised that the writer had communicated with the suer prior to its release.

The court had to decide whether the strophes constituted a substantial copy and as such, subjected it to copyright infringement, or not. It was a challenge to identify what could be considered as a substantial part of a copied work for copyright purposes. Judge Mc Nair J. concluded that the parodist had employed enough mental labour and therefore, this did not represent any infringement to copyright. Thus, no damage was caused because the article was published after the song had lost its popularity, and consequently its value.

The next section deals with cases that were subject to a different approach.

5.5.1.4 Post 1960 (reduction on scope, minimalistic approach)

This period was stricter than the previous one as the scope of interpretation and analyses of cases had been narrowed.⁸⁰⁶ The first case that marked the change in British approach towards parody was in *Twentieth Century Fox Film Corp v. Anglo-Amalgamated Film Distributors* (1965).

The case *Twentieth Century Fox Film Corp v. Anglo-Amalgamated Film Distributors* was brought to court on January 22nd 1965. The plaintiff argued that the defendants had infringed their copyright regarding the film *Cleopatra* of 1963 with the production of a poster that looked very similar to the artwork of the film. The defendants argued that they had parodied the artwork, and thus this was not a copyright infringement. Figure 3 illustrates the plaintiff's artwork of the 1963 film *Cleopatra*.

The plaintiff sued the defendants because the following poster 'Carry on Cleo', an artwork from the *Cleopatra* film by Twentieth Century Fox Film Corp released in 1965 was very similar to the original artwork created by Anglo-Amalgamated Film Distributors. It is worth noting that the two images did coincide in many but the defendants argued that as their work constituted a parody, it did not infringe the plaintiff's copyright. However, looking at these two pictures, one can clearly see that they look very alike, and the defendant had lacked creativity to distinguish his poster from the defendant's artwork. Consistent with this view, judge Plowman, J. decided the case in favour of the plaintiff. As such, the juridical decision forbade the defendants to further reproduce the poster, or any similar illustrations in any form of communication without gaining the prior agreement of the plaintiff. The case ended with a settlement in

⁸⁰⁶ Dinusha Mendis and Martin Kretschmer, *The Treatment of Parodies under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles* (Intellectual Property Office 2013) 11-13.

which the defendants agreed to remove the artwork in dispute, and they substituted it for a different one. Under the legitimacy aspect, it is questionable if the case was a suitable parody defence, or if it infringed any intellectual rights.⁸⁰⁷ This is because the plaintiff did not show evidence that there was any material loss.

This case can be treated as a landmark in IP jurisdiction because prior cases were treated in a ‘relaxed’ way.⁸⁰⁸ Since this case was ruled, copyright cases as the plaintiffs have been increased. The following cases illustrate this stricter approach. The case of *Schweppes Ltd. and Others v. Wellingtons Ltd* (1984) examined a claim of copyright infringement. The plaintiffs of this lawsuit were Schweppes Ltd., Cadbury Schweppes plc. and Cadbury Ltd. The first sour, a seller of Indian tonic water labelled ‘Sweeppers’, claimed that the article manufactured and sold by Wellingtons Ltd copied substantial features of their brands’ name. Moreover, the plaintiffs demanded summary judgment based on Order 14.

The defendant commercialized bubble bath products entitled as ‘Schlurppes’, qualified as a ‘tonic bubble bath’. As pointed out, the label clearly stressed a link between the products. Although the factual connection was exposed, the defendants counterclaimed the allegation of it being a substantial copy. It was argued that the toiletry product had a humorous purpose, and it should be classified as a parody. The defendants’ product shared several similarities such as: the manners in which its features were disposed and the format of the bottle. It also resembled the product in colour, and artwork (royal arm and royal warrant). The distinction resided in the swap of the ‘lur’, instead of ‘we’ in ‘Schlurppes’. Thus, its director, Mrs. Forrow, shared evidence that endorsed the

⁸⁰⁷ Robin Jacob, *IP and Other Things: A Collection of Essays and Speeches* (Hart Publishing 2015) 402.

⁸⁰⁸ Dinusha Mendis and Martin Kretschmer, *The Treatment of Parodies under Copyright Law in Seven Jurisdictions: A Comparative Review of the Underlying Principles* (Intellectual Property Office 2013) 10-13.

fact that the objective of selecting Schlurppes was to highlight a comparison, as the parody implies.

This lawsuit examined whether the defendant's artwork was a substantial replication of the plaintiffs' one or if the work attested the originality requirements to be treated as a parody. The petition of summary judgement was accepted, and it was concluded that the defendants had not produced enough labour on 'Schlurppes' and, consequently, had breached the rights of the suer. To Draw a comparison with trademark laws, these must protect consumers so that they are able to verify, or to distinguish between goods and easily as such, avoid being misled by advertisements. Consistent with this view, the final decision stated that as the defendants had used a substantial part of the artwork and this could not be classified as a parody.

The case of Williamson Music Ltd v. The Pearson Partnership Ltd was brought to court on 29th July 1986. The plaintiff is the author of the famous song 'There is Nothin' Like a Dame', which originated from the Rodgers and Hammerstein musical 'South Pacific'. The first defendant was an advertising agency, which had as one of their clients the second defendant, a bus company. This agency created a television advertisement about an express coach service operating between London and other cities in the U.K, which used a song that contained words from the lyrics of 'There is Nothin' Like a Dame'. On the basis of alliterative similarities, the Plaintiff claimed copyright infringement after seeing this advertisement on television. The defendants however argued that while their advertisement did indeed contain words from the lyrics of the plaintiff's song, this was intended as a parody, and as a result, their work was not an attempt to infringe the author's copyright.

The advertisement consisted of an exhibition of The Rapid Coach Service, which was approximately thirty seconds in length. It described how luxurious the coaches were by using animated characters to sing a song that exhibited the quality of the services provided by the coach. It is worth noting that from these lyrics alone, one could barely notice the similarity between the defendant's and the plaintiff's song. However, the intonation of both songs was very similar. Judge Paul Baker Q.C. considered previous cases of parody and opted to rely on the substantiality test. As a result, the judgement concluded that the lyrics were substantially different, and as such the copyright had not been infringed. This interpretation is in accordance with the argument that a parody serves as a way of free expression. Moreover, judges have followed, in general, the legal interpretation that copyright owners must have their rights safeguarded, but not to the extent that this can be used as a way of suppressing new works.

The next section briefly describes the parody after 1988.

5.5.1.5 Parody Post 1988

The UK adopted the fair dealing approach, which in theory is regarded as open ended. It presented a list of permitted acts, which would not infringe copyright. Later however, after criticisms of the UK's silent position regarding parody⁸⁰⁹, two articles were amended in the Copyright Law of 2014 to expressly insert parody as an exception.⁸¹⁰

The next section focuses on Parody in Europe.

⁸⁰⁹ Robin Jacob, *IP and Other Things: A Collection of Essays and Speeches* (Hart Publishing 2015) 189.

⁸¹⁰ CDPA 1988, 30A(1) and 2A(1), (2) and (3).

5.5.2 Europe

Trying to use a closed list of flexibility of copyrights is complicated as technology advances so fast. The fair use in EU is a system by which the European Union allows each member to determine whether they want to implement flexibilities and exceptions.

Another possibility is for the EU to adopt a semi-open system that provides norms fairly defined which simultaneously leave sufficient flexibility in the system in order to enable it to respond with new updates over time. Thus, it can aim to secure the application of those norms leaving some room for freedom.

A seminal case is the Deckmyn's case which is discussed next.

5.5.2.1 Deckmyn's case

The European Parliament and the Council of the European Union issued a set of recommendations to harmonize certain aspects of copyright and other related issues in 2001, which was entitled the Information Society (InfoSoc) Directive.⁸¹¹ Besides representing a further step towards greater harmonization of European laws, the treaty indirectly forced its members to comply with the Berne provisions.⁸¹² According to the European Union (EU) Directive, member states have the freedom to adopt the recommendations in their national copyright systems, but once they have decided to comply with the legal norm, the interpretation must be coherent⁸¹³. Directive 2001/29/EC states that authors have the exclusive right to authorize the reproduction and communication of their work to the public. However, member states can restrict those rights under the scope of the copyright exceptions of caricature, parody and pastiche.

⁸¹¹ Council Directive (EC) 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (InfoSoc Directive).

⁸¹² Richard Arnold and Eleonora Rosati, 'Are National Courts the Addressees of the InfoSoc Three-step Test?' (2015) 10(10) *Journal of Intellectual Property Law & Practice* 741, 741.

⁸¹³ Carina Gommers, 'The autonomous concept of parody and conflicting fundamental rights: A balancing act' (2014) 9 *Journal of Intellectual Property Law & Practice* 968.

This section will focus on the parody exception presented in Article 5(3)(k)⁸¹⁴ of the Directive.

Among EU countries, it is worth discussing Belgium, because in recent years an important case regarding parody exception was ruled in this country. Regarding the aforesaid EU Directive, in 2005, Belgium amended its Copyright and Neighbouring Law to comply with this EU Directive. Among several modifications, Belgian Copyright Law inserted a parody exception in Article 22(1). Even since these changes, Belgium jurisprudence has presented resistance against ruling in favour of parodies.⁸¹⁵ This article discusses the first case issued to the CJEU regarding parody exception, which was motivated by a Belgian dispute from 2011.

Background to the case

Mr. Deckmyn, a politician member of the Belgian right-wing party *Vlaams Belang's*, handed out calendars as gifts during a New Year's event founded by the *Vrijheidsfond* association in the city of Ghent. On the front page of each calendar, it showed a drawing inspired by a Vandersteen cartoon from 1961. Moreover, the picture depicted the mayor of Ghent dressed in a white tunic, wearing a belt in the colours of the Belgian flag, distributing coins to people from other nationalities and faiths. Thus, Mr. Deckmyn used the front page of the calendar to criticize the attitude of the mayor towards immigrants who lived in the country, which could be interpreted as a xenophobic attitude.

The plaintiffs (Helena Vandersteen and Others), heirs to the IPRs of the copyrighted work and the publishers, argued that the cover of the calendar reproduced the front page of a comic book entitled *Suske en Wiske* from the *De Wilde Weldoener*,

⁸¹⁴ InfoSoc Directive 2001/29, art 5,3(k).

⁸¹⁵ Carolyn Deere, *The implementation game: The trips agreement and the global politics of intellectual property reform in developing countries* (Oxford University Press 2011) 54-55.

(translated as ‘The Compulsive Benefactor’) created by Mr. Vandersteen. The material was a less detailed version of Mr. Vandersteen’s work in which the main character was changed to resemble the mayor of Ghent, and the crowd was modified to illustrate people from distinct ethnic backgrounds.

The Belgian Court ruled on the preliminary injunction presented by the plaintiffs; it determined that the defendants must abstain from using the cartoon, and the Court fixed a fine in case of violation. Prior to hearing the appeal, the defendants had confronted the first decision and argued that the work in question was a parody with a political purpose and therefore, did not infringe any copyright of the comic book. They had based their argument on the parody exception provided within the Belgian copyright law.

The plaintiffs argued against the allegation of parody, because this type of exception, in order to be considered legal, had to follow certain conditions, which in their view had not been complied with by the cartoon. Moreover, the work in dispute employed a discriminatory message illustrated by people of different nationalities and faiths on the front page of the calendar.

In 2013, the Belgian Court issued three questions to the Court of Justice of the European Union (CJEU) related to the concept of parody referring to Johan Deckmyn and Vrijheids- fonds VZW v. Helena Vandersteen and Others⁸¹⁶ (Deckmyn) case. Considering the lack of clarity of the criteria provided to analyse whether a work could be regarded as a parody, the Belgian Court of Appeal issued the following questions to the CJEU:

⁸¹⁶ *Johan Deckmyn v Helena Vandersteen and others*, Case C 201/13 EU:C:2014:2132 (Deckmyn’s Case).

1. Is the concept of “parody” an independent concept in European Union law? 2. If so, must a parody satisfy the following conditions or conform to the following characteristics: The display of an original character of its own (originality); And such that the parody cannot reasonably be ascribed to the author of the original work; Be designed to provoke humour or to mock, regardless of whether any criticism thereby expressed applies to the original work or to someone else; and Mention the source of the parodied work. 3. Must a work satisfy any other conditions or conform to other characteristics in order to be capable of being labelled as a parody?⁸¹⁷

Parody as an autonomous concept (first question referred to the CJEU)

The Directive not only fails to provide a definition of parody, it also does not distinguish it from a caricature or from a pastiche. As such, the lack of concepts can harm the effectiveness of a norm that requires an agreement from both the literature and legal practitioners.⁸¹⁸ As a result, the Belgium Court required further information from the CJEU about parody, because the lack of concepts made it challenging for cases to be judged.

The CJEU, following the opinion of the Advocate General, concluded that where provisions of EU law, did not expressly refer to the law of its member states on matters of concept and application, it must be treated as ‘an autonomous concept of EU law and interpreted uniformly throughout the European Union’.⁸¹⁹ This interpretation does not harm the principle that copyright exceptions addressed by the InfoSoc are non-mandatory; on the contrary, it points out that once adopted, the country is committed to

⁸¹⁷ Deckmyn’s case (C-201/13), [13] .

⁸¹⁸ Christian Rutz, ‘Parody: A Missed Opportunity?’ (2004) 3 IPQ 284, 298.

⁸¹⁹ Deckmyn’s case (C-201/13), [15].

following these instructions. A similar situation can be seen in the Padawans'⁸²⁰ case in which the Court recognised the findings of a dispute involving a private copying exception and the interpretation of fair compensation.⁸²¹ Additionally, it pointed out that the concept under debate should be defined according to its common meaning and daily language, also observing the context and its aim.

Essential characteristics of a parody and other requirements (second and third questions referred to the CJEU)

The decision highlighted the essential characteristics of a parody in two points; firstly, it must 'evoke an existing work while being noticeably different from it'; secondly, 'constitute an expression of humour or mockery'⁸²². However, there is no definition in European law of what constitutes humour or mockery, nor a parameter of what constitutes a noticeable difference. Thus, these characteristics selected by the Court rely on subjective concepts that lack definition or require clarity, and as such, would be subject to further debate.

Apart from the aforesaid characteristics of a parody, the Belgium court submitted two other elements for the CJEU to be analyzed in order to determine whether they should be considered an essential part of a parody: 'mention the source of the parodied work' and 'to display a character on its own'. However, the CJEU rejected these characteristics as it reported that parodies were not subjected to any further conditions. These characteristics can be embedded on the parody, but they do not need to exist in order for the work to be treated as a parody. Thus, it contrasted with the argument of the Advocate General - Cruz Villalón, particularly regarding the second characteristic ('to

⁸²⁰ Padawan SL v Sociedad General de Autores y Editores de España (SGAE) (Padawans' case) (C-467/08) EU:C:2010:620.

⁸²¹ Sue Arrowsmith, 'What is a parody? Deckmyn v Vandersteen (C-201/13)' (2015) 37 EIPR 55, 56.

⁸²² Deckmyn's case (C-201/13), [20].

display a character on its own’), which he considered to be a fundamental part of a parody⁸²³. The decision expressed in this case confronts the fact that a parody’s success partly relies on presenting original features; if the decision did not include this element as a vital part of parodies, future cases on this issue would require national courts to make a judgement in order to determine these boundaries.

According to the opinion emitted by the Advocate General, the nature of parodies is twofold: structural and functional. First, the structural element concerns that parodies operate over a minimum level of originality (which distinguishes them from a mere copy) and under a maximum (which designates the link between this form of art and the resourced material). In this sense, a parody is a work that contains a certain amount of copy and a part of originality.⁸²⁴ Second, the functional element constitutes the purpose, effect and content of a parody. Regarding the purpose aspect, the parodied work can be the object explored by the parody (parody off), or it can operate as an instrument to criticize another work (parody with). In the case of *Deckmyn*, the parody does not evaluate Ms. Vandersteen’s work; instead, it directs a message to a third person.

Discriminatory treatment

The InfoSoc seeks to establish a fair balance between the property and freedom of expression rights, which is represented by the interests of the owners of an intellectual property (authors and rights’ holders) and people that rely on a copyright exception such as a parody. Accordingly, the court held that ‘the holders of the rights to the work parodied have, in principle, a legitimate interest in ensuring that their work is not

⁸²³ Case C-201/13 *Johan Deckmyn v Helena Vandersteen and others* [2014] 458, Opinion of A.G. Cruz Villalón.

⁸²⁴ Carolyn Deere, *The implementation game: The trips agreement and the global politics of intellectual property reform in developing countries* (Oxford University Press 2011) 54-55.

associated with such a message⁸²⁵. Consequently, a work that attends the requirements of a parody, but relies on a discriminatory message can be subject to a lawsuit and possibly be taken out of circulation.

It is unclear what constitutes a legitimate interest and if the discriminatory message on its own is an aspect that attributes an illegal element to parodies. Parodies should be neither over nor under protected by the legal system, instead they should rely on a ‘balanced approach’, which is not a simple task.⁸²⁶

The European Court of Justice remitted the case to the Belgian Court to judge whether the drawing attended the essential characteristics of a parody, whether it had a discriminatory message and attended a fair balance of rights. The CJEU shed some light regarding the discriminatory message; it suggested that the work in question could be in conflict with Directive 2000/43 and Art. 21(1) of the Charter of Fundamental Rights of the European Union.⁸²⁷

Impact

By deciding that the parody’s concept must be interpreted uniformly, the case represents a step forward towards greater harmonization of copyright laws⁸²⁸. This case not only attended the aim of the EU Directive, but it also provided an opportunity for further debate on the fully harmonization of copyright exceptions⁸²⁹. Copyright exceptions promote the transmission of knowledge and stimulate the creation of new

⁸²⁵ Deckmyn’s case (C-201/13), [31].

⁸²⁶ Christian Rutz, ‘Parody: A Missed Opportunity?’ (2004) 3 IPQ 284, 314.

⁸²⁷ Professor Dr von Bernhard von Becker, ‘The Distorting Parody: The CJEU Ruling in *Vrijheidsfonds v Vandersteen* (Freedom to Parody)’ (2015) 10(11) JIPLP 867, 869.

⁸²⁸ C Gommers, ‘The Autonomous Concept of Parody and Conflicting Fundamental Rights: A Balancing Act’ (2014) 9(12) JIPLP.

⁸²⁹ Christophe Geiger, Jonathan Griffiths, Martin Senftleben, Lionel Bently and Raquel Xalabarder, ‘Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in The European Union – Opinion of the European Copyright Society on the Judgment of the CJEU in Case C-201/13 *Deckmyn*’ (2015) 46(1) EIPR 93, 94.

works; therefore, a higher convergence in this area should be advantageous to the copyright system as a whole. So far, the legal approaches towards exceptions and limitation were based on a strict interpretation; however, Deckmyn's case innovates by adopting a more open approach in cases in which the use of an exception involves exercising a fundamental right, such as freedom of expression.⁸³⁰

The outcome of the case gives greater power to national courts to define the meaning of parodies according to their economic and social situation, which means that parody must be treated as an autonomous concept⁸³¹. This represents an opportunity for the CJEU to discuss and clarify some points of this debate, but it still left a lot of questions unanswered. It is just a matter of time; eventually courts will need to adopt a view on this issue.

Analysis

One can argue that the concept of parody cannot be interpreted uniformly among EU countries. The Court elected 'humour or mockery' as an essential part of a parody, but each nation defines these terms as they are very subjective, and they depend on each culture. It is worth noting that previous cases adopted a stricter view on this subject. However, the decision in Deckmyn's case adopts an open approach to copyright exceptions, distinct from stricter approaches in countries like France and England.⁸³² Moreover, it permitted the modalities of 'parody on' and 'parody with'.

Belgian Copyright law adopts 'fair practices' as an additional condition that a parody should attend. Although this topic was not referred to the CJEU, the ruling considered that no further conditions should be implied. In theory, it can be concluded

⁸³⁰ *ibid* 97.

⁸³¹ Juliane Althoff, 'The Parody Exception: Seeing the Funny Side of it' (2014) 25 Entertainment Law Review 265, 266.

⁸³² Christian Rutz, 'Parody: a missed opportunity?' (2004) 3 IPQ 284, 315.

that the ‘fair practices’ test is not valid. Another point of discussion concerns moral rights, which are excluded from the scope of the Directive. Although the case does not address this theme expressly, it is debatable whether the mentioned legitimate interest could be interpreted as a moral right. In which case, this can be exclusively raised by the author. This case could influence the re-appearance of discussion about the harmonization of moral rights.

The European court implemented a test to determine whether the use of parody falls within an exception to EU copyright law, which requires a cautious evaluation of rights. The decision, as to whether it was a premature movement or not, will have its effects tested in further cases. The Court of Justice did not settle the dispute; it returned the case to the Belgian Court, which is competent to appreciate whether the work in dispute fulfils the requirements of a parody. This ruling qualifies as a binding within its jurisdiction, members of this Directive can use the Deckmyn’s case as a precedent to issue questions to the CJEU regarding the definition of EU law concepts.

The next section discusses parody treatment in the US.

5.5.3 United States

The United States adopts the fair use doctrine. Under this regime parody is used as a copyright defence. This legal treatment implies that parodies should present ‘transformative’ features compared with the referenced work in order to be legitimate. Thus, parody cannot be alleged in itself but as a response to a lawsuit.

Among the American cases concerning parody, it is worth mentioning the *Campbell v. Acuff-Rose* or the *Pretty Woman’s* case⁸³³. It provided a positive outcome

⁸³³ *Campbell v Acuff-Rose Music, Inc*, 114 S Ct 1164 (1994), [1181].

to the parodists. The Court recognized that this genre can provide social impact on society. It highlighted that if the parody respects the limits of law, the owner of the copyright material cannot put barriers to the work. In fact, the parodists requested permission to use the work, but it was denied.

The case of *Campbell, aka Skyywalker, et al. v. Acuff Rose Music, INC* was brought to the Supreme Court of the US on 9th November 1993. The plaintiff Acuff-Rose Music owns the copyright of the song 'Oh, Pretty Woman' produced by Orbison and William Dees in 1964. In July of 1989, Linda Fine, 2 Live Crew's manager asked for Acuff-Rose Music's permission to create a parody of this song; however, her request was denied. Nevertheless, the defendant created a parody of this song in the style of rap music. It is noteworthy that the defendant fully acknowledged the authors and publishers rights to the original song. However, the plaintiff argued that the rap music contained several parts of their song, and sued the defendants for copyright infringement. The plaintiff, instead, argued that their music was a parody, and it was not an infringement due to the exceptions of the copyright Act of 1976. This act in its section 107 states that 'the fair use of a copyrighted work . . . for purposes such as criticism [or] comment . . . is not an infringement'. In this case, the plaintiff also argued that the music created by the defendants could undermine its reputation, and as a result, imply less earnings for the plaintiff. This is because the defendants created a piece of rap music that 'was not of a good taste' according to the plaintiff.

The District Court decided in favour of the defendant, 2 Live Crew, arguing that the created song was a parody, which made fair use of the plaintiff's song. It is worth noting that judgement in this case was made following general guidance from the copyright act of 1976 as although the parody had several parts copied from the original

work, it was based on a criticism, and as such, did not constitute any infringement. Another interesting fact is that this Act in section 107 states that the amount and substantiality of the original work used in the parody needs to be taken into consideration. However, the judgement decision did not rely solely on this assumption to reach its final resolution. Another issue is that the interpretation of this section, which states that the nature of the copyrighted work should be taken into consideration, does not help rulers to provide fair judgement of cases⁸³⁴.

It is worth noting that this case was the second in the history of the US in which the Supreme Court addressed the defence of fair use regarding copyright infringement in the context of parody.⁸³⁵ Nonetheless, the interpretation of the copyright act of 1976 is troublesome, and gives judges room for deciding the outcome according to the analysis of each case. However, this also provides an incentive for parody as a form of expression, because although it may contain significant parts of the original work, the way in which it is created is unique. In such cases, the parody must contain elements of comedy or criticism. If the parody follows this requirement, it is likely that the plaintiff will have a lost case, as the courts in the US have adopted the fair use view for these cases⁸³⁶.

In conclusion, the law is not clear as to how the judge will decide whether the parody will harm the reputation, and capacity of generating income of the original work. Parody to be judged under the fair use view needs to represent more than a comic outcome, it also demands a critical perspective. The case should consider: the aim of the

⁸³⁴ *Campbell v Acuff-Rose Music* (92-1292) 510 US 569 (1994) (US).

⁸³⁵ Lisa M Babiskin, 'Oh, Pretty Parody: Music, Inc' (1994) 8 *Harvard Journal of Law & Technology* 193.

⁸³⁶ *ibid.*

parody, the essence of the rights copied, the amount of copied features and the possible harm that it could cause.⁸³⁷

5.6 Conclusion

Intellectual property is a legal area that deals with creativity and innovation, which is constantly changing. The copyright system requires more flexibility as it can be illustrated by those cases as ruled by the courts, which have been troubling to decide due to complex issues involving copyright. Furthermore, the number of reports also indicates that rules, specially related to IPRs, are constantly evaluated. The relevance of these regulations demands joined efforts from public and private sectors.

Currently, it is fairly questionable if the demands required by modern copyright systems can still treat copyright exceptions as optional. The unification of copyright exceptions, considering countries disparities, are overly pretentious at the moment. The Marrakesh Treaty is an interesting example of how countries are rearranging themselves in the international sphere. Copyright, more than others, is a field where developing countries can express their own interests and are better conditioned to resist developed world pressures while contributing to the debate at the same level. Recently, several countries have undergone a modernization in their copyright laws. For instance, the UK has experienced changes in the Copyright Designs, and Patent Act (CDPA). The modernization of this issue was a direct result of the recommendations stated in 2011 Hargreaves Review⁸³⁸, which apart from other contents, supported the belief that parody, pastiche and quotation should be expressively regulated by a national law. Initially, it was recommended to foment harmonization initiatives between countries to clearly

⁸³⁷ Marlin H Smith, 'The Limits of Copyright: Property, Parody, and the Public Domain' (1993) 42 Duke Law Journal 1233, 1272.

⁸³⁸ Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (The Intellectual Property Office 2011) 98-100.

identify parody exceptions and concepts that would benefit practitioners at an international and national level.

Cases of parody in Brazil concern legal practitioners due to a lack of objectiveness, which could cause contradictory decisions. It is worth noting that Brazilian legislation does not address the concept of parody, and as such, judges and practitioners find themselves in tricky situations when attempting to decide the outcome of such cases. The UK does not have a clear definition of parody in its legislation either; however, as it is a common law country, several case judgements have begun to construct a theory of what parody is. This does not happen in Brazil, a civil law country. In this sense, this paper argues that Brazilian legislators should address the concept of parody, making it clear to what extent such a concept could be used to judge cases. One possible starting point is to rely on the substantiality test as it is used in the US. That is, to try to clearly identify how a parody should be treated as a copy of an original work. Indeed, discussion of this subject centres upon how to provide a framework which determines the amount of creativity employed. This concept has fluctuated over the years from a depreciative view to a more sophisticated format which enables freedom of expression to be exercised. Critics proclaim parody to be parasitic due to its prime characteristic as an imitation, copy. Even when taking both points of view into consideration, the impact of this form is a crucial mode in ways of expression in modern society as it becomes increasingly complex. Recently, due to the expansion of rights what is increasingly being brought into question is the whole issue of attributes and aims⁸³⁹. Although inspired by

⁸³⁹ Linda Hutcheon, *A Theory of Parody: The Teachings of Twentieth-Century Art Forms* (University of Illinois Press 2000) 45-47.

other people's work, it is worth noting that it promotes a dialogue between sources capable of producing divergent outcomes⁸⁴⁰.

What is an acceptable percentage of similarities of common work? It would be overly ambitious to attempt to answer this question in this paper, however, this study suggests the principle of the reasonability should be used in order to decide each case. Indeed, the core discussion about this subject is how to provide a new framework that can determine what degree of creativity has been employed. Its concept has fluctuated over the years from a depreciative view to a more sophisticated form which enables freedom of expression to be exercised, although this process has encountered some drawbacks. This type of imitation based on a previous work often has economic and moral rights involved that can lead to conflicts arising as a result of some misconception as to what a parody actually is, especially when there is no common ground to it. Identifying the nature and type of parody by providing a framework is key to enabling rigorous examination of extreme practises.

Moreover, a parody must be used as a means of expressing criticism or humour, and this should be a significant aspect that differentiates this from the original work. An unclear delimitation regarding this phenomenon vexes matters concerned with international copyright law as forums remain silent and national laws are discrete⁸⁴¹ on this matter. Moreover, extremely vulgar or racist works that are likely to create social discontent, while deviating greatly from the original work should not be treated as a parody (referring to Deckmyn's case). This is because a parody should not be used either in terms of protection or legitimation of these works, as this is not the main goal of a

⁸⁴⁰ Moisés Massaud, *Dicionário de Termos Literários* (12th edn, Cultrix 2004) 340-341.

⁸⁴¹ Christian Rutz, 'Parody: a missed opportunity?' (2004) 3 IPQ 284, 284.

copyright Act. Instead, its goal should be not only to protect the original work, but to enable the production of other substantially different works and to allow freedom of expression as well as fomenting creativity. It is not the purpose of parody to protect works that could harm society as in such a distinguished case, as this is clearly deviating from its original goal. From this perspective, the modern conception of parody does not envelop all types of behaviour. Parodies should be constructive, reasonable and respectful. Indeed, the law embraces these tools to balance between freedom of speech and grossly offensive commentary.⁸⁴² In conclusion, the law of parody should safeguard other forms of expression rather than of legitimate irreverent works that promote social discordance.

⁸⁴² Elisangela Dias Menezes, *Curso de Direito Autoral* (Del Rey 2007) 4.

CHAPTER 6: An explorative study in Brazil about Copyright and Open Access

6.1 Introduction

As set out on section 1.2, this study utilized a questionnaire to identify gaps on public knowledge regarding IP. Thus, this study adopts a qualitative-empirical research approach. After having reviewed the systems of limitations and exceptions to copyright and discussed some policy implications, this chapter seeks to further contribute to policy implications regarding whether government should focus on enhancing the education system regarding copyright laws as well as providing grounds to whether a stronger shift to promote the Open Access Movement is needed. Therefore, this chapter aims to complement the previous analyses carried out in previous chapters.

As this thesis focuses on L&Es, another interesting avenue for research is to investigate open access movement and its implications for the copyright system as well as for the economy. Therefore, the aim of this chapter is to discuss insights regarding a new topic, namely open access, in the context of Brazilian Law and to provide an explorative study with regard to this issue and the importance of IP rights from the perspective of Brazilian citizens.

This chapter contributes toward the discussion of open access in Brazil and the economic importance of IP rights in the development of a country's economy. The structure of this chapter is as follows. Section 7.2 explores the open access definition. Section 7.3 presents a questionnaire applied in Brazil, which focuses in open access, copyright limitations and exceptions, as well as the economic importance of IP. Section 7.4 discusses the results with regard to this explorative study. Finally, section 7.5 provides the conclusions based on the questionnaire.

6.2 Open Access

Open access is the process by which a software, application, paper or work is made available to the public without requiring a license or copyright. The concept of open access in the light of legal knowledge can be very interesting to citizens in terms of the ongoing changes to the world and the rise in the speed of acquiring information.⁸⁴³ The Open Access movement in Brazil is recent, but has been creating structural changes in the public sector and for citizens in general. For instance, the software ‘Microsoft Office’ is well established throughout the world, but it also requires a relatively high fee to be paid by the government in order for it to be used by public institutions. Aiming to reduce public expenditure, the government has decided to adopt open access software such as the BrOffice in order to replace Microsoft Office since 2008. This generated a huge saving for the public budget regarding the purchase of software.

The next section describes the questionnaire that was employed to investigate an understanding of IP laws in Brazil, in particular with regard to copyright exceptions, and open access, as well as some implications for economic development.

6.3 Questionnaire

This study conducted interviews in the form of semi-structured questionnaires among the regions of Brazil covering open and specific questions. The questionnaire (presented below) is based on previous research.⁸⁴⁴ The research sample is non-probabilistic (not random), and it was developed according to quota sampling as it is

⁸⁴³ Ann Bartow, ‘Open Access, Law, Knowledge, Copyrights, Dominance and Subordination’ (2006) 10(4) *Lewis & Clark Law Review* 869, 869-870.

⁸⁴⁴ Ferris K Nesheiwat, ‘The Compliance with Intellectual Property Laws and their Enforcement in Jordan- A post-WTO Review & Analysis’ (PhD thesis, University of Durham, 2012) 35-36.

impossible to interview all citizens. First, the questionnaire was prepared in Portuguese, and it was pre-tested (pilot tested) with native speakers in order to ascertain whether the questions were clear.⁸⁴⁵ Second, people were randomly chosen covering respondents from all Brazilian territory, in order to gather answers for the questionnaire. Third, the questionnaire was uploaded to Google's forms in order to gather answers through the online environment.⁸⁴⁶ It is worth noting that the number of respondents in this study is not to be considered an issue as the objective of this analysis is explorative. The results of the questionnaire do not have the aim of being generalized, but instead it is a resource to identify trends and opportunities for strengthening public policy recommendations in Brazil with regard to IP law.

The respondents have been asked 2 groups of questions related to demographic statistics (Age, Region, Etnology) as well as to salary and education. Then, the questionnaire was conducted aiming at questions related to open access, copyright exceptions and copyright defences as illustrated in Table 1.

⁸⁴⁵ Don A Dillman, *Mail and Internet Surveys: The Tailored Design Method* (2nd edn Wiley 2007) 1-5.

⁸⁴⁶ Claire Hewson, Peter Yule (Peter Lewis), Dianna Laurent and Carl Vogel, *Internet Research Methods: A Practical Guide for the Social and Behavioural Sciences* (Sage 2003) 42-45.

Table 1: Questionnaire

<u>Copyright exceptions</u>	<u>Group of questions 1</u>		<u>Answer</u>					
	1. From your knowledge, please tick all the option(s) that do not constitute a copyright offense.	Tick						
	1.1 You can create a parody that refers to an original work.							
	1.2 You can discuss a person's public talk in a journal or diary.							
	1.3 You can copy small parts of a book for your private use.							
	1.4 You can have a single full copy (in the same format) of a product since you have purchased the original one.							
<u>Open Access</u>	<u>Group of questions 2</u>		<u>Answer</u>					
		No	Yes					
	2. Have you ever heard about the Open Access Movement?							
	3. Do you use any of these software? Please tick all the options that apply to you.	Tick						
	Linux							
	BrOffice							
	Google Chrome							
	Mozilla Firefox							
	Other							
		0	1	2	3	4	5	
4. How likely do you think that the open access movement is important for economic development?								

The first group of questions of the questionnaire is with regard to copyright exceptions in which respondents were asked whether 4 statements represented a copyright exception. The first question concerns the issues regarding parody as defined in chapter 5, this question is important because although it is a mechanism overused by many during political years, it is unclear whether the general public is knowledgeable about this exception. Question 1.2 also gains momentum in political years as well as in general discussions proposed by Brazilian congressmen across the years in which many issues are discussed and it is very common to see political discussions in newspapers.

Questions 1.3 and questions 1.4 relates to the issues raised in the introduction as Brazil is a country with many pirated products which have made companies like Nintendo to decide in abandoning operations in the country until only recently in 2018 to decide to reopen only its electronic ecommerce in the Brazilian currency.

The second group of questions focuses on the open access movement and also its relationship to economic development. As discussed in section 1.1 and 1.2, parallel to fomenting a perspective of Creative Commons, a country may also foment the Open Access movement to help boosting its economic development. This group of questions evaluates whether citizens have ever heard about the Open Access movement, next asks if they have used any of the following softwares (Lixux, BRoffice, Google Chrome, Mozilla Firefox) without letting them know that these are open access softwares. Lastly, to those respondents who were aware about the Open Access Movement, the questionnaire raises the issue as to what degree they think this movement is important to boost economic development. By asking these questions, this study hopes to complement the discussion about Open theories and economic development as set out on chapters 1.1 and 1.2.

The results of the questionnaire are presented next.

6.4 Questionnaire Results

This research received the replies of 43 Brazilian respondents from across the five regions of Brazil with the greatest number of respondents coming from the South and the Southeast regions, which is consistent with these regions being the most populated in the country. Table 2 illustrates that there are people interviewed ranging

from all age groups and the majority of the interviewees declared themselves as white people.

Table 2. Demographic Statistics

Panel A. Age			
Age Group	Frequency	Valid Percent	Cumulative Percent
16 to 24	14	32.6	32.6
25 to 34	10	23.3	23.3
35 to 44	7	16.3	16.3
45 to 59	10	23.3	23.3
60 or more	2	4.7	4.7
Total	43	100.0	100.0

Panel B. Region			
Region	Frequency	Valid Percent	Cumulative Percent
North	5	11.6	11.6
Northeast	7	16.3	27.9
Central	1	2.3	30.2
Southeast	11	25.6	55.8
South	19	44.2	100.0
Total	43	100.0	

Panel C. Etnology			
Etnology	Frequency	Percent	Cumulative Percent
White	31	72.1	72.1
Mix	8	18.6	90.7
Black	3	7.0	97.7
Other	1	2.3	100.0
Total	43	100.0	

The next table presents the descriptive frequencies for salary, and education.

Table 3. Salary and Education

Panel A. Salary			
	Frequency	Percent	Cumulative Percent
Up to 2 minimum salaries (£500)	7	16.3	16.3
Between 2 and 3 salaries	8	18.6	34.9
Between 3 and 5 salaries	4	9.3	44.2
Between 5 and 10 salaries	9	20.9	65.1
Between 10 and 20 salaries	11	25.6	90.7
Over 20 salaries	4	9.3	100.0
Total	43	100.0	
Panel B. Education			
	Frequency	Percent	Cumulative Percent
Up to school	2	4.7	4.7
Up to High School	12	27.9	32.6
Up to undergrad	18	41.9	74.4
Postgraduate	11	25.6	100.0
Total	43	100.0	
Panel C. Student			
	Frequency	Percent	Cumulative Percent
No	34	79.1	79.1
Yes	9	20.9	100.0
Total	43	100.0	

The interviewees are spread over a range of salaries in which 65% earn up to ten minimum salaries monthly (£2500), and only 35% of them receive over this threshold. It is worth noting though that this sample is not very representative of the Brazilian population where the average wage is way below the averages of this study, which represents a limitation of this work in generalizing these results to the population. However, the focus of this questionnaire is not to generalize the results but to explore the issue. Actually, as this sample is above the average of Brazilian citizens it may be better qualified to answer the questions correctly. This is also highlighted in the education of the interviewees. The majority of the sample either has received an undergraduate degree or finished postgraduate studies. Only 20% of the sample is still studying. This however,

offers an opportunity for this study to evaluate the understanding of Brazilian copyright law among interviewees that have an above average education. Thus, if the respondents from a higher education are not well aware of L&Es, this can highlight more strongly that government should focus on changes not only on the law as previously discussed in the past chapters but also in its education system.

The next table illustrates the number of questions that the interviewees answered wrongly.

Table 4. Copyright Exceptions

Panel A. Q1. Copyright exceptions			
Incorrect Answers	Frequency	Percent	Cumulative Percent
4 wrong	8	18.6	18.6
3 wrong	11	25.5	44.1
2 wrong	14	32.5	76.6
Do not know	4	9.4	86.0
1 wrong	3	7.0	93.0
0 wrong	3	7.0	100.0
Total	43	100.0	

It is apparent from the table that even though the sample of this study is highly qualified, their knowledge of copyright is insufficient. It is most striking that almost 20% answered all questions wrongly, and only 7% managed to respond correctly to all the questions about copyright. Approximately 76.6% answered at least two questions wrongly, which illustrates the lack of knowledge of Brazilian citizens regarding Brazilian copyright law. This fact is most alarming and Brazilian government should promote the dissemination of its copyright laws.

The next table discloses the results of the survey regarding the Open Access movement in Brazil.

Table 5. Open Access

Panel A. Q2. Open Access Knowledge			
Category	Frequency	Percent	Cumulative Percent
No	28	65.1	65.1
Yes	15	34.9	100.0
Total	43	100.0	
Panel B. Q3. Open Access Software			
Types of Software	Frequency	Percent	Cumulative Percent
None of them	3	7.0	7.0
Google Chrome	22	51.2	58.1
Mozilla Firefox	1	2.3	60.5
Linux and Google Chrome	3	7.0	67.4
Google Chrome and Mozilla Firefox	11	25.6	93.0
Linux, Google Chrome and Mozilla Firefox	1	2.3	95.3
BrOffice, Google Chrome and Mozilla Firefox	1	2.3	97.7
All of them	1	2.3	100.0
Total	43	100.0	
Panel C. Q4. Open Access Importance to economic development			
Category	Frequency	Percent	Cumulative Percent
Low	0	0	0
Low-Mid	1	6.7	6.7
Mid	5	33.3	40.0
Mid-High	4	26.7	66.7
High	5	33.3	100.0
Total	15	100.0	
Missing	28	65.1	
Total	43	100.0	

The panel A of this table reports that approximately 65% of the respondents do not know what the term ‘Open Access’ or in Portuguese ‘Acesso Livre’ means. Nevertheless, 93% of the respondents indicate that they use a type of Open Access software, ranging among Google Chrome, Mozilla Firefox, BrOffice (The Brazilian version of Microsoft Office) and Linux. From the 35% that answered that they were aware of Open Access software, 93% of those acknowledged that the open access

movement have at least a mid to high importance for economic development. This illustrates the importance of Open Access to boosting economic activity.

The next section illustrates the main inferences that can be achieved from the questionnaire in complement to the discussions of previous chapters.

6.5 Conclusion

Firstly, the results of the questionnaire illustrated that Brazilian citizens with higher wage and higher education are not aware of the current system of Brazilian L&Es, this highlights for policy implications that a reform on the educational system of the country may be needed. Secondly, in order to complement the discussion of Creative Commons, the questionnaire addressed initial insights about the Open Access movement and whether this movement is helpful to boost Brazilian economy. Although the results of the questionnaire reveal that many are not aware about the Open Access Movement, it is worth noting that 93% of those who knew about it acknowledged that the open access movement have at least a mid to high importance for economic development. As many indicated never hearing about this movement, this may be due to it being a recent movement, but may also indicate the lack of education of the population and the promotion of these topics in Brazil, even for citizens with an above the average education and wage.

In conclusion, it is striking that most Brazilians interviewed do not have much understanding of Brazilian copyright exceptions. These results suggest a policy recommendation for Brazil to promote by way of the dissemination of its copyright laws and support the growth of Open Access software.

CHAPTER 7: Conclusion

7.1 Overview and main conclusions

This thesis has aimed to review the systems of limitations and exceptions in Brazil, as well as providing first insights about the education surrounding copyright laws and the potential to support the Open Access movement as a way to boost economic development. The main objective has been reached after reviewing the Brazilian history and IP theories on Chapter 2 as well as reviewing the Limitations and exceptions system to copyright on Chapter 3, which provided support for a detailed analysis based on a broad review of the Brazilian system of L&Es in Chapter 4 and in more detail about parody in Chapter 5. Finally, the second objective regarding issues surrounding education of copyright laws as well as a discussion of Open Access Movement has been carried out on Chapter 6. The Chapters from the thesis are briefly discussed and the policy recommendations as well as main conclusions are presented for each chapter.

Chapter 2 reviewed the history of Brazil as well as IP theories reflecting on its implications on authors' rights. The main conclusions achieved are bi-fold. First, IPRs are a constitutional right which lacks justification. Despite its recognized protection, there is no express purpose for IPRs in Brazilian legislation which is a disadvantage to a consistent system of IPRs, resulting in a problematic interpretation of L&Es, where their purpose is not properly stated. With these insights in mind, the Brazilian system of L&Es to copyright operates in an abstruse space. Second, Brazilian regulation is too rigid when it states that any copyright infringement is a criminal offense. This is also a reflection of Brazilian history, which welcomed authors' rights in criminal codes, prior to any legislation on this matter being touched by civil laws. These are the greatest challenges to copyright reform in Brazil.

Chapter 3 addressed the Brazilian approach to L&Es in comparison to other international sources. By doing so, it covered the legal nature of limitations, form of limitations relating authors' rights and different systems' approach towards limitation among jurisdictions. It is worth highlighting Brazilian history relating to compulsory license schemes in the field of patents. This limitation provided several benefits such as: pressuring pharmaceutical industry to reduce the price of patented drugs and permitting the purchase of generic drugs from other countries. As such, Brazil has experienced the remarkable benefits of compulsory licenses applied to patents, which suggest that its application would also have the same positive effect on copyright. Currently, Brazilian law does not regulate compulsory licenses applied to copyright. For this reason, Brazilian government has not tackled this issue yet. As such, there is no jurisprudence covering this limitation relating to copyright. It is worth pointing out other countries' experiences. In this sense, India is a prime example of using compulsory license to address copyright issues. From the perspective of Brazilian legislation, there are no impediments to insert this limitation in national law. In fact, Brazil is a signatory country of many international treaties, and none prohibits adopting this limitation. In this light, this study encourages the adoption of this limitation in Brazil. Following this point, Brazilian law can benefit from international jurisprudence to help drafting this limitation. Furthermore, international jurisprudence can additionally provide significant support and insight to direct Courts' decisions when facing forthcoming disputes. This legal source would be extremely helpful in constructing grounds for the application of this licenses. This Chapter also focused on recent attempts at reforming copyright in Brazil. This part of the study offers a critical analysis of those experiences so far. It concludes this point by

encouraging similar initiatives and expressing an urgent need for the modernization of Brazilian copyright law.

Chapter 4 focused on a detailed study of the Brazilian system of L&Es to copyright. Unlike UK legislation, Brazilian L&Es is sub-divided into three pieces of legislation: Copyright Law, Software Law and Penal Code. In order to tackle this issue, this study adopts a classification which divides L&Es into three groups, limitations related: to the reproduction right, the performance right and to derivative works. It addresses each limitation by comparing them with other jurisdictions, focusing particularly on UK legislation, and other international sources, such as international treaties and regional treaties. As a result, it recommends some changes to Brazilian law and also points out a few suggestions for UK legislation. This study also points out the advantages of and endorses the adoption of greater flexibility for the Brazilian system. Specifically, the policy recommendations are manifold. First, it is necessary to insert new clauses regarding limitations for religious and official celebration, and broadcast for social institutions. Second, it is advised to expand the scope of limitations for educational purposes and for library and archives. Third, the Brazilian structure of copyright is not adequate, which acclaims authors' perspective over users' and should be focused on users rather than authors' perspective. Thus, this study advocates for a new rationale on copyright, promoting an Open-right. In this light, Brazilian copyright could develop into a creative commons community. Fourth, Brazilian law is still developing regarding the copyright of database and its exceptions, so there is a need to delimitate the scope of the 'sui generis' of a database. Additionally, following the need of a 'sui generis' protection, this thesis also suggests that a law focusing on the protection of the personal data of citizens needs to be created. Currently, Decree 8,776/16 already provides protection

when it is related to data connection providers, however, this needs to be expanded to other businesses and the three spheres of the Brazilian government. Currently, the rights of citizens could be exploited without their consent, and this must change.

Chapter 5 concentrates on the parody exception. It revisits the history of parody and studies regarding the treatment of parody among jurisdictions. It is worth noting that Brazilian law first addressed parody in 1973, whereas the UK did not adopt a parody exception until 2014. Another significant point between these two legal regimes is based on the types of derivative works protected by the exception. In Brazil, the exception applies to paraphrases and parodies, whereas in the UK it includes caricature, parody and pastiche. Despite parody's early adoption in Brazilian Law, there are still many controversial points and miss-conceptions surrounding this issue. Based on this, it looks at some of Brazil's most iconic lawsuits relating to parody. In doing so, it seeks to determine which grounds are used by the Brazilian Courts to define legitimate uses of parody. Unsurprisingly, there is little cohesion in the way decisions are reached. It seems that a vague concept of parody, added to a powerful Brazilian influence from the *droit d'auteur* rationality, results in prejudice towards parodies. Furthermore, Brazilian jurisprudence can vary on this issue, which almost certainly is a consequence of the absence of a strong justification for this exception. Therefore, there are at least two policy recommendations. First, this paper argues that Brazilian legislators should address the concept of parody, making it clear to what extent such a concept could be used to judge cases. A parody must be used as a mean of expressing criticism or humour, and this should be a significant aspect that differentiates this from the original work. Second, this study also recommends an amendment to Brazilian Copyright law by inserting other derivative works, such as caricature and pastiche by utilising this type of exception. It

highlights that when Brazilian courts legislate regarding parodies they are solely allowing cases, which would not appear to imply any discredit to the target work. This part raises some concern, due to Brazilian history. The country has only recently returned to democracy after a period of dictatorship. Based on this, it is especially important that legislation should be carefully considered in order to avoid creating a censorship effect on parodies. In fact, parody is a technique, which by definition, ‘plays with the art’, which in many cases implies a certain degree of irreverence. Nonetheless, this does not mean that this study encourages nor supports the weaponizing of parodies.

Chapter 6 provides an initial view about Brazilian people’s knowledge of IP, and its importance to the economy. It is worth noting that this was an explorative approach, and which could be replicated by national government in order to get more respondents and get a more precise picture of the situation. The aim of this chapter was to provide initial insights about the topic. The main results indicate that Brazilians are generally neither aware of copyright laws nor open access software, but those who are aware acknowledged that the Open Access movement have at least a mid to high importance for economic development. Therefore, the policy implications are two-fold. First, government should help to promote the system of L&Es at the school level helping to address the lack of knowledge regarding this important topic for the future generation. Second, this study argues that the government should help to promote the Open Access movement as a way to boost economic activity. This view has been also confirmed by the view of other Brazilian citizens via questionnaire and support the growth of open access software.

The next section describes some suggestions for future research.

7.2 Suggestions for Future Research

Another avenue for future research is to investigate the framework of IP and open access and the joint implications of these topics to economic activity. So far, many empirical studies seem to challenge the assumption that higher standards of protection lead to economic development. IP should help to boost a country's economy, and thus helping to develop the framework of copyright, exceptions as well as open access should be beneficial for countries' economies. This would be of interest to Brazil as IP laws are still developing in the country and have a long way to go before they truly balance copyright holders and users' interests. This applies not only to the content of the law, but also to its enforcement, which is fundamental. In this sense, strict rules which cause mass-criminalization of society weaken IPRs in the country. In the same manner, unachievable standards of protection do not boost enforcement either. The prime challenge to IPRs, and copyright in particular, is to create a system which coexists in harmony with the digital space.

Appendix 1

Country	Legislation on parody	Year	Parodist	Subject	Case Law (+ for parodist) (- against parodist)	Test
Brazil	Law 9,610/99	2002	Comunicação Contemporânea LTDA	EMI Odeon Fonografica Industrial e Eletrônica LTDA	(-)	Parodies with commercial purposes are not allowed. It must be committed to a minimum of creativity to be considered a new work.
		2007	Eliana Michaelchin	Cid Moreira	(-)	The parody cannot promote a risk to the credibility, honour, and dignity.
		2008	Globo Comunicações e Participações S/A	Maria Cristina	(-)	Could not be considered parody: a reproduction of two strophes from a musical work. It is not a new work. The parody should contain the acknowledgment and should communicate the owner of the original work.
		2013	Beta Shows Produções e Entretenimentos Voltados para Rádio e TV LTDA e outros	Rede Pura Comunicação LTDA e outros	(+)	It is not required to prohibit the parody in cases that it has aspects related to comedy and do not cause confusion with the original work.

		2014	Gilmar Mendes	Paulo Henrique	(-)	The freedom of information and communication is not absolute. A parody cannot harm the honour and dignity of the author. It should be based on truth statements and facts.
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