From Soviet to European Copyright:

The Challenges of Harmonizing the Copyright Legislations of Post-Soviet Non-EU States with the European Copyright Law (Georgian Case)

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Table of Contents

Abbreviations:

AA – Association Agreement

BC – Berne Convention for the Protection of Literary and Artistic Works

BGH - Bundesgerichtshof (German Federal Court of Justice)

CEE - Central and Eastern European Region

CRM - Collective Rights Management

CMO - Collective Management Information

EC – European Community

ECJ – European Court of Justice

EEA – European Economic Area

ENP – European Neighborhood Policy

EU – European Union

GmbH - Gesellschaft mit beschränkter Haftung

ILM – International Legal Materials

IP – Intellectual Property

MS - Member State

NEP – New Economic Policy

OJ - Official Journal of the European Communities

OLG – Oberlandesgericht (German Upper Regional Court)

PCA – Partnership and Cooperation Agreement

PSNEUS – Post-Soviet Non-EU States

RSFSR – Russian Soviet Federative Socialist Republic

SSR – Soviet Socialist Republic

TRIPS – Agreement on Trade-Related Aspects of Intellectual Property Rights

UCC – Universal Copyright Convention

UNTS - United Nations Treaty Collection

UrhG – Urheberrechtsgesetz (German Copyright Act)

USSR – Union of Soviet Socialist Republics

WCT – WIPO Copyright Treaty

WIPO – World Intellectual Property Organization

WPPT – WIPO Performances and Phonograms Treaty

WTO – World Trade Organization

WWW – World Wide Web

I Introduction

European copyright law on one hand, and copyright laws of the post-Soviet states which are not the members of the European Union on the other, are often discussed separately but rarely together. Generally, it has been recognized that the influence of European copyright law extends beyond the borders of the EU and reaches non-member states as well. Furthermore, EU copyright law has had significant influence on the legislations of post-Soviet states. However, these two elements, European and post-Soviet copyright law, are rarely connected in the academic debate. Our research examines the interrelation between these two elements, namely to define certain features of implementing the former in the latter.

The study investigates the *main characteristics of harmonizing the copyright laws of post-Soviet non-EU states with European copyright law*. Besides this main question, the research addresses several other sub-questions concerning the development of European copyright law from the perspective of the post-Soviet non-EU states; and the characteristics of copyright laws in these post-Soviet countries from the European perspective. The research presents a *case study of Georgia*, which was selected as typical example of a post-Soviet country aspiring towards European integration but which is not a member of the EU. Additionally, since Georgia shares certain similarities with other post-Soviet non-EU states, we compare the legislations of these post-Soviet countries rather than examining Georgian copyright law in isolation. Georgia shares, with *Armenia* and *Azerbaijan*, a common geographical and historical context of the South Caucasus, whereas in terms of European integration, Georgia most closely resembles *Moldova* and *Ukraine*, which are also signatories to the recent EU Association Agreements. The development of *Russian* copyright law must

also be considered, as this was influential on all of the Soviet republics. Accordingly, we have selected these five countries for our observations and comparisons, and refer to them as the *post-Soviet non-EU states*.

All of these PSNEUSs follow the continental European system of authors' rights, rather than the doctrine of copyright, which belongs to the 'common law' system. However, while discussing the different continental European and post-Soviet systems of authors' rights in the English language, they are usually translated as "copyright". EU copyright law follows the same principle, since its subject matter is defined as "copyright", even though the majority of the EU countries follow the system of authors' rights. Accordingly, following this common practice, we also use the English term "copyright" while referring to the continental European, Soviet, and post-Soviet systems of authors' rights, provided that they are covered by the term "copyright" for the purposes of this research.

Another basic notion commonly used here is that of 'harmonization'. Within the context of this research, harmonization should be understood differently from the way it is commonly employed in the legal literature. Usually, in a legal context, 'harmonization' describes the process of approximation of the laws.[1] On the other hand, the original meaning of this term is derived from the Greek word '*harmonia*' (ἁρμονία), meaning "joint, fit together", and is mostly used in musical language meaning "the simultaneous sounding of 2 or more notes; in this sense synonymous with chord"[2]. As we can see, the original meaning of harmony does not depend on the similarity, but on the coexistence of different elements.[3] This coexistence, however, has to be organized in a manner that these different elements should fit to each other, in order to avoid disharmony. This main essence of harmonization can also be 'translated' in the legal context. Accordingly, for the purposes of this research, the term

[1] Rajan, Copyright and Creative Freedom, p. 10.
[2] Kennedy, Rutherford-Johnson, p. 373.
[3] Rajan, Copyright and Creative Freedom, p. 10.

'harmonization' should be understood not as mere approximation, but as the adjustment of different elements to each other.

While addressing the research questions, we examine two basic components that are interrelated and, to a certain extent, opposed to each other. Namely, we refer to the European copyright law as the first component, and Soviet copyright law plus the other alternative approaches to copyright (which are derived from the notion of copyright and are, at the same time, proposing alternative interpretations of the main features of copyright) as the second component. Based on critical evaluation of these two components, we seek to develop the third component, considered as a 'synthesis' of the previous elements, in order to develop theoretical foundations for the harmonization of European copyright law with that of the post-Soviet non-member states. In terms of methodology, we employ *deductive* reasoning, implying the move from general observations to specific case-studies. Accordingly, the research starts from a general evaluations of the two main elements of our research (termed the first and second components), developing a tentative synthesis of certain features of these two elements, and finally 'translating' this to concrete recommendations and proposals for legal harmonization.

The starting point of our research is European copyright law, examined from the perspective of its implementation in the non-member states, especially the post-Soviet states. We distinguish its several layers, and start from the development of the doctrines of *copyright* and *authors' rights*. Unifying the concepts of *copyright* and *authors' rights* has been one of the most important achievements of EU copyright law harmonization. This process was started in the late 1980s, and has continued at various rates of progress during the last three decades. Academic discussion concerning the harmonization process has developed simultaneously with the process of harmonization itself. However, this discussion has mostly focused on the perspective of member states of the European Union. On the other hand, it has also been declared within the framework of this discussion that EU copyright law has

already extended beyond the EU borders and has been used in countries outside the EU.[4] Accordingly, this leads to the additional necessity of discussing the harmonization of European copyright law from the perspectives of non-member states.

Discussion concerning the relevance of the non-member states' perspective is also provided in the first part of our research; and also examines the relevance of implementing EU copyright law in the legislations of non-member states. It also seeks to substantiate the necessity of broadening the academic discussion concerning EU copyright law by introducing a new perspective to this discussion, namely that of the non-member states. When examining the relevance of the non-member states' perspectives, it provides arguments from both 'outside' and 'inside'. While discussing the reasonableness of implementing EU copyright law in the legislations of non-member states, it takes *legal*, *economic*, and *political* approaches into consideration.

After resolving the issue of the relevance of non-member states' perspective regarding EU copyright law on one hand, and the applicability of this law in non-member states on the other, EU copyright legislation is discussed in detail. Namely, we examine nine EU Directives adopted in the area of copyright to date: Computer Programs Directive, Rental and Lending Rights Directive, Satellite and Cable Directive, Term Directive, Database Directive, Information Society Directive, Resale Right Directive, Orphan Works Directive, and CRM Directive. Among the European copyright legislation, we did not involve the Enforcement Directive,[5] which is the common practice,[6] as it concerns all intellectual property rights[7] and not exclusively copyright. Accordingly, the Enforcement Directive would broaden the scope of the research from copyright-specific issues to general matters of intellectual property

[4] Hugenholtz, in: Harmonisation of European IP Law, p. 58.
[5] Directive 2004/48/EC.
[6] Tritton, Dreier/Hugenholtz, Walter/Lewinski, etc.
[7] Lakits-Josse in: Cottier/Veron Concise International and European IP Law, p. 464.

rights, which we tried to avoid. We also examine the practice of the European Court of Justice, as this is a significant part of EU copyright law.

The second part of the research is dedicated to Georgian copyright legislation in comparison with other post-Soviet non-member states. A brief overview of Georgian law prior to the Soviet Union underlines the differences from historical developments in Western Europe and mentions traditional principles of Georgian law regarding its harmonization with foreign legal sources. In terms of the development of copyright legislation, Georgian law is compared with those of other post-Soviet non-member states, namely: Armenia, Azerbaijan, Moldova, Russia, and Ukraine. Most of these countries (excluding Russia) had begun developing their copyright legislations during the 1920s under the Soviet ruling and in compliance with the fundamentals of the Soviet copyright legislation, which were obligatory for all of the 'Soviet' states. Later on, the wave of reform before the accession of the Soviet Union to the UCC (Universal Copyright Convention) affected the copyright legislations in all of these countries. They underwent permanent deviation from the Communist foundations, to compromises towards 'capitalist' systems of copyright, and maximizing the censorship element of copyright altogether before the breakup of the USSR. In this regard, Soviet copyright law is an important element in the developments of copyright legislations in these post-Soviet non-member states.

After the breakup of the Soviet Union all of these countries also experienced the bitterness of radical shifts from the Communist system to the completely different Western system of copyright law, which has since prevailed. This shift has been equally disorienting for these newly independent countries, hesitating between the different types of copyright regulation and different structures of the copyright laws. The elaboration of national copyright laws after the breakup also took place simultaneously during the 1990s in these post-Soviet countries. They consequently share certain similarities, and comparative analysis shows the basic trends of developing copyright laws in the PSNEUSs, leading to an overall picture of

developing post-Soviet copyright law. The development of court practice in the area of copyright is also examined within the context of developing national copyright law.

The second part of the research also discusses the differing levels of harmonization between Georgian copyright legislation and EU law. The general process of harmonization can be discussed in two steps: Partnership and Cooperation Agreements (PCAs) between the European Community (EC) and the post-Soviet countries in the late 1990s represented the first step towards harmonization, while the EU Association Agreements (AAs) with Georgia, Moldova, and Ukraine can be considered as more advanced steps. After the elaboration of the national copyright laws, the second wave of copyright reform among post-Soviet countries was initiated within the framework of the PCA agreements, and certain significant changes have been made in this regard. Accordingly, the third level of more comprehensive reform to the copyright laws of these post-Soviet countries is approaching.

After examining EU copyright law and those of the post-Soviet countries in detail, the third part critically evaluates both of these components. Consideration of these critical points should lead to the development of alternative proposals opposed to these criticized components. Therefore, the first critical evaluation considers European copyright law, the propertization trend,[8] the commercial foundations of which is an object of criticism. On the other hand, the copyright laws of post-Soviet non-member states are also evaluated from a critical perspective. Subsequently, we critique the radical shift from the Soviet to the Western system, followed by the disoriented development of national copyright legislation, and finally an ongoing process of harmonizing national copyright laws with those of the EU.

We provide certain alternatives to the criticized elements. In doing so, the essence of harmonization is first defined, referring to the adjustment of different elements. We then examine European copyright law as the first component, and refer to the Soviet copyright law as an alternative of its European counterpart. However, since it turns out that Soviet

[8] Siegrist, in: United in Diversity, p. 12.

copyright law could not serve as an 'appropriate' alternative due to its self-contradictory and censorial character, we look for other alternatives. Namely, we examine so-called 'copyleft' and the initiative to raise the importance of moral rights in copyright law. These two alternatives can also be used as the 'theoretical' part of our recommendations and proposals for the future harmonization of copyright laws in the post-Soviet non-member states with those of the EU.

In order to 'translate' all these theoretical observations into practice, we provide recommendations for the further development of the copyright laws in the post-Soviet non-EU states. Following the balance-based approach (aiming to reach a balance between the public and private as well as international and domestic needs) and considering the alternative interpretations (the recently emerged 'copyleft' and the initiative to raise the importance of moral rights), we develop certain proposals regarding the types of copyright regulation and the structure of copyright laws in post-Soviet non-EU states; and the practical implementation of 'balance-based approaches' in these laws, and modifying the definition of copyrighted work. Finally, we present proposals for further implementation of EU copyright legislation into those of the post-Soviet member states. In proposing these recommendations, we examine all of the nine EU Directives adopted in the area of copyright to date. In order to define the frontiers of the future harmonization process, we provide recommendations for further implementation of European copyright law in the post-Soviet legislations, and set certain limitations on this implementation process. All of these practical proposals are based on the theoretical observations and hypotheses elaborated so far, and are oriented to contribute to the process of harmonizing European copyright law with those of the post-Soviet non-EU states.

II European Copyright Law and its Implementation in the Non-EU States

1. Introduction

The discussion concerning European copyright law started even before the adoption of the first EC Directive in the field of copyright in 1991.[9] This discussion has continued over the last three decades, covering the variety of issues and characteristics, mostly examined from the perspective of the European Union. On the other hand, European copyright law long exceeded the borders of the Union, and nowadays numerous non-member states attempt to harmonize their domestic legislation with that of the EU. Therefore, it is time to develop a new perspective in the discussion concerning EU copyright law, namely that of non-member states. Assessment of European copyright law from non-member states' perspectives would be helpful in order to display the features and characteristics of these laws which were not visible from the 'insider' perspective.

Copyright, as such, has emerged and developed in Western Europe. Accordingly, while referring to European copyright law, we also have to examine the foundations and development of the doctrine of copyright. In this regard we differentiate the concepts of *copyright* and *authors' rights* according to their times and places of origin as well as their forms of development. However, they regulate the same subject matter and share the same space in relation to property rights. Besides that, one of the most significant aims of European copyright harmonization has been the unification of these two concepts. Accordingly, we will examine the raisons d'être of both copyright and authors' right, their

[9] I.e. EC Green Paper on Copyright and the Challenge of Technology.

common justifications, and also the characteristics that differentiate them from each other. Additionally, it is necessary to define what we imply by the term "copyright" and why we have chosen this meaning.

Since the harmonization of European copyright law began due to economic impulses, in order to remove the differences in national law having "direct and negative effects on the functioning of the common market",[10] these economic impulses of EU copyright law must first be taken into consideration. Furthermore, one of the initial aims of this harmonization was to overcome the challenges of technology, which gave impulse to the creation of European copyright law. These Directives had to find a 'delicate balance'[11] between the various diverse issues; therefore, this compromise-oriented, balance-based approach characterizes the legal standard created by EU copyright legislation. Furthermore, political factors play an important role in the formation of EU copyright law. All of these elements and characteristics of European copyright law have to be examined objectively from the perspective of their implementation in non-EU states.

Discussing European copyright law from the 'insider' perspective, considering their implementation in member states, seems logical at first sight. However, implementation of this EU legislation among non-member states, either obligatory or voluntarily[12], is already a fact. Accordingly, this necessitates a new perspective in the academic discussion concerning European copyright law, namely from the perspective of non-member states. In this regard, we have to evaluate the legal standard created by the EU copyright law, together with the economic factors playing the most important role in this harmonization both inside and outside the EU; and the political factors (mostly expressed in the political process of European integration) that also play an important role in shaping the directions of this process of integration among non-member states. Based on this evaluation, we address the

[10] Recital 4, Directive 91/250/EEC.
[11] Hugenholtz, in: Harmonization of European IP Law, p. 60.
[12] Dietz, in: Harmonization of European IP Law, p. 105.

question of whether, and to what extent, EU copyright law is worth implementing in non-member states.

In order to answer this question, we thoroughly examine EU copyright legislation, namely the Directives adopted by the European Union in the field of copyright from 1991 to the present (the most recent CRM Directive[13] was adopted in 2014). These Directives have been discussed and examined in the academic literature many times already. However, they were mostly discussed from the 'EU-perspective', whereas we now need to examine them from the perspective of the non-member states. To do this, the following discussion presents the Directives in chronological sequence and assesses each from the perspective of non-member states. This assessment refers to the general content and character of the Directive as a whole, as well as evaluating the norms and provisions of each Directive in detail. Such observations should highlight the features and characteristics of the EU copyright legislation that were not visible while discussing it from the usual 'inside' perspective of the EU member states.

At this point, we should differentiate two terms for the purposes of this research: 'EU copyright legislation' and 'EU copyright law'. Although they appear quite similar, there is a difference between them: when referring to the EU copyright *legislation* we imply the legal acts adopted by the European Union (or European Community), whereas EU copyright *law* is a broader term including but not limited to the EU copyright legislation. The former basically comprises the nine EU Directives adopted since 1991, whereas the latter also refers to other sources, including the decisions of the European Court of Justice. Accordingly, both of these sources – EU copyright Directives and the practice of the ECJ concerning (but not limited to) these Directives have to be examined.

The practice of the European Court of Justice concerning copyright started two decades before the adoption of the first EU copyright Directive. Since then, ECJ decisions are an

[13] Directive 2014/26/EU.

integral part of EU copyright law. ECJ practice is also a significant part of the process of harmonizing European copyright law. The court intends to integrate not only the law of the EU concerning copyright, but also the interpretation of this law provided in the decisions of the European Court of Justice. In this regard, while discussing EU copyright law, we also have to examine the decisions of the ECJ, most of them interpreting the EU copyright Directives and creating the common standards concerning their interpretation. Similarly to the EU copyright Directives, the decisions by the European Court of Justice must also be examined according to their relevance for the copyright legislations of non-member states.

2. Development of Copyright and Authors' Rights in Europe

The concepts *copyright* and *author's rights* developed within different legal systems and geographical spaces. Even the names reflect the distinct characteristics of these two concepts. However, the term 'copyright' is often used as an English translation of the concept of "authors' right" prevailing in continental European countries. Therefore, it is important to review the origins of these concepts, differentiate them from each other, identify the justification and raison d'être of copyright (author's rights), and define the terminology to be used.

2.1. Necessity of Copyright

The concepts of copyright and authors' rights have been unknown for the ancient legal systems including Roman law.[14] Although some of the terms used even nowadays regarding copyright and authors' right have their origins in ancient Rome (i.e. "plagiarus" used by Roman poet Marcus Valerius Martialis, 40-104 AD)[15], copyright or authors right as the legal institute, or any norms to regulate these issues, did not exist in the ancient times, nor until the 18th century (namely the year 1709[16]). The absence of copyright or authors' right could be explained with the fact that there was simply no need to create such regulation: the texts were written and rewritten by handwriting, usually by the monks in the monasteries, so the

[14] Hansen, p. 12.
[15] Berger, in: United in Diversity, p. 90.
[16] Stokes, p. 23.

circle of the writers and the readers was rather limited and copying, or re-writing, was commercially unattractive.[17]

The invention of printing press by Johannes Gutenberg in 1440 created the printing industry and, accordingly, created the necessity of its regulation.[18] After this invention the situation has changed radically: the amount of books and printed texts increased rapidly, they were spread intensely and quickly. Therefore the necessity of regulating and controlling this newly created huge industry has been emerged. Accordingly, the book industry was put under the control of the state and the sovereign authorities, including the church.[19] As a result, the system of privileges had been developed in England, according to which the monopoly privileges were granted to printers by the Crown from 15th century onwards,[20] which also led to the establishment of publishing houses[21]. As we can see, the development of the printing industry created the necessity of regulating, controlling and censoring this industry basically in the geographical area where it was widely spread – in the Western Europe.

2.2 Development of Copyright

The development of printing industry and the system of privileges paved the way for copyright as a tool of regulating and controlling the spread of printed literature. Copyright, as such, has been developed in England, after the adoption of the first copyright statute in the world – the Statute of Anne (1709).[22] According to this statute, the right to print book was given to authors, not to publishing houses, and it was mandatory to register the title of

[17] Berger, in: United in Diversity, p. 90.
[18] Sreenivasulu N. S, p. 483.
[19] Berger, in: United in Diversity, p. 90.
[20] Stokes, p. 23.
[21] Hansen, p. 17.
[22] Stokes, p. 23.

the book in the Register of the Company of Stationers in order to take necessary measures against the infringements of this registered copyright[23] (this Stationers Company was a guild of publishers founded in London in 1556[24]). Besides that, the Statute of Anne entitled the Lord Archbishop of Canterbury to limit the unreasonable prices for the published books and also obligated the publishers to provide a copy of each book to the Royal Library as well as several universities.[25]

As we can see, the Statute of Anne was quite 'balanced' act even from nowadays perspective in terms of adjusting the private rights of the authors and publishers to the common interests of the society, in general: it granted exclusive rights to the authors and publishers as well as guaranteed the remedies for the infringement of copyright, on one hand, and required to set reasonable prices for the books as well as spreading them in the library and universities, on the other. Such 'balance-based' approach is aspirational for the copyright law even nowadays.[26] However, the later development of copyright portrayed it as rather 'mercantile' concept which is basically oriented on controlling the commercial exploitation of the work[27]. Even semantically the concept of copyright refers to the "right to copy" in the context of the printed press.[28] Besides that, copyright has been invented as a tool of censorship[29], in order to control the spread of printed literature. The focus on economic issues, commercial exploitation and censoring character have been typical aspects of the concept of copyright since the beginning of its development.

[23] Berger, in: United in Diversity, p. 91.
[24] Hansen, p. 17.
[25] Berger, in: United in Diversity, p. 91.
[26] Eechoud, p. 299.
[27] Berger, in: United in Diversity, p. 92.
[28] Newcity, p. 3.
[29] Rajan, Copyright and Creative Freedom, p. 1.

2.3 Development of Authors' Rights

The concept of authors' rights has emerged rather later and in a different way. The birthplace of this concept is France, where the system of privileges had been abolished by the revolution in 1791, which gave impulse to the development of droit d'auteur[30]. The notion of literary property has been defined in Le Chapelier's law of 1791 for the first time and generalized two years later by the new decree.[31] This was the result of developing personal rights after the revolution, since the authors right was considered as a protection of the work which is an expression of the authors' creativity and, accordingly, personality.[32] The doctrine of 'moral rights' (droit moral) has been introduced even earlier in 1777[33]. The essence of these moral rights is that they refer to the personality of the author and not to the economical exploitation of the work,[34] unlike copyright. According to the French doctrine, the authors' right is related to the freedom of expression.[35] Therefore the French concept of droit d'auteur is referred even as antagonistic towards the 'American' model of copyright.[36]

The concept of authors' rights has spread from France to the other countries of continental Europe. However, there are systemic differences between French and German concepts of authors' right expressed in monistic and dualistic theories. According to the monistic theory, which is implemented in German copyright law, authors' right is a single, united and undividable right, which unifies both: the component of personal rights as well as the element of property rights.[37] On the other hand, the dualist theory suggests that moral rights and commercial exploitation rights should be separated from each other.[38] This dualist

[30] Authors' right (French).
[31] Rajan, Moral Rights, p. 56.
[32] Berger, in: United in Diversity, pp. 92-93.
[33] Rajan, Moral Rights, p. 53.
[34] Berger, in: United in Diversity, p. 91.
[35] Strowel / Tulkens, p. 9.
[36] Zollinger, p. 46.
[37] Hansen, p. 25.
[38] Berger, in: United in Diversity, p. 93.

approach is realized in French Intellectual Property Code,[39] where the moral and economic rights are visibly differentiated.[40] Dualistic concept is justified by the different characteristics of moral and property rights, since the former belongs to the personality of the author and the latter is an economic right.[41] On the other hand, the existence of exploitation rights in authors' right concept at all can be justified by the need of publishing the work of the author and making it available to the public.[42]

Regardless to the difference between monist and dualist approaches, there is a set of characteristics uniting the legal systems which belong to the concept of authors' rights and differentiates it from copyright. First of all, the doctrine of moral rights, created in France and spread all over the European continent, differentiates authors' right from copyright.[43] In this regard authors' rights are basically oriented on the 'personality' sphere of the author and his personal intellectual creation.[44] Besides that, the origins of these two concepts are different: authors' rights have been emerged from the development of the human rights after the French revolution while copyright has been created in order to regulate and control the printing industry. Finally, the geographical dimensions of these two concepts are also different: authors' rights have established in the countries of continental Europe while copyright is basically spread from England in the countries which belong to the system of "common law".

[39] Titre II, Code de la propriété intellectuelle.
[40] Sirinelli, Warusfel, Durrande, pp. 86-87.
[41] Hansen, p. 24.
[42] Markellou, p. 33.
[43] Berger, in: United in Diversity, p. 92.
[44] Hansen, p. 23.

2.4 Raison d'être (Justifications)

Although the difference between the concepts of copyright and authors' rights is significant, it is obvious that they belong to the property rights, more specifically – to the intellectual property rights[45]. If we follow the deductive reasoning in order to define the place of copyright/authors' right in the system of rights, we will have the following line narrowed down from general to specific: *civil rights – property rights – intangible property rights*[46] - *intellectual property rights – copyright/authors' rights*. It might also be the case that certain intellectual property rights overlap each other.[47] In this regard intellectual property rights can be defined "as a set of individual exclusive rights to intellectual work or intangible assets"[48]. There are not only tangible goods which belong to the notion of property[49]; according to the decision of the German Federal Constitutional Court, the coverage area of the property is not limited to tangible goods and also applies to the legal positions,[50] which reaffirms that copyright/authors' rights belong to the property rights. Therefore the justification of copyright/authors' rights equals to that of the notion of property, which, according to the liberal approach, is the base of individual freedom, achievement, wealth, progress, etc.[51] The utilitarian justification also suggests that copyright aims to ensure a continuing profit to the author, for whom the grant of exclusive rights is an incentive to create.[52] In this regard, the relationships in culture and science are based on property and regulated similarly to property, which is referred as the process of "propertization".[53] We have to mention that these economic and utilitarian arguments basically refer to the copyright and 'economic' part of authors' right.

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[45] Barnes / Conley, p. 3.
[46] Immaterialgüterrecht (German).
[47] Derclaye / Leistner, p. 2.
[48] Siegrist, in: United in Diversity, p. 12.
[49] Enders, in: United in Diversity, p. 33.
[50] Abs. 34, BVerfGE 31, 229 (7 Juli 1971).
[51] Siegrist, in: United in Diversity, p. 9.
[52] Stokes, pp. 10-11.
[53] Siegrist, in: United in Diversity, p. 12.

Another part of authors' right, on which the 'moral' justification of authors' right and also of copyright is based, is the element of moral rights referring to the personality of the author[54]. This justification is referred as 'just rewards theory'[55] and is, first of all, based on the principle of the Gospel that "the labourer is worthy of his hire"[56]. According to this principle, the effort of the author deserves to be recognized, rewarded, and, since the author creates something of the benefit to society, he/she is entitled to require appropriate remuneration in return.[57] Such approach is based on the French doctrine of droit morale,[58] and requires proper recognition as well as remuneration for the performed work. However, the definition of "work" is problematic in this regard, since, in case of art, it can also be a creation - result of inspiration, and not only a work – result of labors.[59] Besides that, the concept of proper remuneration is also arguable: what can be considered appropriate and what if the remuneration is above or below the appropriate level.

The similar problem of defining 'fare' level arises while justifying the copyright/authors' rights with 'public' arguments. According to this justification, property right promotes social integration, economic wealth, political stability and cultural progress of the society.[60] However, together with encouraging the production of scientific, artistic and literary works, copyright/authors' rights can also act "as a fetter on those who need to copy the works for desirable purposes such as private study or research".[61] Here the classical contradiction between the private and public interest emerges where the appropriate balance between these conflicted interests have to be found. In this regard, the first copyright act – Statute of Anne can be taken as an example. According to this Statute, printers and booksellers should

[54] Berger, in: United in Diversity, p. 91.
[55] Stokes, p. 13.
[56] Luke 10:7 (KJV).
[57] Stokes, p. 13.
[58] Moral right (French).
[59] Stokes, p. 13.
[60] Siegrist, in: United in Diversity, p. 9.
[61] Stokes, p. 12.

not make the prices "too high and unreasonable"[62] and the Lord Archbishop of Canterbury was entitled to limit these prices[63]. Moreover, it was mandatory to provide a copy of each printed book to the libraries of the universities and to the Royal Library.[64] Due to such balanced regulation of the public and private interest the Statute of Anne can be used as an example of balance-based approach, on which the copyright/authors' right should be oriented,

2.5 Terminological Explanations

The terms 'copyright' and 'authors' rights' refer to the similar subject matter with the different perspectives. Copyright has been created in England in the beginning of 18th century[65] as a tool of censorship[66] and spread in the countries of the "common law". Authors' rights emerged in France in the end of 18th century, shortly after the French revolution,[67] as a right which should protect the individual creation and personality of the author. Accordingly, copyright is more oriented on the commercial exploitation of the copyrighted work, while the authors' rights protect the personality of the author and his/her moral rights. In practical terms, copyright can be alienated, while authors' rights should not. Even semantically they express the different concepts: copyright refers to the "right to copy" and is therefore more oriented on the economical exploitation of the works, while authors' rights refer to the personality of the author and is aimed to protect his/her rights at first.

However, it is also obvious that copyright and authors' rights both refer to the similar subject matter and belong to the intellectual property rights. Therefore, while referring to the

[62] Part IV, Statute of Anne.
[63] Berger, in: United in Diversity, p. 91.
[64] Part V, Statute of Anne.
[65] Berger, in: United in Diversity, p. 91.
[66] Rajan, Copyright and Creative Freedom, p. 1.
[67] Berger, in: United in Diversity, p. 91.

different continental European systems of authors' rights in the English language, they are usually translated as "copyright". For example, German *Urheberrecht,* which is one of the prominent representatives of continental European authors' rights system, is translated in English as "copyright".[68] Even the terms like Russian *avtorskoje pravo*, derived from French droit d'auteur, which obviously means "authors' right", are also commonly translated in the English language as "copyright".[69] As we can see, English translation of authors' right as "copyright" is quite common practice in the English literature. The same principle is applied in EU copyright law, where the subject matter is defined as "copyright", even though the majority of EU member states belong to the system of authors' rights (especially after the UK referendum of 23rd June 2016). Therefore, since our research is written in the English language, we have also decided to use the English term "copyright" in its broad sense, provided that it also covers the continental European as well as Soviet and post-Soviet doctrines of authors' right.

2.6 European Harmonization

Harmonization of European copyright law has been started as an ambitious plan of providing the set of basic rules, which should be common for all of the member states, and which was supposed to remove the national law differences affecting the common market[70]. This was not an easy task, if we consider the differences and characteristics which are typical for the different member states. It is a bit early to evaluate whether EU copyright law has fulfilled this ambitious goal, since the European Union, as well as European law, and EU copyright law, in particular, are in a state of transition[71]. However, the harmonization of different

[68] https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html.
[69] Levitsky, p. 1.
[70] Recital 4, Directive 91/250/EEC.
[71] Berger, in: United in Diversity, p. 89.

copyright legislations of the various member states of the European Union and their coordination[72] still remain an ultimate goal for the EU copyright law.

One of the basic complicated tasks of the harmonization process has been the 'reconciliation' of copyright and authors' rights concepts to each other. This task has not only regional, but also global significance, since these doctrines (or a mixture of them, such as the copyright law of China,[73] Indonesia and Japan[74]) are spread all over the world and not only over the member states of the EU. European Union had to create certain standard which should contain all of the characteristics of different systems applicable in the member states which belonged either to copyright or to the authors' right system. Accordingly, this standard should be applicable in these different legal systems of the member states considering all original and typical characteristics available in these various countries. Although the significant steps have been made and progress achieved towards the way of creating this standard, the harmonization of European copyright law is still an ongoing process and the 'reconciliation' of these different systems is still going on.

[72] Art. 2.2, Directive 89/552/EEC.
[73] Lehman, Blacklock & Ou, in: pp. 176-178.
[74] Berger, in: United in Diversity, p. 93.

3. Harmonization of European Copyright Law

The process of harmonizing European copyright legislation has been going on at various levels of intensity for the last three decades. Academic discussion concerning the harmonization of European copyright law started simultaneously with the process of harmonization itself, mostly focusing on EU member states. However, as the expansion of European copyright law beyond the borders of the European Union has already occurred, there is a need to also discuss the harmonization of European copyright law from the perspectives of non-EU states.

3.1 Process of harmonizing European Copyright Law

More than two and half decades have passed since the first Directive harmonizing the issues of copyright protection all over the EC Member States has been adopted.[75] The process of involvement of the community in the copyright issues has started even earlier.[76] Since then the process of harmonizing European copyright legislation has gone even beyond the initial scope: from the early "first generation" Directives regulating specific subject matters to the "second generation", "horizontal" Information Society Directive and even further[77]. In common, nine Directives have been adopted so far. The initial and mostly productive part (in terms of adopting Directives) of harmonizing European copyright law has practically been going on in the 10-year interval between 1991 and 2001.[78] Afterwards the "consolidation decade" has started[79] when the harmonization process slowed down in 2001-2011[80]. The only

[75] Council Directive 91/250/EEC – of 14 May 1991 on the legal protection of computer programs.
[76] Green Paper "Copyright and the Challenge of Technology" 1988.
[77] Eechoud, p. 297.
[78] Hugenholtz, in: Derclaye, p.12.
[79] Years 2001-2009.

Directive adopted in this period is the Enforcement Directive[81] which is commonly not even considered among the EU copyright Directives as it does not exclusively deal with certain issues of copyright, but Intellectual Property, in general. Since 2011 the new wave of copyright Directives has been initiated and two other Directives[82] have been adopted. Namely, the adoption of the Orphan Works Directive[83] in 2012 accelerated the process of European copyright law harmonization. The newest Directive adopted in the area of copyright is on collective management of copyright adopted in 2014.[84] The period since 2009 up until now is also referred as "the age of judicial activism" because of the *Infopaq case*[85] of 2009, with which the agenda of 'harmonization by interpretation' has been pursued by the Court.[86]

Harmonization of the European copyright legislation was based on the variety of motives. Economic impulses are considered to have the primary importance, as the new copyright legislation had to remove the differences between the laws of the member states which should "have direct and negative effects on the functioning of the common market"[87]. Accordingly, the legal harmonization has been based on the economic objectives and, in this regard, harmonizing European copyright legislation has been seen as a tool for achieving these objectives. On the other hand, the new copyright norms had to respond properly to the challenges of technology, the importance of which had already been increased by 1988, when the Green Paper on Technology[88] was adopted. At the same time European copyright legislation had to achieve the goal of harmonizing the legal systems of different member

[80] Ohly & Pila, p.61.
[81] Directive 2004/48/EC.
[82] Directive 2012/28/EU and Directive on collective management of copyright – 04.02.2014.
[83] Directive 2012/28/EU.
[84] Directive on collective management of copyright – 04.02.2014.
[85] Case C-5/08 (16.07.2009).
[86] Ohly & Pila, p.62.
[87] Recital 4, Directive 91/250/EEC.
[88] Green Paper "Copyright and the Challenge of Technology" 1988.

states, which comprised political element as well. Accordingly, the relevance of newly adopted legislation to the objectives mentioned above has become the subject of discussion.

Academic discussion concerning the harmonization of European copyright law has been connected with the process of harmonization itself and the topics of this discussion covered the variety of dimensions. First of all, the importance of academic reviews and the role of academic experts as "quality controllers"[89] have been recognized. Aim of these reviews has been the evaluation of the actual acquis communautaire, on one hand, and recommendation for the future development of the harmonization process, on the other. The evaluation of the actual legislation comprised the applicability and relevance of these norms in the member states from the practical perspective as well as the review of the legal standards created by the Directives from theoretical point of view. The task of these quality controllers appeared to be rather difficult, while they had to take into consideration the whole dimension of the European Union with its member states having different legal systems.

Consequently, European copyright law can be seen as a product of certain compromise. The legal systems, which this legislation had to harmonize, significantly differed from each other and had been developed through the distinctive ways during the centuries. Difference between common law and civil law systems is a typical example in this case; UK and Ireland belong to the common law system while Germany, France and several other countries have different systems, which differ not only from the common law, but are also significantly different from each other.[90] Moreover, it had also been the case that even in one country[91] the difference between the distinctive legal regimes of former German Democratic Republic and the Federal Republic of Germany appeared to be problematic from the harmonization perspective.[92] Dealing with such a different legal systems initially created the need for

[89] Hugenholtz, in: Harmonization of European IP Law, p. 61.
[90] Aplin, in: Derclaye, p.54.
[91] Germany
[92] Gaubiac et al., in: Derclaye, p.164.

compromise, without which the harmonization could not go further. On the other hand, inevitable character of the compromise, in general, is that it always becomes a subject of criticism from all of the parties between which it is reached. Therefore the European copyright legislation shared "the fate of all political compromises: neither the proponents nor the opponents… are perfectly happy with it"[93]. Accordingly, being a product of compromise has become one of the main reasons for the European copyright Directives to be criticized from different sides.

Critics have found several other defects in European copyright legislation. It has generally been criticized from the harmonization perspective for not being able to produce "a balanced, transparent, and consistent legal framework in which the knowledge economy in the European Union can truly prosper" and, moreover – for being "largely failed to live up to its promise of creating uniform norms of copyright across the European Union"[94]. In particular, certain Directives have been criticized for being "unimportant, and possibly invalid"[95]. Certain norms of the Directives have been evaluated as not being systematized and lacking legal clarity.[96] More precisely, the legal technique used in the provisions of earlier Directives have also been criticized for using "tentative approach", the result of which is "a patchwork of measures covering seemingly unrelated (and, in some cases, apparently unimportant) areas of the law".[97] The content-related aspects, such as using the "without prejudice" clause to earlier Directives have been criticized as well, since it "inevitably leads to inconsistencies"[98]. We will review these critical approaches in the following parts of our research[99].

[93] Ohly, in: Derclaye, p.232.
[94] Hugenholtz, in: Harmonization of European IP Law, p. 62.
[95] Hugenholtz Bernt, Why the Copyright Directive is Unimportant and possibly invalid; Published in [2000] EIPR 11, p. 501 – 502.
[96] Ohly, in: Derclaye, p.232.
[97] Tritton, p. 487.
[98] Hugenholtz, in: Harmonization of European IP Law, pp. 61-62.
[99] See pp. 30-32.

The "quality controllers"[100] of the European copyright legislation have been focused on the harmonization perspective and, since there is always a room left for further harmonization, their judgments might sound mostly critical. On the other hand, we have to mention the positive evaluations which European copyright legislation has deserved so far. First of all, it is commonly acknowledged that European copyright law has successfully responded to the economic and technological challenges mentioned above. Moreover, it has also managed to find "that legendary 'delicate balance' between the interests of right holders in maximizing protection and the interest of users (i.e., the public at large), in having access to products of creativity and knowledge"[101]. Generally, finding balance between the several interests is considered to be the most challenging task and, therefore, most positive character of European copyright legislation. Balance should be found between the private rights and the public interest[102]; between the interests of authors, entrepreneurs and general public[103]; between the different legal systems, different objectives, "old" and "new" member states[104], etc. European copyright legislation has overcome this challenge with more or less success, which has been one of the basic reasons for its expansion on the international level.

3.2 Aspects of Harmonizing European Copyright Law

In order to evaluate the relevance of implementing European copyright legislation in the non-member states we have to underline the basic elements of EU copyright law harmonization from the perspective of its implementation outside. These elements can be various and differ from each other, but they mainly belong to the three basic sub-groups. First of all we have to bear in mind the *legal standard* created by European copyright

[100] Eechoud, p. 300.
[101] Hugenholtz, in: Harmonization of European IP Law, p. 60.
[102] Janssens, in: Derclaye, p. 336.
[103] Janssens, in: Derclaye, p. 336.
[104] Goldammer, p. 13.

legislation and discuss the relevance of its implementation in non-member states. We also have to mention the primary importance of the *economic impulses,* while the harmonization of copyright and related rights has been driven by the economic objectives. Besides that, *political factors* have to be taken into consideration as well, while the general process of European integration has also inspired the implementation of EU copyright law in non-member states (however, the importance of political motives can be different if we compare the harmonization process in the non-member states to each other). After summarizing the issues mentioned above we will be able to evaluate the relevance of implementing European copyright law in the legislations of the non-member states.

3.2.1 Legal Standard

European copyright legislation had to face the variety of challenging tasks from the very beginning of its harmonization. Initially the process of harmonization has started in order to "complete the internal market"[105], so the economic objectives of the harmonization process have been obvious. Afterwards, "the Internal Single Market Program gave rise to the watershed Green Paper on Copyright and the Challenge of Technology"[106] and highlighted another objective of the European copyright harmonization, which had to deal with the increased technological challenges. The legislation aiming to harmonize the different legal systems of various member states naturally had to reach a certain compromise between these systems. Besides that, finding "delicate balance"[107] between the several interests has originally been the main objective of copyright legislation, in general, regardless to its local, regional or international dimensions. It is a matter of evaluation, with how much success European copyright legislation has dealt with this variety of challenges.

[105] Stamatoudi & Orremans, p.9.
[106] Prime, p.246.
[107] Hugenholtz, in: Derclaye, p.232.

The first and foremost challenge of the European copyright legislation, officially declared in the Computer Programs Directive in 1991, has been to remove the national law differences having "direct and negative effects on the functioning of the common market"[108]. Consequently, the evaluation of European copyright legislation usually starts at this point, while it implies the evaluation of fulfillment of this aim by the European copyright law, in general, or by the certain Directives and their norms, in particular. Even nowadays the process and directions of the further harmonization are mostly defined in accordance with the needs of functioning of the internal market,[109] although it might be the case that the academic evaluations do not always respond to the needs of the market[110]. The success made by the harmonization process is generally measured by its relevance for functioning of the common market. On the other hand, the critics towards the current state of aquis communautaire basically imply the need for further harmonization and removing borders in order to let the common market function properly.

Economic objectives of harmonization are closely linked to the challenge of technology. In general, the dynamic and original character of the copyright law, which makes it different from other fields of law, is the necessity to respond the technological challenges rapidly. On the other hand, the development of technology threatens the stability of the copyright legislation, while there is a risk of making the latter outdated[111]. Rising challenges caused by the audio-visual home copying, computer programs, databases and other technological innovations have been considered by the Commission of the European Communities in 1988[112]. The very first Directive of the European Community adopted in 1991[113] can be seen as a response to these challenges. Since then "reality had radically changed with, first of all, the advent of the internet era followed by the continuous convergence of media,

[108] Recital 4, Directive 91/250/EEC.
[109] Grosheide, in: Derclaye, p.257.
[110] Synodianou, p.9.
[111] Aplin, in: Derclaye, p.67.
[112] Green Paper "Copyright and the Challenge of Technology" 1988.
[113] Directive 91/250/EEC.

communication channels and devices",[114] and, accordingly, European copyright legislation had to respond to these changes as well. Afterwards, the Information Society Directive[115] has been adopted, the aim of which was to deal with the internet and ensuing technological innovations. Internet, in itself, "has also given rise to the rapid development of new business models which force the copyright system to react quickly"[116]. We can see after bearing all these aspects in mind that the European copyright legislation has been as much reactive as possible to the challenges of technology emerging from time to time.

The process of harmonizing European copyright law has deserved several other commendations for performing the works which "has overall been both sweeping and useful"[117]. The substantial influence of it made on copyright law has been appreciated as well.[118] The achievements of harmonization in certain fields, such as computer programs[119], databases,[120] and term of protection,[121] also deserved positive evaluations. In general, finding "delicate balance"[122] between several interests is a commonly acknowledged positive character of the European copyright legislation. This balance had to be found, first of all, between the interests of the copyright holder and the copyright user. It has also been mentioned, that there are three interests to be balanced: "the interest of authors, the interest of entrepreneurs and the interest of general public"[123]. Besides that, the different legal systems of the various member states had to be balanced as well, which was not an easy task. Balance between common law and civil law systems, on one hand, and between the copyright and author's right systems[124], on the other, could be achieved only through the

[114] Ohly, in: Derclaye, p.324.
[115] Directive 2001/29/EC
[116] Ohly, in: Derclaye, p. 235.
[117] Derclaye, p. 10.
[118] Seville, p. 23.
[119] Bing, in: Derclaye, p. 407.
[120] Aplin, in: Derclaye, p. 75.
[121] Gaubiac, in: Derclaye, p. 149.
[122] Hugenholtz, in: Harmonization of European IP Law, p. 60.
[123] Ohly, in: Derclaye, p. 238.
[124] Mogel, p. 27.

way of compromise[125]. However, the product of compromise is inevitably criticized from all of the parties between which this compromise has been reached. Therefore European copyright legislation also shared the fate of all compromises, when "neither the proponents nor the opponents are perfectly happy with it"[126].

Consequently, the European copyright legislation, in general, as well as its certain Directives, have been criticized because of the same reason - "because differences subsist between Member States, and notably between countries of copyright and of the authors' rights traditions"[127]. As we can see, the unsatisfactory level of balance has also been an object of criticism[128]. The level of harmonization has been criticized as being unsatisfactory from the systematic perspective as well.[129] In many cases the critical approach is generalized towards the whole process of harmonization, stating that "the harmonization agenda has largely failed to live up to its promise of creating uniform norms of copyright across the European Union"[130]. Particular Directives have also deserved certain amount of critics. For example, the Information Society Directive[131] has been criticized for the inconsistency[132] and the certain articles of it[133] - for the abstract wording[134]. Moreover, in terms of the Database Directive[135] "European Commission has even considered withdrawing the whole Directive or at least the sui generis right"[136].

As we have already mentioned, the critical approach towards the harmonization of European copyright legislation often refers to its initial economic objectives. For example, it has been

[125] Aplin, in: Derclaye, p. 54.
[126] Ohly, in: Derclaye, p. 232.
[127] Kamina, in: Derclaye, p. 77.
[128] Eechoud, p. 305.
[129] Ohly, in: Derclaye, p.226.
[130] Hugenholtz, in: Harmonization of European IP Law, p. 62.
[131] Directive 2001/29/EC.
[132] Ohly, in: Derclaye, p. 226.
[133] Articles 2 to 4.
[134] Ohly, in: Derclaye, p.232.
[135] Directive 96/9/EC.
[136] Leistner, in: Derclaye, p.428.

mentioned that "as long as territorially defined national copyrights and related rights persist, no complete internal markets will be possible, even if total and perfect harmonization of national laws were to be achieved"[137]. The territorial nature of copyrights and related rights has been evaluated as the "serious impediment to the creation of an internal market" and "fragmentation of rights along the national borders of Member States" has also been criticized, as it "obviously presents a competitive disadvantage".[138] The harmonization of economic rights in the European copyright legislation has also become an object of criticism, since the rights of performance and adaptation – "two fundamental economic rights have not been the object of harmonization yet" and generally "the relevant provisions on economic rights are scattered over several Directives"[139].

Other critical opinions are more focused on the 'technical' aspects of European copyright law. For example, the legal technique used in the provisions of earlier Directives have also been criticized for using "tentative approach", the result of which is "a patchwork of measures covering seemingly unrelated (and, in some cases, apparently unimportant) areas of the law"[140]. Besides that, the lack of transparency has also been problematic since nowadays "copyright law has become over-intellectualized and detached from reality", and therefore "it is important that users are able to understand the 'sense' behind the copyright system and its balancing mechanisms, which, in turn, may enhance proper observance of the rules".[141] The absence of regulations concerning the private copy[142] and choice of law [143], together with lack of harmonization in the field of collective management[144] has been mentioned as well. Moreover, harmonization of the general private laws in Europe as a whole has been characterized as "highly unrealistic project"; intellectual "insensitivity" towards the national

[137] Hugenholtz, in: Derclaye, p.25.
[138] Hugenholtz, in: Derclaye, pp.18 and 22.
[139] Ohly, in: Derclaye, p.233.
[140] Tritton, p. 487.
[141] Janssens, in: Derclaye, p.336.
[142] Dusollier & Ker, in: Derclaye, p.371.
[143] Torremans, in: Derclaye, p.457.
[144] Frabboni, in: Derclaye, p .373.

jurisdictions has also been criticized and the problematic character of antagonism between the interests of harmonizing copyright, on one hand, and national systems, on the other, has been highlighted.[145] However, we have to mention that all these critics are mostly focused on the improvement and progress in the harmonization and not skeptical towards the process of harmonization itself.

In spite of all the critical evaluations mentioned above, we can obviously see that European copyright legislation has created certain legal standard with its distinguishable character. When criticizing European legislation, we also have to bear in mind the aspects putting the harmonization process into limitation[146]; hard procedure of European lawmaking, which brings a lot of challenges to the legislators and the limited competence of the European Community as well[147]. Besides that, "any solution will easily become the target of criticism and, admittedly with hindsight, it is of course easy to find fault with past achievements"[148]. What makes this standard original and, from the perspective of the non-member states – valuable is the balanced approach towards the different and, sometimes, even contradictory interests as well as its reacting character to the technological challenges. However, the aspects of critical evaluations highlighted above are important from the non-member states perspective. Accordingly, the legislators of these states should have to take these critics into consideration while implementing the European legal standard in the legislations of their countries.

[145] Rahmatian, in: Derclaye, pp. 315-316.
[146] Ellins, p. 272.
[147] Leistner, p. 71.
[148] Janssens, in: Derclaye, p.324.

3.2.2 Economic Impulses

Economic interests have initially been the main motivators of developing copyright legislation from the historical point of view. Protection of economic and commercial interests of the authors has characterized the early development of the copyright law (and, in general – intellectual property law) both in common law and civil law systems. Significance of the economic aspects can be observed not only in the national laws of the European countries but also in the development of international copyright law, since "concentration on economic interests was one of the main reasons why it became possible as a consequence of the expansion of international trade in cultural products in the second half of 19th century to internationally harmonize national copyright laws leading to the establishment of the Berne Convention (BC) in 1886" and therefore copyright has been considered as "an individual property right capable of being transferred to a third party in order to exploit it".[149] Consequently, the later development of the international intellectual property law remained closely connected with the economic aspects and "the growing economic importance of the copyright industries for national economies"[150] led to the adoption of TRIPS agreement in 1994[151]. Nowadays the economic aspects maintain their significance for the copyright legislation on the international level.

European copyright law is an illustrative example for showing the importance of economic impulses. Initially the EC law has been considered as "only an economic one, whose primary goal was to create a common market"[152]. The economic objectives, in fact, motivated the launch of harmonization of the European copyright law. Namely the new copyright legislation has been based on the requirements of the common market.[153] Accordingly, the progress made by the harmonization process is measured by the level of fulfilling these

[149] Grosheide, in: Derclaye, p.243.
[150] Kur & Dreier, p.247.
[151] The Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994.
[152] Stamatoudi & Torremans, p.8.
[153] Recital 4, Directive 91/250/EEC.

economic objectives. The necessity of further harmonization also depends on the interests of the European common market. Deviation from the needs of the common market, even from an academic point of view, leads to the "fierce confrontation"[154]. This steady interconnection between the European copyright law and European common market suggests acknowledging an importance of the latter.

The famous 'balance-based approach' discussed above[155] is also considered as a tool for reaching balance between interest of the right holder in order to maximize protection, and, on the other hand, the interest of the users to have an access to the subject-matter of the copyright.[156] Even those rights (i.e. moral rights) which apparently do not have the economic nature, "can still have a significant economic impact"[157]. From this perspective the important aspects of European copyright legislation have been evaluated and, to certain extent, criticized. In terms of the territoriality principle, which is considered to be "the single most important obstacle to the creation of the common market"[158], it has been mentioned that the harmonization process has left it "largely intact" and, consequently, "as long as territorially defined national copyrights and related rights persist, no complete internal markets will be possible, even if total and perfect harmonization of national laws were to be achieved"[159]. Such evaluations demonstrate the importance of economic aspects for the harmonization process and the relevance of it in terms of its implementation.

As mentioned above, the needs of common market define the future of the harmonization process and the directions of its development. State of the European copyright law by the end of 2000s had been evaluated in a following manner: "at present the EC is of the opinion that practice does not indicate that the absence of harmonization is detrimental to the

[154] Synodinou, p. 9.
[155] See p. 29.
[156] Hugenholtz, in: Derclaye, p.17.
[157] De Werra, in: Derclaye, p.268.
[158] Hugenholtz, in: Geiger, p.273.
[159] Hugenholtz, in: Derclaye, pp.18 & 25.

functioning of internal market; consequently, the EC is not planning any further harmonization, but is rather preparing to introduce adjustments to the existing Directives to improve the applicability of the acquis communautaire"[160]. The needs for harmonizing certain rights, such as the right of integrity, are defined in accordance with its effect on the functioning of the internal market "in a significant way"[161]. Situation in the certain segment of the market also defines the fate of harmonization and, when these markets are local, the creation of pan-European space in this segment is considered as "a utopia"[162].

Economic objectives are also important in terms of implementing European copyright law in the non-member states, since these countries have economic relations with the European Union. Particularly it refers to the countries having signed the Partnership and Cooperation Agreements as well as the countries which have formed the Association Agreements with the EU. For those countries the economic impulses are more significant and they have to "establish a functioning market economy and to gradually approximate its economic and financial regulations to those of the EU, while ensuring sound macroeconomic policies"[163]. Besides that, it is generally acknowledged truth that "the need for an approximation is stronger in region which aspires to build a single market for goods and services, such as in the European Union"[164]. Consequently, the relevance of implementing European copyright law in the legislations of the non-member states significantly depends on the economic relations between these states and the European Union.

[160] Grosheide, in: Derclaye, p.257.
[161] De Werra, in: Derclaye, p.270.
[162] Hugenholtz, in: Derclaye, p.23.
[163] Article 277, EU-Georgia Association Agreement.
[164] Vallés, in: Derclaye, p. 119.

3.2.3 Political Factors

Harmonization of the European copyright law, and of the European law, in general, is considered as a part of overall and multidimensional process called European integration. The harmonization process has been driven not only by the internal market concerns, but also by the political factors[165]. European integration has initially been defined as "the historical process whereby European nation-states have been willing to transfer or more usually pool their sovereign powers in a collective enterprise"[166]. The 'sovereign powers' which the member state had to transfer in a 'collective enterprise' also referred to the legal regimes, or, more precisely – to the differences between the legal systems of the member states. The need of 'balanced approach' and the necessity of reaching certain compromise derived from the nature of the European integration as well. Therefore the harmonization of the European copyright law has to be observed not only from the legal or economic perspective, but also as a part of general political process of the European integration.

One of the main characteristics of the European integration is its infinite aspiration towards "ever closer union"[167] and seeking the new ways in order to fulfill this objective. The infinite character of the integration process refers to the geographical dimension as well. Nowadays the notion of "European integration" refers not only to the member states but also to the non-members. Current policies of the European Union[168] comprise the non-member states and involve them in the overall process of the European integration. There are several ways of involvement of these non-member states in the integration process and they differ according to the nature of their relations with the European Union. However, the level of involvement of the certain non-member state in the European integration depends on the willingness and aspiration of this state towards the integration process.

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[165] Kur & Dreier, p. 247.
[166] Gilbert, p. 1.
[167] Preamble, the Maastricht Treaty (Treaty on European Union) 7 February 1992.
[168] I.e. European Neighborhood Policy.

Formation of the Partnership and Cooperation Agreements (PCAs) between the European Community and several non-member Eastern European, Southern Caucasian and Central Asian countries including Russia[169] can be considered as an illustrative example of the involvement of non-member states on the process of European integration. Since then[170] the integration process has gone further and some of these countries have reached more advanced level of cooperating with the European Union. The Association Agreement (AA) of 2014 between the European Union and three non-member states (namely: Georgia, Ukraine and the Republic of Moldova)[171] indicates the new level of European integration for these countries. Generally the objective of the Association Agreement is to deepen political and economic relations between these states and the EU and to integrate them gradually into the European internal market. Accordingly, the implementation of the European law into the legislations of these countries and, particularly, the implementation of copyright legislation has to be examined in the framework of the general process of European integration.

According to these two agreements between the EU and the non-member states, the process of harmonizing the laws of these non-member states with EU copyright legislation can be divided into two levels. The main difference between these two types of agreements is that the Association Agreements are "concluded by the relevant countries with the European Union and its Member countries with the deliberate perspective of a possible later EU-membership whereas the partnership and cooperation agreements are not"[172]. Accordingly, the harmonization process within the framework of the PCAs should be considered as the first level, where the "appropriate levels of effective protection of intellectual, industrial and commercial property rights"[173] are required, whereas the Association Agreements require the

[169](http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/eastern_europe_and_central_asia/r17002_en.htm)
[170] Basically 1997-1999 years, excluding the PCA with Tajikistan formed in 2009.
[171] European Commission - MEMO/14/430 23/06/2014
[172] Dietz, in: Harmonization of European IP Law, p. 106.
[173] Art. 53.1, PCA between the EC and Georgia.

higher level of protection, similar to that of the EU[174]. Namely, the Association Agreements require to "achieve an adequate and effective level of protection and enforcement of intellectual property rights"[175]. However, these various formulations used in these two types of agreements does not necessarily mean that the effect of harmonizing copyright laws have correspondingly different results.[176] The idea of common market-based approximation of the copyright legislations remains the same in both of these agreements.

Another significant political event, which is supposed to have an important effect on the future harmonization of the EU copyright law, is a British referendum of 23 June 2016, as a result of which the majority of the participants from England, Northern Ireland, Scotland and Wales decided to exit the European Union (commonly referred as Brexit)[177]. European copyright law is generally considered as a synthesis of copyright, created in the UK, and authors' right, developed from France to the continental Europe. Finding balance between copyright, which belongs to the 'common law' regime, and authors' right, which is a part of 'civil rights' system, is considered to be one of the most significant achievements of the EU copyright law harmonization. Since the UK will no longer be the part of the European Union, the future of EU copyright law, namely the proportion between copyright and authors' rights elements in it, seems quite blurred. Accordingly, political changes are one of the significant elements causing the 'dynamic' and changing character of the EU copyright law.

[174] Dietz, in: Harmonization of European IP Law, pp. 106-107.
[175] Art. 277.b, Association Agreement between the EU and Moldova.
[176] Dietz, in: Harmonization of European IP Law, p. 107.
[177] Kuhn, in: WiSt - Wirtschaftswissenschaftliches Studium, p. 317.

4. Non-Member States' Perspective

As we have already mentioned,[178] European copyright law has mostly been discussed from the 'insider-perspective', oriented on the implementation, function, and operation of this copyright law in EU member states. On the other hand, it is obvious that this law is being implemented in not only the member-states but also in the non-member states, either obligatory or voluntarily.[179] Accordingly, EU copyright law "has normative effect not only in the member states that are obliged to transpose the Directives, but also at the international level".[180] Therefore, it creates the necessity to broaden the horizon of the academic discussion concerning the EU copyright law by introducing a new perspective, namely that of non-EU states. To do this, we must first substantiate the relevance of the non-member states' perspectives for the EU copyright law as well as the reasonableness of implementing this law in their legislations.

4.1 Relevance of the Non-Member States Perspective for the EU Copyright Law

As we have already seen, the topics selected for academic discussion concerning European copyright legislation have been diverse: they comprise economic, technological, legal, and even political objectives; they evaluate the entire process of harmonization as well as certain Directives, concrete norms, and specific details of these norms; they involve the development of the harmonization process up until now, review the current status of it and define certain guidelines for the future. However, we have to mention that the geographical space for this academic discussion has basically been rather limited. The authors are

[178] See p. 3.
[179] Dietz, in: Harmonization of European IP Law, p. 105.
[180] Hugenholtz, in: Harmonization of European IP Law, p. 58.

generally focused on the member states of the European Union[181]. They are discussing the development of different legal systems of several member states[182] and making comparisons between them as well as evaluating the implementation of European copyright law (both the legislation in general and the norms of certain Directives in particular) in the member states. Although it has been generally mentioned that "acquis has had normative effect not only in the Member States that are obliged to transpose the Directives, but also at the regional and international levels"[183], the geographical area of their observation did not pass by the member states of the European Union in most of the cases.

On the other hand, expansion of the European copyright law beyond the borders of the European Union is a fact already. The illustrative example of implementing EU copyright legislation in the non-member states is the formation of Partnership and Cooperation Agreements (PCAs) between the European Community and several non-member states, defining numerous fields of law which should be harmonized, and the copyright law is among them[184]. These non-member states comprise Eastern European, Southern Caucasian and Central Asian countries including Russia.[185] The actual process of implementing EU copyright law in non-member states has going on during the last two decades.[186] Nowadays European copyright legislation has already been implemented in these countries to more or less extents. Accordingly, this process needs to be discussed and the harmonization of EU copyright law has to be evaluated not only from the perspective of its implementation in the member states, but in non-member states as well.

Broadening the geographical dimension for discussing the harmonization process would be supportive in order to highlight the new and original aspects which have not been

[181] Linder & Shapiro, p. 57.
[182] i.e. Aplin in: Derclaye, p.49; Gaubiac et al, in: Derclaye, p.148, etc.
[183] Hugenholtz, in: Eechoud p. 298.
[184] Art. 43(2) Partnership and Cooperation Agreement between Georgia and EC, 1 July 1999.
[185] http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/eastern_europe_and_central_asia/r17002_en.htm
[186] Since 1997.

mentioned while discussing it in the EU member states. Since the perspectives of member and non-member states in terms of harmonizing European legislation are significantly different, such discussion would also promote the detection of the problematic issues which were not significant from the EU perspective. Overview and comparison of the implementation processes going on in the non-member states will also manifest the basic trends and characteristics which are typical for implementing European law outside EU. It will also support the illustration of the differences between harmonizing European copyright law inside and outside of the European Union and support determination of the extent for further harmonization. As some of the PCA countries (namely: Georgia, Ukraine and the Republic of Moldova) have already taken part in the Association Agreements with the EU,[187] discussing the implementation of the European law in these countries would be relevant also from the future perspective of European integration.

While considering the relevance of the point mentioned above, at first we have to make the quality assessment of the existing European copyright legislation. This task seems legitimate because of the variety of reasons. First of all, it contains critical approach towards the implementation, which is reasonable, while EU copyright law has deserved some critics even from the insider perspective and the legal technique used in the earlier Directives has also been criticized, though the progress made by European copyright legislation has been recognized as well. Accordingly, we have to sum up the current level of EU copyright law harmonization and consider both the positive and critical evaluations, in order to answer the question, whether the EU copyright law should be implemented in the legislations of the non-member states.

[187] European Commission - MEMO/14/430 23/06/2014

4.2 Relevance of Implementing European Copyright Legislation in the Legislations of the Non-Member States

Development of the harmonization process of European copyright law up until now, on one hand, and the actual fact of expanding European copyright legislation beyond the borders of the European Union, on the other, supports the idea of expanding the discussion concerning the harmonization process and insert the perspective of the non-member states in this discussion. The characteristic of art, in general, which does not have frontiers, and, consequently, the modern approach to copyright law, which has reached the stage of postmodernism[188] and suggests to "look beyond national and corporatist self-interest" and expand a debate at European level,[189] also leads to the further expansion of this debate and inserting non-member states perspective in it. In order to start this discussion, at first we need to assess the relevance of the European copyright legislation for the non-member states. For this reason we have examined legal, political and economic aspects of the harmonization process of European copyright law. In the following parts we will sum up the results of this examination.

4.2.1 Legal Approach

The legal aspect of harmonizing European copyright law has primary importance since the European legislation and the interests of national legislations of the non-member states have to converge. Although the legal harmonization initially had the economic objectives and the harmonization process can generally be seen as a part of the European integration process, the relevance of legal approach is still decisive while discussing the legal harmonization and therefore we have to consider legal perspective at first. While discussing this perspective we have to mention that, in spite of all critics, European copyright legislation has created certain

[188] Ohly & Pila, p.256.
[189] Synodianou, p.2.

legal standard. One of the original characters, which differentiates European copyright legislation and makes it valuable, is its more or less adequate responses to the challenges of technology. Although this aspect of European copyright law has deserved certain critics as well, we still have to consider the challenging tasks the legislation has to fulfill in this regard[190]. We also have discussed the initial objective of European copyright law harmonization, which aimed to remove all of the national law differences having "direct and negative effects on the functioning of the common market"[191]. This objective is not fully reached, but the trend of harmonization goes to this direction, which grants added value to the European copyright legislation from the non-member states perspective.

Another significant challenge for the European copyright law has been finding balance between the several interests. Harmonization process initially aimed to find this balance by means of reaching compromise between the different interests. Balancing the interests of user and holder of the right[192] has been an ultimate goal of the copyright law, in general. More importantly, European copyright legislation attempted and, to the certain extent, succeeded in balancing the different legal systems of several member states. Such kind of balance-based approach is mostly valuable from the non-member states perspective, since, if the European copyright law managed to balance highly distinctive legal systems of the member states, it should be worth implementing for the non-members as well. The harmonization aimed to reach (and, to the certain extent - reached) the balance even between the common law and civil law regimes, as well as between the copyright and author's right systems.[193] This character of European copyright legislation should be mostly valuable from the perspective of non-member states, as they also belong to the different legal systems.

[190] Ohly, in: Derclaye, p. 324.
[191] Recital 4, Directive 91/250/EEC.
[192] Hugenholtz, in: Derclaye, p. 17.
[193] Aplin, in: Derclaye, p. 54.

Significance of this balance-based approach is even higher, since it has to be considered as the core principle in terms of implementing European copyright law into the legislations of the non-member states. Namely the compromise has to be reached between the European legal standards, on one hand, and the national legal regimes of the non-member states, on the other. The process of implementing European copyright law in these states has its own challenges as well. An abstract desire of harmonizing European law should not be enough to overcome these challenges. Rather, the legislators have to take into consideration not only the European law which has to be implemented, but the existing reality and the logic of development in the local legislations as well. Similarly, during the implementation, balance has to be found between the general interests of harmonization and local interests of the existing legislation. In our opinion, this kind of 'balance-based' approach would lead to the successful realization of the European copyright law harmonization into the legislations of the non-member states.

4.2.2 Economic Approach

The economic aspects have historically been significant for the development of copyright legislation from the very beginning of its appearance, since this legislation has been based on the economic impulses. The importance of these impulses is equally typical both for the national and international copyright legislations. On the other hand, the economic aspects had primary significance for the harmonization of European copyright legislation since the beginning of the harmonization process. These economic objectives still remain to be primarily significant, so that they define the current status and the future directions of harmonization. Consequently, the legislators of the non-member states have to consider the importance of the economic aspects for the process of implementing European copyright law in their national legislations. The process of implementation itself significantly depends on

the economic aspects of relations between the states aspiring to implement European legislation, on one hand, and European Union, on the other.

4.2.3 Political Approach

Implementation of the European copyright law in the legislations of the non-member states has to be evaluated from the political perspective as well, since the implementation and, moreover, harmonization of the European copyright law (and European law, in general) belongs to the overall process of European integration. The integration process comprises not only the member states of the European Union but also the non-members. In this regard, political relations of the non-member states with the EU, together with their willingness and aspiration towards European integration (which differs from country to country), have the primary importance. Policies and instruments of participating in the integration process are various and also differ from country to country.[194] Accordingly, the levels of involvement in the European integration are different for these non-member states. Consequently, the implementation of European copyright legislation in each of these countries has to be evaluated from the perspective of political process of the European integration. In this regard, copyright law harmonization should be considered as the part of the general political process of the European integration going on in the non-member states in different levels and dimensions.

[194] We basically focus on the Partnership and Cooperation Agreements (PCAs) and the Association Agreements (AAs).

5. EU Copyright Legislation

This chapter reviews European copyright legislation and mainly focus on the issues of its implementation in non-member states. By European copyright legislation, we imply the nine Directives adopted to date: Computer Programs Directive, Rental and Lending Rights Directive, Satellite and Cable Directive, Term Directive, Database Directive, Information Society Directive, Resale Right Directive, Orphan Works Directive, and CRM Directive. Among the European copyright Directives, we did not involve the Enforcement Directive,[195] which is the common practice,[196] as it concerns all intellectual property rights[197] and does not deal exclusively with issues specific to copyright. Therefore, discussing the Enforcement Directive would broaden the scope of the thesis from copyright-specific issues to general matters of intellectual property rights. The Directives are presented in chronological order according to date of adoption.

5.1 Computer Programs Directive

Directive 91/250/EEC is the first European act intended to harmonize the certain aspects in the European copyright law which has removed the significant differences existed previously in the laws of the Member States[198]. This Directive concluded a debate concerning the type of protection of computer programs started in 1960s[199] and granted copyright protection to the computer programs instead of sui generis protection. Particularly the computer programs are protected as literary works, within the meaning of the Berne Convention.[200] Such

[195] Directive 2004/48/EC.
[196] Tritton, Dreier/Hugenholtz, Walter/Lewinski, etc.
[197] Lakits-Josse in: Cottier/Veron Concise International and European IP Law, p. 464.
[198] Bentley in: Dreier/Hugenholtz Concise Copyright, p.211.
[199] Walter in: Walter/Lewinski, p. 91.
[200] Art. 1.1, Directive 91/250/EEC.

equalization of computer programs and literary works can be problematic, as their natures are different and some norms of traditional copyright might not be suitable for the computer program[201]. Therefore it would be recommended to dedicate separate section to the protection of computer programs, as it is, for example, in German Copyright Act[202]. Another important feature of this Directive is that it does not provide the definition of the term 'computer program', it only indicates that the term 'computer programs' shall include their preparatory design material.[203] Such a definition can be found in the preparatory documents[204], but it was not included in the text considering that such definition could become outdated.[205] As the Computer Programs Directive has been the response to technological challenges, such approach can be justified due to the dynamic character of technological developments which can easily make the definitions outdated. In German Copyright Act, for example, 'computer programs' are defined as "programs of any form, including the drafts and their preparatory design material"[206].

The Directive expresses the general principle of copyright protection, which is granted only to the expression in any form and not to the ideas and principles[207]. As the computer program is a specific issue, recital 14 adds that" 'in accordance with this principle of copyright, to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected under this Directive"[208]. Another general principle of copyright, which the Directive applies to, is the principle of originality, according to which the work can be protected if it is original in the sense that it is author's own intellectual creation. In order to implement this norm some of the EU member states

[201] Walter, in: Walter/Lewinski, p. 93.
[202] Abschnitt 8 - Besondere Bestimmungen für Computerprogramme, Urheberrechtsgesetz.
[203] Art. 1.1, Directive 91/250/EEC.
[204] Janssens in: Stamatoudi/Torremans, ECL, 2014
[205] Bentley, in: Dreier/Hugenholtz Concise Copyright, p.216.
[206] Art 69a.1, German Copyright Act.
[207] Walter, in: Walter/Lewinski, p. 102.
[208] Recital 14, Directive 91/250/EEC.

had to lower the thresholds in their legislations, while the others had to lift them up[209]. Similarly the non-member states should also have to adapt the thresholds in their legislations to this norm of the Directive.

Authorship is also one of the general principles regulated by the Directive into details. Particularly, the author shall be natural person or group of natural persons who has created the computer program. At the same time the legal person can also be designated as the right-holder "where the legislation of the Member States permits"[210]. The balanced nature of this norm makes it applicable for the legislations of the non-member states with different regulations of ownership. The example of 'balance-based approach' in terms of finding delicate balance between the interests of authors, entrepreneurs, and general public[211] is Article 5 of the Directive, since it defines the exceptions to restricted acts and requires to recognize that computer programs can be used in particular ways without infringing copyright[212]. Similarly to the notion of the computer programs, the Directive does not define what is deemed a collective work and leaves the definition of such works to the national legislations.[213] Beneficiaries of protection can be all natural or legal persons "eligible under national copyright legislation as applied to literary works"[214]. The nature of some exclusive rights of the right-holder is also specified in the Article 4 of the Directive, but this Article is not exhaustive and it leaves other rights to be determined by national laws[215]. As we can see, these norms are quite flexible to be implemented in the national legislations of non-member states.

However, the Directive also contains some norms which are specifically intended for the EU and its member states. Article 4, for example, refers to the Community, stating that "the first

[209] Bentley, in: Dreier/Hugenholtz Concise Copyright, p.217.
[210] Art 1.1, Directive 91/250/EEC.
[211] Janssens, in: Derclaye, research Handbook, p.336.
[212] Bentley, in: Dreier/Hugenholtz Concise Copyright, p.225.
[213] Walter, in: Walter/Lewinski, p. 114.
[214] Art 1.1, Directive 91/250/EEC.
[215] Bentley, in: Dreier/Hugenholtz Concise Copyright, p.220.

sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy…"[216]. The Community here refers to the European Economic Area[217]. This norm is too specific to be implemented in the legislations of the non-member states. Another example of such 'EU-specific' norm is Article 7, which indicates several times that it refers to the member states[218]. However, in this case the content of these norms are not 'EU-specific' and, although they were initially intended for the member states, still they can be referred to the legislations of the non-member states as well (the problematic aspects of implementing Article 7 will be discussed below). Article 10 refers exclusively to the implementation of the Directive in the legislations of the member states. Finally the Directive states explicitly that it is "addressed to the Member States"[219], but it does not preserve the Directive to be implemented in the non-member states as well. In case of member states the implementation "could be carried out more or less by copying the Directive's provisions"[220]. On the other hand, the legislators of the non-member states have to be more careful and oriented on the selection of the norms applicable for their countries rather than copying them automatically.

Article 7 defines the special measures of protection and requires that member states shall provide appropriate remedies against a person who commits infringing acts "in accordance with their national legislation"[221]. Problem of implementing this norm in the legislations of the non-member states can be that the realities in these countries shall be inappropriate for imposing such requirements. Particularly, in terms of computer programs protection the situations in member and non-member states of the EU differ from each other significantly. Considering the general principle that the legislation has to be appropriate to the reality in the country, the imposition of such requirements should not be recommended in the

[216] Art 4.c, Directive 91/250/EEC
[217] Bentley, in: Dreier/Hugenholtz Concise Copyright, p.224.
[218] Art. 7.1, 7.2, 7.3, Directive 91/250/EEC.
[219] Art. 12, Directive 91/250/EEC.
[220] Walter, in: Walter/Lewinski, p. 216.
[221] Art. 7.1, Directive 91/250/EEC.

countries where the level of computer programs protection is significantly lower, comparing to the one in the EU. Otherwise we will receive the situation when the law and the actual reality are in conflict with each other. Therefore the implementation of Article 7 of the Directive should be based on the consideration of actual realities in each of the non-member states in terms of computer programs protection.

5.2 Rental and Lending Right Directive

Being the second Directive in European copyright legislation, the Rental and Landing Right Directive has also been "the first harmonization measure of the EC in the field of 'classical' copyright, and, in a fundamental way, in the area of related rights"[222], since, as we have seen, computer programs do not belong to the area of 'classical' copyright. The Directive extends the proposed rental rights to authors and performers, it "not only deals with rental and lending rights,.. but also with neighboring ('related') rights of performing artists, phonogram producers, film producers and broadcasting organizations"[223]. It also creates the European standard of protecting the producers of the film by means of adding them to the scope of protection.[224] Unlikely to the Computer Programs Directive, the Rental and Lending Right Directive provides definitions of the basic terms which are the following: "'rental' means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage" and "'lending' means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public".[225] Since these definitions refer to the key notions of this Directive, their implementation in the appropriate national legislations would generally be recommended.

[222] Lewinski, in: Walter/Lewinski, p. 253.
[223] Krikke, in: Dreier/Hugenholtz Concise Copyright, p.239.
[224] Walter, in: Walter/Lewinski, European Copyright Law, p. 558.
[225] Art. 1.1 and 1.2, Directive 92/100/EEC.

The Directive defines the right-holders and subject matter of rental and lending right. Particularly, the exclusive right for authorizing or prohibiting rental and lending belongs to the author, performer, phonogram producer and producer of the first fixation of a film in respect of their works.[226] The term "rightholder" refers to the 'first right holders', "in whom the rental and lending rights are originally vested and not persons who gain the rights by way of transfer, presumption of transfer, or otherwise"[227]. The Directive also provides an interesting definition of the term 'film', which is "a cinematographic or audiovisual work or moving images, whether or not accompanied by sound"[228]. According to this definition, the films are covered by this Directive regardless to the aims of their production and the material object in which they are fixed, whether or not being work or accompanied by sound.[229] These provisions and definitions have been elaborated after consolidating the different opinions of the member states and EU institutions. Accordingly, they should be applicable in the non-member states as well.

The Directive seeks to guarantee that the authors and performers should benefit from their rental rights, since they have generally weak bargaining positions compared to the producers.[230] Therefore it provides the unique and essential element of unwaivability, without which the authors and performers would run the risk of being forced by the producer to waive the right.[231] Therefore, according to this Directive, the authors and performers will remain entitled to this unwaivable right to remuneration even after having transferred their rental rights to a producer.[232] Generally this norm of the Directive supports to strengthen the relatively weaker positions of the authors and performers. We have to mention that in case of the countries where the property rights of the authors and

[226] Art. 2.1, Directive 92/100/EEC.
[227] Lewinski, in: Walter/Lewinski, p. 271.
[228] Art. 2.1, Directive 92/100/EEC.
[229] Lewinski, in: Walter/Lewinski, p. 279.
[230] Krikke, in: Dreier/Hugenholtz Concise Copyright, p.249.
[231] Lewinski, in: Walter/Lewinski, p. 296.
[232] Krikke, in: Dreier/Hugenholtz Concise Copyright, p.249.

performers, together with significant amount of their moral rights, were 'occupied' by the state (namely – in the Soviet Union),[233] their positions are much weaker. The authors and performers remained in that kind of weakened positions during the decades. Therefore the implementation of this norm in the legislations of the former Soviet Union countries would change the situation.

Since reaching delicate balance between the interests of authors, entrepreneurs and general public is one of the main principles of copyright law[234], the Directive follows this balance-based approach and provides the possibility of derogation from the exclusive public lending right. Particularly it allows member states to derogate from the exclusive right in respect of public lending, provided that "at least authors obtain a remuneration for such lending"[235] and specifies the options of such derogation. Although Article 5 specifically refers to the member states in terms of defining the possibilities of derogation, this norm can easily be applicable in the non-member states as well, since it does not have the 'EU-specific' content. However, the implementation of this norm in the non-member states can still be problematic, as not all of these countries have such system of paying remuneration for the public lending. The states aspiring towards the European integration should establish such system, though, since they are willing to join the European common market and it automatically requires the inculcation of such system. Accordingly, the implementation of this norm depends on the inner regulations of the non-member states concerning the public lending as well as their aspiration towards the European integration, in general.

Chapter II of the Directive covers the rights related to copyright. Even the title of this chapter demonstrates the careful and balance-based approach of the legislator, according to which the term 'rights related' have been chosen instead of 'neighboring rights', in order to ensure that the Directive does not impose continental European legal regime of 'authors

[233] Arts. 475-517, Part IV, Civil Code of the RSFSR 1964.
[234] Janssens, in: Derclaye, p. 336.
[235] Art. 5.1, Directive 92/100/EEC.

rights and neighboring rights' and it "allows the relevant Member States to retain the copyright system"[236] as long as they follow the provisions of this Directive. Particularly Article 6 grants exclusive rights to the performers and broadcasting organizations to authorize or prohibit the fixation of their performances and broadcasts, which is "the first reproduction of a performance or broadcast on a tangible medium… a prerequisite for any further exploitation of the original performance or broadcast"[237]. Article 8 refers to the broadcasting and communication to the public, aiming to harmonize the rights of performers, phonogram producers and broadcasting organizations in this area and, following the equivalent provisions of the Rome Convention[238], provides the upper level of protection in several aspects[239]. Article 9 provides them an exclusive distribution right and Article 10 lists the possible limitations to all the rights contained in chapter II to which the member states can apply or not, providing that they cannot apply any limitations other than those ones provided in the article[240] and provides the balanced character to the whole Directive.

In our opinion, harmonizing the legislations of the non-member states with the provisions of this Directive discussed above would make these legislations more responsive to the challenges of contemporary technological developments. The first chapter contains the useful definitions and provisions strengthening the positions of the authors and performers, the implementation of which would be recommended for these legislations. Furthermore, the first part of Article 9 dealing with the exclusive rights for performers, phonogram producers, film producers and broadcasting organizations, should be novelty for the non-member states, which would be reasonable to impose. The implementation of the limitations set by Article 10 would be necessary, in order to defend the 'delicate balance' between the right holders and users. Although most of the articles of the Directive address to the member

[236] Lewinski, in: Walter/Lewinski, p. 310.
[237] Krikke, in: Dreier/Hugenholtz Concise Copyright, p. 252.
[238] Arts. 7.1,a, 12, 13.a, and 13.d, Rome Convention,
[239] Lewinski, in: Walter/Lewinski, p. 318.
[240] Krikke, in: Dreier/Hugenholtz Concise Copyright, p. 257.

states, their content is not 'EU-specific' and they can easily be implemented in the legislations of the non-member states as well.

5.3 Satellite and Cable Directive

Directive 93/83/EC has initially been intended to "break down national barriers and enhance transborder broadcasting and cable retransmission of television programmes within the European Union"[241]. The text of this Directive is quite similar to the Television without Frontiers Directive[242], since both of them have the same objectives and cover the similar subject matters. However, the former deals with not only broadcast television but also radio services[243]. General aim of the Directive is to ensure that audiovisual programs are broadcast across the borders of the EU "while guaranteeing remuneration for holders of copyright and related rights, on the basis of facilitated acquisition of satellite broadcasting and cable retransmission right"[244]. Generally the content of the Directive is more 'EU-specific', intended for the European member states having the unified satellite and cable system. However, it contains several useful definitions the implementation of which would be useful for the legislations of the non-member states.

Basically these definitions are contained in Article 1 of the Directive. "Satellite" refers to "any satellite operating on frequency bands which… are reserved for the broadcast of signals for reception by the public or which are reserved for closed, point-to-point communication"[245]. This definition is considered to be broad and technology-neutral, since here the decisive factor is, whether the signals transmitted by satellite can be received by the general public.[246] 'Communication to the public by satellite' is defined as "the act of

[241] Seville, p.35.
[242] Directive 89/552/EEC.
[243] Hugenholtz, in: Dreier/Hugenholtz Concise Copyright, p.263.
[244] Dreier, in: Walter/Lewinski, p. 404.
[245] Art. 1.1, Directive 93/83/EC.
[246] Hugenholtz, in: Dreier/Hugenholtz Concise Copyright, p.271.

introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth"[247]. This definition is very important for the proper understanding of this Directive and, since it harmonizes the substantive copyright law[248], can also be applicable for the implementation in the non-member states. The same applies to the definition of 'cable transmission' as "the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public",[249] if we consider the notion of "state" in this definition instead of the "member state", in order to generalize the meaning. Through in this definition it is ensured that the person who takes responsibility for the satellite broadcast has to be considered as the user of copyright material[250]. Another important notion defined by the Directive is 'collecting society' referred as "any organization which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes"[251]. The definition is quite broad, as it includes collecting societies of all sorts as well as other organizations[252], and is therefore flexible for being implemented.

Chapter II of the Directive is dedicated to satellite broadcasting and creates unitary right of satellite communication exercised only in the country of origin of a satellite transmission in order to prevent the fragmentation of the European market.[253] Article 2 obliges the member states "to provide an exclusive right for the authors to authorize communication to the public

[247] Art. 1.2.a, Directive 93/83/EC.
[248] Dreier, in: Walter/Lewinski, p. 404.
[249] Art. 1.3, Directive 93/83/EC.
[250] Dreier, in: Walter/Lewinski, p. 412.
[251] Art. 1.4, Directive 93/83/EC.
[252] Hugenholtz, in: Dreier/Hugenholtz, Concise Copyright, p. 274.
[253] Seville, p. 35.

by satellite of their copyright works"[254]. Generally, Article 2 and Article 3.1 of the Directive have been largely superseded by the Information Society Directive[255], which provides more detailed and, to the certain extent, strict regulation of the same subject matter[256]. Chapter III of the Directive deals with cable transmission and sets out a system of obligatory collective management of cable retransmission rights.[257] Particularly it contains the copyright provisions which had been left unregulated by the Television without Frontiers Directive.[258] The provisions of this chapter ensures that cable retransmission of programs from other member states have to be governed "on a basis of individual or collective contractual agreements"[259] between right holders and cable operators.[260] In order to achieve the objective of ensuring the unabridged cable retransmission of programs from other member states, cable operators should have possibility to acquire all rights in the programs to be retransmitted, when they conclude compulsory contractual agreements.[261] Accordingly, Article 9 defines the general rules of exercising the cable retransmission right "only through collecting society"[262]. However, broadcasting organizations are exempted from this obligation of managing cable retransmission rights collectively[263]. Article 11 establishes a system of mediation when an agreement can not be concluded[264] and Article 12 provides the measures aimed at prevention of the abuse of negotiating positions.

Generally, while regulating satellite and cable broadcasting, the Directive had to deal with the specific technical issues. Orientation on the member states and the attempt of creating unitary right of satellite and cable communication makes it even more specific and also 'EU-

[254] Dreier, in: Walter/Lewinski, p. 423.
[255] Directive 2001/29/EC
[256] Hugenholtz, in: Dreier/Hugenholtz, Concise Copyright, p.275.
[257] Seville, p.36.
[258] Dreier, in: Walter/Lewinski, p. 446.
[259] Art. 8.1, Directive 93/83/EC,
[260] Hugenholtz, in: Dreier/Hugenholtz, Concise Copyright, p.278.
[261] Dreier, in: Walter/Lewinski, p. 450.
[262] Art. 9.1, Directive 93/83/EC.
[263] Art. 10, Directive 93/83/EC
[264] Hugenholtz, in: Dreier/Hugenholtz, Concise Copyright, p.283.

specific' to the certain extent. Although the non-member states are free to implement the norms of the second and third chapters specifically dealing with the certain issues of satellite broadcasting and cable retransmission, these provisions would not have much practical importance unless these states are going to join the European system of trans-frontier broadcasting. However, the Directive also contains very useful definitions of 'satellite', 'communication to the public by satellite', 'cable retransmission' and 'collecting society', contained in Article 1, the implementation of which would be useful for the non-member states regardless to their aspiration towards European integration, since these definitions are useful because of their balanced and flexible contents. Therefore the implementation of these definitions in the legislations of the non-member states would generally be recommended.

5.4 Term Directive

The adoption of the Term Directive in 1993 was an important step towards harmonizing the European copyright law, as it harmonizes "an essential element of copyright and neighboring rights"[265] - the term of protection. The common term of protection is important for European common market, as the difference in such terms could impede the functioning of this market.[266] Before this Directive most of the member states had adopted the minimum requirement for copyright protection by convention, which was 50 years pma[267] and there were significant variations in the relevant legislations of the member states.[268] In 2006 it was replaced by the new Directive[269], but the main provisions which are relevant for harmonization have not been changed. Unlike to the common international rules of copyright providing only the minimum level of protection, this Directive also sets the

[265] Visser in: Dreier/Hugenholtz, Concise Copyright, p. 287.
[266] Walter, in: Walter/Lewinski, European Copyright Law, p. 506.
[267] Post mortem auctoris (after the author's death).
[268] Seville, p.38.
[269] Directive 2006/116/EC.

maximum duration of protection[270]. The main essence of the Directive is "to extend the term of protection laid down by Berne Convention to a uniform standard of 70 years pma."[271] There are several reasons for choosing the period 70 years, which is above the international standard. Although the 50 years period "was the more common term in Europe", those countries having the longer term would need lengthy transitional measures; the new term also had to cover two generations in the "increasing average lifespan in EU" and, finally, "lengthening the term of protection would strengthen the position of the author during his lifetime"[272]. Therefore, implementing this term means to agree with the abovementioned arguments.

Article 1 provides the general rule and the most important provision of the Directive, stating that the term of protection for literary or artistic works shall run for the life of the author and for 70 years after his/her death[273]. The date when the work is lawfully made available to the public is not relevant for the term of protection.[274] Convincing arguments have been brought in order to justify the term of exactly 70 years, according to which the logic of imposing such term of protection, in general, was to protect the author during his lifetime plus two generations of his/her descendants and, considering the increased average life expectancy in Europe, 50 years duration was not enough any longer.[275] Therefore the first paragraph of Article 1 is the manifestation of this provision. The rest of the parts of Article 1 deal with joint authorship, anonymous or pseudonymous works, collective works and legal person as a right-holder, partially published works and those works which are not lawfully made available within seventy years pma. Article 1.1 is the key provision of this Directive which has to be implemented if the non-member state is willing to implement the Directive

[270] Walter, in: Walter/Lewinski, European Copyright Law, p. 507.
[271] Tritton, p. 515.
[272] Visser, in: Dreier/Hugenholtz, Concise Copyright. p. 287-288.
[273] Walter, in: Walter/Lewinski, European Copyright Law, p. 514.
[274] Art. 1.1, Directive 93/98/EEC,
[275] Walter, in: Walter/Lewinski, European Copyright Law, p. 518.

at all. Rest of the paragraphs listed above are also auxiliary provisions to the main one and their implementation with the first paragraph of Article 1 would be recommended as well.

Article 2 is dedicated to cinematographic or audiovisual work, the definition of which is not provided though. It grants the right to be considered as author or one of the authors to the principal director of such works.[276] There is no definition provided for the principal director, but, according to the prevailing opinion, it has to be understood as the leading director[277]. The term of protection of cinematographic or audiovisual works is seventy years after the death of the last survivor from the following authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music.[278] Article 3 relates to four categories of related rights under the Rental and Lending Right Directive,[279] namely the rights of: performers, producers of phonograms, producers of the first fixation of a film and broadcasting organizations. The rules of calculating the dates are also provided in each of these cases.[280] The European standard created by the Rental and Lending Rights Directive, which added producers of first fixations of the films to the scope of protection[281], is followed by the Term Directive as well. Article 3 harmonizes the term of protection for all these four categories of work, the duration of which is 50 years. This term is equal to the minimum duration defined by the TRIPS agreement[282] while it has also been defined as the longest term provided by the member states before the adoption of the Directive, therefore it is to be understood as a minimum term and, at the same time, as a maximum term of protection for such works[283].

[276] Article 2.1, Directive 93/98/EEC,
[277] Walter, in: Walter/Lewinski, European Copyright Law, p. 547.
[278] Article 2.2, Directive 93/98/EEC.
[279] Visser, in: Dreier/Hugenholtz, Concise Copyright. p. 296.
[280] Art. 3, Directive 93/98/EEC.
[281] Walter, in: Walter/Lewinski, European Copyright Law, p. 558.
[282] Art. 14.5, TRIPS agreement,
[283] Walter, in: Walter/Lewinski, European Copyright Law, p. 558.

Article 4 relates to the right for the owner or finder of unpublished work "which would have qualified for copyright protection as an original work of authorship, but of which the term of protection has lapsed"[284]. The term of protection defined for such posthumous works, which is 25 years from the date of lawful publication, also has to be considered as a minimum and, at the same time, maximum term[285], as it is also equal to the term defined in German Copyright legislation[286]. Article 5 permits the member states to protect critical and scientific publications of works come into the public domain and defines 30 years from the lawful publication as a maximum term of protection. This article is not a mandatory provision[287] and it provides only maximum term of protection which should not exceed 30 years. Accordingly, if the non-member states agree this balanced approach of defining the term of protection for the related rights, then they should implement this term in their legislations as well.

Article 6 harmonizes the term and conditions of copyright protection for photographs. It requires two standards which have to be satisfied by the photographic works: level of originality and "author's own intellectual creation" (already provided by Computer Programs Directive[288]). Article 7 prescribes reciprocity towards the authors from the third countries for work which does not have member state as a country of origin[289]. Article 8 provides the rule of calculating the term from the first of January of the year following the event which gives rise to them. Article 9 makes clear that the term of protection for moral rights is not harmonized by the Term Directive. Article 10 defines the time of applying this Directive to the certain works. The rest of the articles of this Directive are intended specifically for the member states and they are not relevant for the implementation in the legislations of the non-member states.

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[284] Visser, in: Dreier/Hugenholtz, Concise Copyright. p. 297.
[285] Walter, in: Walter/Lewinski, European Copyright Law, p. 577.
[286] Art. 71.3, German Copyright Act.
[287] Visser, in: Dreier/Hugenholtz, Concise Copyright, p. 298.
[288] Art. 1.3, Directive 91/250/EEC.
[289] Art. 7.1, Directive 93/98/EEC.

5.5 Database Directive

The Database Directive has harmonized the legal protection of databases and created two-tier protection regime for electronic and non-electronic databases. The issue of covering database by copyright protection has been contentious because of the difference in the subject matter[290]. Therefore the Directive has created an exclusive, "sui generis" right for database,[291] which means that "it is not a copyright and does not as such fit into any other general category of intellectual property right"[292]. This sui generis right has generated legal uncertainty, so that the European Commission has even considered withdrawing the whole Directive or at least the sui generis right[293]. Despite of these controversies, it has been commonly acknowledged that, considering the European copyright law, in general, "the most significant harmonization to date has occurred in relation to databases"[294]. The level of harmonization reached through this Directive still remains to be exemplary comparing to the other areas of European copyright legislation.

The definition of the general notion of 'database' has been the core of this Directive, since the Computer Program Directive, for example, does not provide such definition[295]. The Directive defines database as "a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means".[296] The evaluations of this definition have been as controversial, as the assessments of the Directive itself. It has been characterized as "extremely broad",[297] which "goes much

[290] Seville, p. 41.
[291] http://ec.europa.eu/internal_market/copyright/prot-databases/index_en.htm
[292] Hugenholtz, in: Dreier/Hugenholtz, Concise Copyright, p. 327.
[293] Leistner, in: Derclaye, Research Handbook, p.429.
[294] Aplin, in: Derclaye, Research Handbook, p.75.
[295] See p. 47.
[296] Art. 1.2, Directive 96/9EC.
[297] Seville, p. 42.

further than it what is meant by that word in common parlance"[298]. In terms of implementation in the non-member states the broad and flexible character of this definition is even more appropriate. The Directive uses the term ''collection" similarly to Berne Convention[299] and refers to the independent works, data or other materials. The requirement of independence of materials has been introduced in order to avoid undesired interpretations.[300] Moreover, these independent elements should be individually retriveable[301] and arranged in a systematic or methodical way, which draws a line between database and a non-systematic, unstructured accumulation of data[302]. Paragraph 3 of the first Article draws the line between the computer programs and database, stating that the computer programs, even if they have been used in the making or operation of databases, still do not belong to the scope of protection of the Directive. Implementation of this definition of database has a crucial importance in terms of implementing the whole Directive.

Article 2 leaves intact the acquis created before its imposition, namely the provisions related to computer programs, term of protection, rental and lending rights. Such legal technique of leaving the existed acquis intact and declaring "without prejudice" the earlier Directives has been criticized, as it "inevitably leads to inconsistencies"[303]. In chapter II of the Directive the element of "the author's own intellectual creation" is considered to be the criterion according to which the copyright protection is granted to databases. This condition has already been introduced by the Computer Programs Directive[304] and the Term Directive[305], so the Database Directive chooses the same criteria in order to "be consistent and avoid any reproach of working piecemeal"[306]. Same refers to the Article 4, which defines author as the

[298] Tritton, p. 356.
[299] Art. 2.5, Berne Convention,
[300] Lewinski, in: Walter/Lewinski, European Copyright Law, p. 694.
[301] Hugenholtz, in: Dreier/Hugenholtz Concise Copyright, p. 316.
[302] Lewinski, in: Walter/Lewinski, European Copyright Law, p. 695.
[303] Hugenholtz, in: Eechoud, p. 301.
[304] Art. 1.3, Directive 92/100/EEC.
[305] Art. 6, Directive 93/98/EEC.
[306] Lewinski, in: Walter/Lewinski, European Copyright Law, p. 707.

natural person or group of natural persons, regulates the issue of the collective works, refers to the database created by a group of natural persons jointly and is in accordance with the relevant provision of the Computer Programs Directive[307]. Such coherent approach makes the implementation of the whole European copyright law aqcuis much easier, as the provisions of the different Directives are already consolidated with each other.

Article 5 defines the acts which are carried out or authorized exclusively by the author of a database and this includes: temporary or permanent reproduction understood in a broad way ("by any means and in any forms"[308]); translation, adaptation, arrangement and any other alteration; any form of distribution to the public, whereas the first sale of a copy of the database in the Community exhaust the right to control resale of that copy within the Community (this provision is too 'EU-specific' to be implemented by the non-member states) and any communication, display or performance to the public. Article 6 lists the exceptions to database copyright and it gives the national legislators broad discretion to provide for exceptions to the economic rights[309] granted by Article 5 mentioned above. The Directive refers to the 'lawful user', which is authorized to use part of the database and which is similar (but not identical) to the lawful acquirer referred by the Computer Programs Directive[310]. The imposition of the exceptions listed by the article is optional and is not a subject of mandatory implementation. These exceptions are the cases of reproduction for private purposes; teaching or scientific research; public security, administrative or judicial procedures and traditional exceptions which are authorized under national law.

Chapter III is dedicated to the sui generis database right established by the Directive, which protects the investment of the database producer, that is, "the human, technical and financial resources invested in the contents of the database"[311]. Maker of the Database, which is "the

[307] Art. 2.1, Directive 92/100/EEC.
[308] Art. 5.a, Directive 96/9EC.
[309] Hugenholtz, in: Dreier/Hugenholtz, Concise Copyright, p. 325.
[310] Art. 5,1, Directive 92/100/EEC.
[311] Hugenholtz, in: Dreier/Hugenholtz, Concise Copyright, p. 327.

person who takes the initiative and the risk of investing",[312] enjoys the right to prevent extraction and/or re-utilization of his/her database. Both of these uses are defined in the Directive. "Extraction" refers to "the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form"[313] while "re-utilization" means any form of making it available to the public "by renting, by online or other forms of transmission"[314]. These definitions are quite broad and flexible for the implementation in the legislations of the non-member states.

Article 8 guarantees lawful users of a database certain user rights that might not be overridden by contract, whereas any end user, who is contractually authorized to use the database, is considered as lawful user.[315] Article 9 allows the limited exceptions to the sui generis right and comprehensively regulates the permitted exceptions, meaning that the member states do not need to provide for any exceptions, but if they do so, they must not go beyond those permitted in Article 9.[316] However, this rule refers only to the member states, which means that non-member states have a broad discretion concerning the implementation of these provisions. Article 11 determines the term of protection by the sui generis right, which is 15 years from the date of completion, or, if the database is made available to the public before the expiry of that period, then 15 years from this first making available to the public. This term of protection will be prolonged after each and every additional substantial change to the contents of the database.[317] Article 11 defines the beneficiaries of protection under the sui generis right, which are EU nationals or residents and the companies established in the EU. As we can see, this norm is strictly 'EU-specific' and its implementation in the non-member states would not be relevant, since it is oriented directly to the EU space.

[312] Recital 41, Directive 96/9EC.
[313] Art. 7.2.a, Directive 96/9EC.
[314] Art. 7.2.b, Directive 96/9EC.
[315] Hugenholtz, in: Dreier/Hugenholtz, Concise Copyright, p. 332.
[316] Lewinski, in: Walter/Lewinski, European Copyright Law, p. 772.
[317] Art. 10.3, Directive 96/9EC.

The rest of the norms of Database Directive are common provisions. Namely, Article 12 requires member states to provide appropriate remedies in respect of infringements of the rights provided for in this Directive. The non-member states are surely free to implement this norm in their national legislations as well. However, in most of the cases the situations in these countries significantly differ from the level of the database protection in the EU. On the other hand, the Database Directive generally includes a number of useful and flexible definitions, both in recitals and in the provisions of the articles, the implementation of which would be appropriate and useful for the legislations of the non-member states. This Directive has created a certain standard in European copyright law and harmonization with this standard would be recommended especially for those countries which are aspiring towards the European integration.

2.6 Information Society Directive

The initial aim of the Information Society Directive has been to deal "solely with the copyright implications of the internet".[318] However, the scope of application has gone further to provide a harmonized legal framework on copyright to foster substantial investment, stimulate growth, etc.[319] and it has also been characterized as "the most important measure ever to be adopted by Europe in the copyright field" which "brings European copyright rules into the digital age"[320]. Now it aims to "adapt legislation on copyright and related rights to reflect technological developments and to transpose into Community law the main international obligations arising from the two treaties on copyright and related rights adopted within the framework of the World Intellectual Property Organization (WIPO) in December 1996"[321]. Particularly, this Directive reflects the provisions of two international

[318] Tritton, p. 531.
[319] Shapiro, in: Lindner/Shapiro, Copyright in the Information Society, p. 27.
[320] Seville, p.49.
[321] Web-page of the European Commission.
(http://ec.europa.eu/internal_market/copyright/copyright-infso/copyright-infso_en.htm)

treaties: WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. This Directive "initiated the 'second generation' of European copyright Directives which harmonizes the copyright law more horizontally."[322] Moreover, "with its far-reaching effects upon matters such as the reproduction right and the range of permissible defences, the Information Society Directive probably ought to be regarded as the true precursor to a Community copyright code."[323] The Directive contains two general parts: the first one deals with the certain rights related to the information society and exceptions to these rights; the second part provides the protection for technological measures and rights-management information. Generally, this Directive responds to the contemporary challenges of the information society.

The Directive includes 61 recitals, which is unusually big number of such recitals for the copyright Directive. Article 1 defines the basic concern of the Directive which is "the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society"[324]. This indication towards the information society does not mean that the application of the Directive is restricted to the internet, while it also covers some traditional areas of copyright, but it does not harmonize all aspects of copyright law in the information society (i.e. moral rights)[325]. The Directive leaves intact all of the existing provisions of these earlier five Directives, which we have already discussed.[326]

Article 2 deals with the reproduction right, which is the core of copyright and related rights and is of eminent importance within the concept of copyright protection[327]. The Directive grants reproduction right "by any means and in any form"[328]. The types of reproduction can be direct or indirect, in whole or in part, it can also be mere use of a work. Holders of the

[322] Bechtold, in: Dreier/Hugenholtz, Concise Copyright, p. 343.
[323] Tritton, p. 488.
[324] Art. 1.1, Directive 2001/29/EC.
[325] Bechtold, in: Dreier/Hugenholtz, Concise Copyright, p. 355.
[326] Art. 1.2, Directive 2001/29/EC.
[327] Walter, in: Walter/Lewinski, European Copyright Law, p. 963.
[328] Art. 2, Directive 2001/29/EC.

authorship and related rights are divided into five categories and they include the authors, performers, phonogram producers, producers of the first fixations of films and broadcasting organizations. Article 3 refers to the same categories (excluding the authors) while harmonizing the rights of communication to the public of works and right of making available to the public other subject-matter. It covers all traditional forms of communication to the public characterized by the distant element.[329] Making available to the public is a special case of the general right of communication to the public.[330] Article 4 harmonizes the distribution right generally, which is a significant novelty, while beforehand these rights have been harmonized separately in specific areas.

Article 5 enacts an exhaustive list of mandatory or facultative exceptions and limitations which refer logically only to the rights covered by the Directive, namely the reproduction right, the distribution right for authors and the right of communication to the public.[331] The enumeration of exceptions and limitations to the reproduction right and the right of communication to the public made hereby is exhaustive. Article 5 also provides the so-called 'three-step test', stating that the exceptions shall be applied "in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interest of the rightholder"[332]. The exceptions provided by this Article can be divided as mandatory and facultative for the member states. However, they have such character only referring to the member states, while the non-member states are free to implement any of these norms, being obligatory or facultative, which makes their implementation in the legislations of these countries less complicated.

Chapter III is dedicated to the protection of technological measures and rights-management information. Article 6 itself implements the provisions of WIPO Copyright Treaty[333], WIPO

[329] Walter, in: Walter/Lewinski, European Copyright Law, p. 980.
[330] Bechtold, in: Dreier/Hugenholtz, Concise Copyright, p. 361.
[331] Lewinski, in: Walter/Lewinski, European Copyright Law, p. 1012.
[332] Art. 5.5, Directive 2001/29/EC.
[333] Art. 11, WCT.

Performances and Phonograms Treaty[334] and also provides the important definitions. 'Technological measures' are defined as "any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorized by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right"[335]. It also refers to 'effective' technological measures "where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective"[336]. Both of these definitions might seem too complicated for the national legislations, as not all of the details are necessary for them to implement. The facultative character of the EU Directives for the non-member states is helpful in such cases, while the legislators can modify these definitions in order to take those parts and elements of them which are relevant for the legislations of these countries.

Article 7 also implements the provisions of WCT and WPPT while defining the obligations concerning rights-management information and, at the same time, exceeds the scope of application of these treaties by extending protection to film producers and broadcasting organizations, as well as the sui generis right in databases.[337] Article 8 defines the sanctions and remedies for infringements of the rights and obligations set out in the Directive and it also suggests that the sanctions have to be "effective, proportionate and dissuasive"[338]. Similarly to such requirements of other Directives, the non-member states do not necessarily have to implement this article in their legislations and in any case they have to consider the actual situation in terms of protection of the rights set out in the Directive. The remaining

[334] Art. 18, WPPT.
[335] Art. 6.3.s1, Directive 2001/29/EC.
[336] Art. 6.3.s2, Directive 2001/29/EC.
[337] Lewinski, in: Walter/Lewinski, European Copyright Law, p. 1077.
[338] Art. 8.1, Directive 2001/29/EC.

provisions are common and not relevant in terms of being implemented in the legislations of the non-member states.

Information Society Directive has generally been an advanced step towards the harmonization of European copyright law. It has been criticized for being inconsistent, broad and, accordingly, having less harmonizing effect[339]. It has been mentioned that the results of harmonizing the exceptions by Article 5 of this Directive have been disappointing.[340] The Directive has also been criticized for not covering the issue of private copy because of the "political reasons"[341]. However, despite of all the critics, it has been generally acknowledged that the Information Society Directive "marks a turning point in the history of European copyright harmonization"[342]. Accordingly, the implementation of this Directive is very important also for the non-member states within the context of implementing European copyright law, in general.

5.7 Resale Rights Directive

The most recent act in the European copyright legislation of the first decade (1991-2001 years) is the Resale Right Directive (as we do not count the Enforcement Directive in this legislation according to the common practice). Most of the member states had already regulated resale rights in their national legislations by the time of adoption of the Directive,[343] but they were not harmonized on the community level and the existing disparities between the laws of the member states were affecting negatively on the common market. The Directive harmonizes the resale rights for the benefit of the author of an original work of art, but not every aspect of the resale right, since the harmonization is

[339] Ohly, in: Derclaye, Research Handbook, p. 226 and 232.
[340] Janssens, in: Derclaye, Research Handbook, p. 327.
[341] Dusollier/Ker, in: Derclaye, Research Handbook, p. 371.
[342] Janssens, in: Derclaye, Research Handbook, p. 327.
[343] Walter, in: Walter, Europäisches Urheberrecht, p. 961.

limited to those aspects that directly affect the functioning of the internal market[344]. The resale right is also known as droit de suite – "the right of "following" the work"[345]. This right is an integral part of copyright and intends "to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art."[346] Such right is mostly important for the works of visual artists since the value of their work can change considerably as their reputation grows.[347].

The Directive provides the definition of the resale right as an "inalienable right, which cannot be waived, even in advance, to retrieve a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author"[348]. The resale Right Directive generally follows the concept of the author's participation in the sale price of every successive sale of the work's original.[349] There is a certain limit defined by the Directive, according to which the resale right does not apply if the seller has acquired the work directly from the author less than three years before that resale and where the resale price does not exceed EUR 10000.[350] This particularly refers to the situation where art galleries acquire works directly from the authors who are mostly unknown and the purpose of this provision is "not to discourage such galleries from buying works of unknown artists"[351]. The definition of the resale right and the provision strengthening the positions of the unknown artists would be appropriate and useful for the legislations of the non-member states as well. However, while implementing the latter, they should convert the amount of EUR 10000 into the relevant amounts in their national currencies, or change the amount according to the actual standards existing in these countries.

[344] Vanhees, in: Dreier/Hugenholtz Concise Copyright, p. 405.
[345] Tritton, p. 541.
[346] Vanhees, in: Dreier/Hugenholtz Concise Copyright, p. 406.
[347] Seville, p. 57.
[348] Art. 1.1, Directive 2001/84/EC.
[349] Walter, in: Walter/Lewinski, European Copyright Law, p. 849.
[350] Art. 1.2, Directive 2001/84/EC,
[351] Vanhees, in: Dreier/Hugenholtz, Concise Copyright, p. 412.

The Directive also provides the definition of the 'original work of art' as the "works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided that they are made by the artist himself or are copies considered to be original works of art"[352]. The enumeration made by this definition is not exhaustive and only exemplary, but generally only the works of art protected by copyright can be subject to the resale right.[353] Article 2 also considers the copies made in limited numbers by the artist himself or under his authority as the original works of art.[354] The implementation of the definition provided above and the standard of covering the copies by it can be harmonized by the non-member states as well and they are also free to modify the definition according to the standards established in their legislations.

Article 3 gives the possibility to the member states to set a minimum sale price from which the sales should be subject to resale right[355] and states that this minimum sale price "may not under any circumstances exceed EUR 3000"[356]. As we can see from the wording, imposition of this provision is facultative even for the member states. The Directive also sets the rate of the resale right and provides a system that divides the sale price of the original work of art subject to the resale right into different price bands to which a degressive rate scale is applied, the aim of which is to reconcile the different interests of all the parties that operate on the market of original works of arts, on one hand, and to reduce the risk of sales relocation and of the circumvention of the community rules on the resale right,[357] on the other.[358] Article 5 makes just a short notice that the sales price discussed above are net of tax. Article 6 lays down the basic rule, according to which the resale right royalty is payable to

[352] Art. 2.1, Directive 2001/84/EC.
[353] Vanhees, in: Dreier/Hugenholtz, Concise Copyright, p. 413.
[354] Art. 2.2, Directive 2001/84/EC.
[355] Art. 3.1, Directive 2001/84/EC.
[356] Art. 3.2, Directive 2001/84/EC.
[357] Vanhees, in: Dreier/Hugenholtz. Concise Copyright, p. 415.
[358] Art. 24, Directive 2001/84/EC.

the author and after his death to those entitled under him (legal successors) and which corresponds with general principles of copyright and civil law.[359] The member states are also free to provide for compulsory or optional collective management of the resale right.[360] Article 7 mandatorily prescribes to apply material reciprocity vis-à-vis authors originating from third countries.[361] Article 8 states that the term of protection of the resale right should correspond to the Term Directive and also sets certain dates which are applicable in terms of resale right. Article 9 grants to the persons entitled to receive royalties the right to obtain information.

Generally the Directive has harmonized an important aspects of the resale right on the community level and gave artist the droit de suite to a share in the proceeds of any subsequent sale of an original work[362]. The Directive has also played positive role in terms of balancing the positions of young and unknown artists, on one hand, and galleries or collectors, on the other. The Directive also includes the useful definitions and the provisions providing common standards. Therefore the introduction of these norms to the legislations of the non-member states would be recommended. The definitions and especially the provisions defining certain amounts in EUR should be modified according to the actual situations in these countries and in their national currencies.

5.8 Orphan Works Directive

After 11 years of not adopting any Directives, the first act in the 'new wave' of the European copyright legislation is the Orphan Works Directive[363]. Later than a decade since the adoption of the Resale Rights Directive[364] the legislation process in European copyright law

[359] Walter, in: Walter/Lewinski, European Copyright Law, p. 869.
[360] Art. 6,2, Directive 2001/84/EC.
[361] Walter, in: Walter/Lewinski, European Copyright Law, p. 876.
[362] Seville, p. 57.
[363] Directive 2012/28/EU.
[364] Directive 2001/84/EC.

has been accelerated again. Generally the Orphan Works Directive provides a mutual recognition of the status of an orphan work granted in one member state and recommends some guidelines to carry out the diligent search of the rights owners, that is required as a preliminary step to acknowledge a work as orphan.[365] Generally the Directive can be considered as an exception to copyright, according to which, if the right holders cannot be found, the Europe's Film Heritage Institutions (FHI) can make use of the work and, if a work is orphan in one member state, the status is valid across the EU.[366]

The subject-matter and the scope of the Directive refer to the certain uses made of orphan works by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organizations, established in the member states, in order to achieve aims related to their public-interest missions.[367] According to the general rule, a work is considered orphan if the right-holders (or right-holders) can not be identified and/or not located.[368] The Directive makes a distinction between a work and phonogram, stating that they can be considered an orphan work "if none of the rightholders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out and recorded"[369]. Article 3 of the Directive requires that a diligent search is carried out in good faith in respect of each work or other protected subject-matter in order to find out whether a work or phonogram is an orphan work.[370] Among the sources where this diligent search has to be performed include information and databases from film heritage institutions, national libraries, producers organizations, collective management organizations, standardization bodies, etc.[371] The Directive also sets a general rule, according

[365] Dusollier, in: Geiger, Constructing European IP, p.29.
[366] Herlt, Introduction.
[367] Directive 2012/28/EU, Art. 1,1.
[368] Herlt, Diligent Search.
[369] Directive 2012/28/EU, Art. 2,1.
[370] Directive 2012/28/EU, Art. 3,1.
[371] Herlt, Diligent Search.

to which a work or phonogram, that is considered an orphan work in a member state, shall be considered an orphan work in all member states.[372] Accordingly, if the non-member states implement this provision, a work or phonogram will be considered an orphan work in this non-member state as well.

5.9 CRM Directive

The most recent EU Directive in the area of copyright from nowadays perspective is the so-called CRM Directive[373], which regulates collective management of copyright, related rights and multi-territorial licensing of rights in musical works for online use in the internal market. The Directive is divided into 5 titles and 45 articles, which is an unusually big amount of the articles for the EU Directive in the field of copyright. Aim of the adoption of this Directive has been "to facilitate the emergence of a European single market for the exploitation of musical works in digital format"[374]. The Directive has been criticized even before its adoption for proposing a new system which "would in the long run be detrimental to the small and medium-sized CMOs[375] in the EU and to cultural diversity"[376]. One of the reasons for adopting this Directive is the fact that the Commission had to punish the conduct of collective management societies quite frequently for fixing excessively high rates for users, as well as for the imposition of discriminatory clauses[377], misusing their de jure monopoly position.[378] Accordingly, the Commission issued a Recommendation on the same issue as early as in 2005.[379] However, since the Recommendation did not seem to be regulative

[372] Directive 2012/28/EU, Art. 4,s1.
[373] Directive 2014/26/EU.
[374] Arezzo, in: IIC, p. 535.
[375] Collective Management Organizations.
[376] Matanovac Vučković, in: IIC, p. 29.
[377] Arezzo, in: IIC, p. 535.
[378] Matanovac Vučković, in: IIC, p. 30.
[379] 2005/737/EC.

enough, the Commission "decided to turn to a more incisive legal instrument such as a Directive"[380].

The first title of the Directive contains the general provisions. Namely, it defines the subject-matter of the Directive, which aims "to ensure the proper functioning of the management of copyright and related rights by collective management organisations" and is also aimed at "multi-territorial licensing by collective management organisations of authors' rights in musical works for online use"[381]. Accordingly, the Directive proposes a number of definitions, including the "collective management organization", defined as "any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose"[382]. The Directive also defines the other terms such as 'independent management entity', 'rightholder', 'member', 'statute', 'general assembly of members', 'director', 'rights revenue', 'management fees', 'representation agreement', 'user', 'repertoire', 'multi-territorial license' and 'online rights in musical works'.[383]

The second title is dedicated to the collective management organizations. Namely, it regulates the representation of rightholders and membership, as well as the organization of CMOs, while defining the best interests of the rightholders and not imposing unnecessary obligations as the general principles.[384] The Directive also defines the rights of rightholders, membership rules of collective management organizations, rights of rightholders who are not members of the collective management organization, general assembly of members of the collective management organization, supervisory function and obligations of the persons

[380] Arezzo, in: IIC, p. 538.
[381] Art. 1, Directive 2014/26/EU.
[382] Art. 3.a, Directive 2014/26/EU.
[383] Art. 3, Directive 2014/26/EU.
[384] Art. 4, Directive 2014/26/EU.

who manage the business of the collective management organization.[385] While referring to the management of rights revenue the Directive regulates the issues such as collection and use of rights revenue, deductions and distribution of amounts due to rightholders.[386] Management of rights on behalf of other collective management organizations contains the rights managed under representation agreements as well as deductions and payments in representation agreements.[387] Licensing and users' obligations belong to the issue of relations with the users.[388] Transparency and reporting comprises the regulations concerning the information provided to rightholders on the management of their rights, information provided to other collective management organizations on the management of rights under representation agreements, information provided to rightholders, other collective management organizations and users on request and disclosure of information to the public and Annual transparency report.[389]

The third title regulates multi-territorial licensing of online rights in musical works by collective management organizations, which includes multi-territorial licensing in the internal market, capacity to process multi-territorial licenses, transparency of multi-territorial repertoire information, accuracy of multi-territorial repertoire information, accurate and timely reporting and invoicing, accurate and timely payment to rightholders, agreements between collective management organizations for multi-territorial licensing, obligation to represent another collective management organization for multi-territorial licensing, access to multi-territorial licensing and derogation for online music rights required for radio and television programs.[390] The fourth title is dedicated to the enforcement measures, including complaints procedures, alternative dispute resolution procedures, dispute resolution, compliance, exchange of information between competent authorities and

[385] Title II, Chapter 1, Directive 2014/26/EU.
[386] Title II, Chapter 2, Directive 2014/26/EU.
[387] Title II, Chapter 3, Directive 2014/26/EU.
[388] Title II, Chapter 4, Directive 2014/26/EU.
[389] Title II, Chapter 5, Directive 2014/26/EU.
[390] Title III, Directive 2014/26/EU.

cooperation for the development of multi-territorial licensing.[391] The fifth and the final title of the Directive defines reporting and final provisions concerning notification of collective management organizations, report, expert group, protection of personal data and transposition.[392] This last title, similarly to the most of the final provisions of other Directives, contains the provisions which are not relevant for the implementation in the non-member states.

The Directive on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Use in the Internal Market belongs to the new type of Directive not only chronologically, but according to its content as well. The Directive regulates the issue of CMOs and multi-territorial licensing into details. It is rather strict and incisive[393] comparing to other EU Directives in the field of copyright. Another aspect which makes it different from the other Directives is the fact that the CRM Directive is more oriented on the protection of the public interests while regulating the activities of the CMOs and, to the certain extent, limiting their discretion in favor of the public interests. In this regard the CRM Directive reflects the balance-based approach, aimed at balancing the private and public interests. Accordingly, the implementation of the CRM Directive in the copyright legislations of the non-member states would generally be recommended.

[391] Title IV, Directive 2014/26/EU.
[392] Title V, Directive 2014/26/EU.
[393] Arezzo, in: IIC, p. 538.

6. Practice of the European Court of Justice in the Field of Copyright

Harmonization of court practice is integral to the general process of harmonizing European copyright law, since it aims to integrate not only EU law concerning copyright, but also the interpretation of this law provided in the practice of the European Court of Justice (ECJ). Therefore, since the harmonization of EU copyright law is progressing, the activity of the ECJ also has to follow the same route.[394] Accordingly, the role of the ECJ in shaping EU copyright law has emerged during recent decades[395]: "there has been a dramatic recent increase in references to the Court, with 6 cases filed in the 10 years following the Phil Collins case of 1992, 6 cases in the 5 years between 2002 and 2006, and 28 cases between 2007 and 2012".[396] Currently, ECJ practice plays an increasingly important role in the harmonization of EU copyright law. Therefore it is important for the non-member states, which are willing to implement EU copyright law in their legislations, to consider also the practice created by the ECJ in the field of copyright.

6.1 Initial Development of the ECJ Practice

The function of the European Court of Justice is defined in a following manner: "it shall ensure that in the interpretation and application of the Treaties the law is observed."[397] Therefore the acts of the EU legislature and of the member states "can be controlled in view of their compatibility with primary community law"[398]. EU copyright Directives belong to the community law and are, in this regard, subject matter to be covered by the practice of

[394] Dreier, in: J. Copyright Soc'y U.S.A, p. 211.
[395] Carre, in: La contribution de la jurisprudence, p. 1.
[396] Favale et al., p. 3.
[397] Art. 19.1, Treaty on European Union.
[398] Dreier, in: J. Copyright Soc'y U.S.A, p. 188.

the ECJ. Copyright, as such, is not mentioned in the Treaty on the European Union. However, the same treaty regulates certain aspects concerning the intellectual property, which also refers to copyright. The treaty generally requires to "establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements"[399]. Regarding the court procedures, the Council of Europe is entitled to confer jurisdiction to the Court of Justice of the European Union (CJEU) "in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights".[400] Besides that, Protocol N.3 of the Treaty on European Union also requires "to take account of the specific features of litigation in the field of intellectual property".[401]

The development of ECJ practice concerning copyright started long before the adoption of EU copyright Directives. In 1971 the court defined the distinction between 'exercise' and 'existence' of the intellectual property right in the decision on *Deutsche Grammophon case*[402], which is the first case in the field of copyright examined by the ECJ. Later on, in 1980, in *Coditel case,*[403] copyright has been discussed within the context of exception to the principle of the free movement of services on the basis of an intellectual property right for the first time[404]. Shortly afterwards, in 1981, the court examined another case[405] where copyright has been explicitly mentioned for the first time[406]. Five other cases related to the

[399] Art. 118, Treaty on European Union.
[400] Art. 262, Treaty on European Union.
[401] Art. 53, Treaty on European Union (No 3).
[402] Case 78/70 (08.06.1971) parts 6 and 11.
[403] Case 62/79 (18.03.1980).
[404] Dreier, in: J. Copyright Soc'y U.S.A, p. 195.
[405] Joined cases 55/80 and 57/80 (20.01.1981).
[406] Dreier, in: J. Copyright Soc'y U.S.A, p. 195.

field of copyright have also been examined by the ECJ before the adoption of the first copyright Directive[407] in 1991.

6.2 First Wave of ECJ Practice concerning Copyright after the Adoption of the First Copyright Directive by the EC

Phil Collins case[408] is considered as the first copyright case in the ECJ practice[409] since it has been registered and delivered after the adoption of Computer Program Directive[410], which is the first legal act regulating copyright by the EC. Besides that, Phil Collins decision is also significant for defining the EU copyright law regarding the issue of discrimination.[411] The decision regulates the application of the Treaty on European Union to copyright and related rights as well.[412] This decision also defined the retroactive effect of the non-discrimination principle, which means: "it applies even to facts which took place at a time when the other Member State was not yet a Member of the EU"[413]. After this decision a new provision had been added to the German Copyright Act, according to which "nationals of another Member State of the European Union (EU) or of another state party to the Agreement on the European Economic Area (EEA)… are deemed equal to German nationals"[414].

The next case in the area of copyright examined by the ECJ is *Metronome Musik v. Music Point Hokamp case*[415] which referred to the related rights, namely the Rental and Lending Rights Directive and its application in Germany. In this case ECJ decided that "the non-exhaustion of the distribution right as far as the rental right is concerned is not in violation

[407] Directive 91/250/EEC.
[408] Joined cases C-92/92 and C-326/92 (20.10.1993).
[409] Favale et al, p. 8.
[410] Directive 91/250/EEC, afterwards replaced by the Directive 2009/24/EC.
[411] Dreier, in: J. Copyright Soc'y U.S.A, p. 202.
[412] Joined cases C-92/92 and C-326/92 (20.10.1993), [17].
[413] Dreier, in: J. Copyright Soc'y U.S.A, p. 203.
[414] Art. 120.2.2, Urheberrechtsgesetz.
[415] Case C-200/96 (28.04.1998).

of the EC Treaty"[416]. This ruling has been specified in the ECJ decision on the *FDV v. Laserdisken case*[417], which referred to the same topic of rental and lending rights and was made in the same year 1998. In this decision ECJ clarified that the rental right is not exhausted after the first rental,[418] since the rental right „would be rendered worthless if it were held to be exhausted as soon as the object was first offered for rental"[419].

Another significant decision made by the ECJ concerning the term of protection regulated by the Term Directive[420] is so-called *Butterfly-decision*[421], where the court had to define the application of term of protection in time[422]. In this decision ECJ concluded that the Term Directive contained an obligation of member states to protect acquired rights of third parties, but that the detail of such measures is left to the discretion of the Member States"[423]. Since the Italian companies[424] were participating in the case, the court referred to the Italian legislation providing for a limited time, in which "sound-recording media may be distributed by persons who, by reason of the expiry of the rights relating to those media under the previous legislation, had been able to reproduce and market them before the revival took effect"[425].

The next case[426] examined by the ECJ referred to the Satellite and Cable Directive[427]. Namely, the court examined the question whether the defendant was undertaking a communication to the public or cable retransmission within the meaning of the Directive[428] by installing a system for the reception of television programs broadcast terrestrially and by satellite and

[416] Dreier, in: J. Copyright Soc'y U.S.A, p. 198.
[417] Case C-61/97 (22.09.1998).
[418] Dreier, in: J. Copyright Soc'y U.S.A, p. 198.
[419] Case C-61/97 (22.09.1998), 21.
[420] Directive 93/98/EEC afterwards replaced by Directive 2006/116/EC.
[421] Case C-60/98 (29.06.1999).
[422] Art. 10, Directive 93/98/EEC.
[423] Dreier, in: J. Copyright Soc'y U.S.A, p. 216.
[424] Butterfly Music Srl and Carosello Edizioni Musicali e Discografiche Srl (CEMED).
[425] Dreier, in: J. Copyright Soc'y U.S.A, p. 216.
[426] Case C-293/98 (03.02.2000).
[427] Directive 93/83/EEC
[428] Art. 1, Directive 93/83/EEC.

their exclusive distribution to the guests occupying the rooms of the hotel.[429] The court came to the conclusion that this question "is not governed by the Directive, and must consequently be decided in accordance with national law"[430]. Such 'hesitating' decision shows that the court has not been 'courageous' enough to harmonize the interpretation of the term "public" and left it up to the national courts of the member states to decide this issue according to their own opinions.[431]

6.3 Second Wave of ECJ Practice in the Area of Copyright

There is a significant gap between the *SENA v. NOS decision* made in 2003 (referring to broadcasting and communication to the public as well as rental and lending right)[432] and *Lagardère v. SPRE decision* made in 2005 concerning the related rights, namely the broadcasting of phonogram and equitable remuneration[433]. Accordingly, the former is considered as the final case of the first wave while the latter begins the new wave of ECJ practice in copyright.[434] In the following year (2006) three cases have been examined and the decisions made: *Laserdisken v. Kulturministeriet case*[435] concerning the InfoSoc Directive, namely distribution right and rule of its exhaustion[436]; *SGAE v. Rafael Hoteles*[437] case referring to the right of communication and making available to the public in the same InfoSoc Directive[438], and *Uradex v. RTD & BRUTELE case*[439] concerning the exercise of the cable retransmission right in Satellite and Cable Directive[440].

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[429] Dreier, in: J. Copyright Soc'y U.S.A, p. 216.
[430] Case C-293/98 (03.02.2000), 29.
[431] Dreier, in: J. Copyright Soc'y U.S.A, p. 217.
[432] Case C-245/00 (06.02.2003).
[433] Case C-192/04 (14.07.2005).
[434] Favale et al, p. 36.
[435] Case C-479/04 (12.09.2006).
[436] Art. 4, Directive 2001/29/EC.
[437] Case C-306/05 (07.12.2006).
[438] Art. 3, Directive 2001/29/EC.

Two other significant cases were examined and decisions made by the ECJ two years later – in 2008: *Promusicae v. Telefónica case*[441] referring to the InfoSoc Directive[442], namely the issues of disclosing certain data, and *Peek & Cloppenburg v. Cassina case*[443] also concerning the InfoSoc Directive, namely the right of distribution to the public[444]. Another two decisions were made in the following year 2009. The first was the *Sony v. Falcon case*[445] referring to the related rights of phonogram producers and the term of protection according to the Term Directive[446]. The case also referred to the nationals of non-member states, who, according to the courts' decision, are also covered by the provision of the Directive stating that the term of protection applies to all works "which were protected in at least one Member State"[447]. The second was *Infopaq v. Danske Dagblades Forening case*[448] also concerning the InfoSoc Directive, namely the reproduction right including exceptions and limitations[449].

Another significant decision by the ECJ is the one referring to the resale right in *Fundación Gala-Salvador Dalí v. ADAGP case*.[450] The right to receive royalties after the death of the author by those entitled under him/her defined in the Resale Rights Directive[451] has been interpreted as not precluding a provision of national law, "which reserves the benefit of the resale right to the artist's heirs at law alone, to the exclusion of testamentary legatees",[452] and left the task of resolving this issue to the national courts. In this regard the court once again

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[439] C-169/05 (01.06.2006).
[440] Art. 9, Directive 93/83/EEC.
[441] Case C-275/06 (29.01.2008).
[442] Directive 2001/29/EC.
[443] Case C-456/06 (17.04.2008).
[444] Art. 4.1, Directive 2001/29/EC.
[445] Case C-240/07 (20.01.2009).
[446] Directive 2006/116/EC.
[447] Art. 10.2, Directive 2001/29/EC.
[448] Case C-5/08 (16.07.2009).
[449] Arts. 2 and 5, Directive 2001/29/EC.
[450] C-518/08 (15.04.2010).
[451] Art. 6.1, Directive 2001/84/EC.
[452] Gherghinaru, in: Landmark IP Decisions of the ECJ, p. 62.

hesitated from creating the common rule, for which it has been criticized[453] regarding *Egeda v. Hoasa case*[454], and justified it with "no need to eliminate differences between national laws"[455] in this regard.

Decision on the *BSA v. Ministerstvo kultury case*[456] refers to the Computer Programs and InfoSoc Directives. Namely, the court stated that a graphic user interface is not a form of expression of a computer program within the meaning of the Directive provision[457] and, therefore, cannot be protected by copyright as a computer program under that Directive.[458] However, the court came to the conclusion that such an interface can be protected as a work by the InfoSoc Directive[459], provided that interface is its authors' own intellectual creation.[460] Computer Programs Directive (although the new version[461]) has also been interpreted in *UsedSoft v. Oracle case*[462], where the exhaustion of the distribution right[463] is defined meaning that the right is exhausted "if the copyright holder who has authorized, even free of charge, the downloading of that copy from the internet onto a data carrier has also conferred, in return for payment of a fee intended to enable him to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor, a right to use that copy for an unlimited period".[464]

Another significant decision concerning the InfoSoc Directive is the one made on the *Stichting de Thuiskopie v. Opus Supplies case*[465], where the court interpreted the provision of

[453] Dreier, in: J. Copyright Soc'y U.S.A, p. 217.
[454] Case C-293/98 (03.02.2000).
[455] Gherghinaru, in: Landmark IP Decisions of the ECJ, p. 64.
[456] C-393/09 (22.12.2010).
[457] Art. 1.2, Directive 91/250/EEC.
[458] Holý, in: Landmark IP Decisions of the ECJ, p. 112.
[459] Art. 2.a, Directive 2001/29.
[460] Holý, in: Landmark IP Decisions of the ECJ, p. 112.
[461] Directive 2009/24/EC, which has replaced Directive 91/250/EEC.
[462] Case C-128/11 (03.07.2012).
[463] Art. 4.2, Directive 2009/24/EC.
[464] Flamme, in: Landmark IP Decisions of the ECJ, pp. 266-267.
[465] C-462/09 (16.06.2011).

the InfoSoc Directive concerning the exceptions and limitations[466] as meaning that "the final user who carries out, on a private basis, the reproduction of a protected work must, in principle, be regarded as the person responsible for paying the fair compensation".[467] Another provision of the InfoSoc Directive interpreted by the ECJ in *Circul Globus Bucureşti v. UCMR – ADA case*[468] is the right of communication to the public granted to the authors[469], which, according to the ECJ decision, refers "only to communication to a public which is not present at the place where the communication originates, to the exclusion of any communication of a work which is carried out directly in a place open to the public using any means of public performance or direct presentation of the work"[470]. InfoSoc Directive has also been interpreted by the ECJ in the decision on the *Scarlet Extended v. SABAM case*[471] (evaluated as "an emerging backlash against corporate copyright lobbies in Europe"[472]) as "precluding an injunction made against an internet service provider which requires it to install a system for filtering".[473] The term 'distribution' defined in the Directive[474] has been also interpreted by the court in 2012[475] as an act of a trader "who directs his advertising at members of the public residing in a given Member State and creates or makes available to them a specific delivery system and payment method, or allows a third party to do so, thereby enabling those members of the public to receive delivery of copies of works protected by copyright in that same Member State".[476]

[466] Art. 5.2.b and 5, Directive 2001/29.
[467] Vaal, in: Landmark IP Decisions of the ECJ, p. 141.
[468] Case C-283/10 (24.11.2011).
[469] Art. 3.1, Directive 2001/29.
[470] Quane, in: Landmark IP Decisions of the ECJ, p. 186.
[471] Case C-70/10 (24.11.2011).
[472] Daly and Farrand, in: Cultures of Copyright, p. 26.
[473] Keustermans, in: Landmark IP Decisions of the ECJ, p. 153.
[474] Art. 4.1, Directive 2001/29.
[475] Case C-5/11 (21.06.2012).
[476] Krook and Langenskiöld, in: Landmark IP Decisions of the ECJ, p. 231.

Together with the InfoSoc Directive, the Rental and Lending Rights Directive has also been interpreted by the ECJ in the decision on the *SCF v. Marco Del Corso case.*[477] Namely, the term 'communication to the public', used in the Directive,[478] has been interpreted as meaning that "it does not cover the broadcasting, free of charge, of phonograms within private rental practices engaged in professional economic activity, such as the one at issue in the main proceedings, for the benefit of patients of those practices and enjoyed by them without any active choice on their part".[479] Another decision referring to the Rental and Lending Rights Directive (although the new version[480]) is the one made on the *Phonographic Performance v. Ireland case*[481], which refers to the same concept of 'communication to the public' in the same provision[482]. Within the meaning of this provision, a hotel operator providing televisions in guest rooms is a 'user' conducting a 'communication to the public', according to the decision of the ECJ, and, therefore, is obliged to pay equitable remuneration under the same provision.[483]

The issue of database has also been examined by the ECJ. Namely, in the decision on *Football Dataco v. Yahoo case*[484] the court defined that database, within the meaning of the Directive,[485] should be interpreted as meaning that it is "protected by the copyright laid down by that Directive provided that the selection or arrangement of the data which it contains amounts to an original expression of the creative freedom of its author, which is a matter for the national court to determine".[486] Football Dataco applied to the ECJ once again concerning the database issue, this time against Sportradar GmbH and the case has been

[477] Case C-135/10 (15.03.2012).
[478] Art. 8.2, Directive 92/100/EEC.
[479] Perani, in: Landmark IP Decisions of the ECJ, p. 167.
[480] Directive 2006/115/EC which has replaced Directive 92/100/EEC.
[481] Case C-162/10 (15.02.2012).
[482] Art. 8.2, Directive 92/100/EEC.
[483] McGovern, in: Landmark IP Decisions of the ECJ, pp. 173-174.
[484] Case C-604/10 (01.03.2012).
[485] Art. 1.2, Directive 96/9/EC.
[486] Georgiades and Xanthoulis, in: Landmark IP Decisions of the ECJ, p. 222.

decided in the same year 2012.[487] This time the term 're-utilization' defined in the Directive[488] has been interpreted by the court as "the sending by one person, by means of a web server located in Member State A, of data previously uploaded by that person from a database protected by the *sui generis* right under that Directive to the computer of another person located in Member State B, at that person's request, for the purpose of storage in that computer's memory and display on its screen, constitutes an act of 're-utilisation' of the data by the person sending it".[489]

The Satellite and Cable Directive has also been interpreted by the ECJ in *Airfield v. SABAM & Agicoa decision*[490]. Namely, the broadcasting right defined by the Directive[491] is interpreted "as requiring a satellite package provider to obtain authorization from the rightholders concerned for its intervention in the direct or indirect transmission of television programmes, such as the transmission at issue in the main proceedings, unless the rightholders have agreed with the broadcasting organization concerned that the protected works will also be communicated to the public through that provider, on condition, in the latter situation, that the provider's intervention does not make those works accessible to a new public".[492] In *Bonnier Audio v. Perfect Communication case*[493] ECJ has also interpreted the right on information defined in the Enforcement Directive[494] as "not precluding national legislation",[495] although this Directive is usually not considered among the EU copyright Directives.

[487] Case C-173/11 (18.10.2012).
[488] Art. 7.2.b, Directive 96/9/EC.
[489] Georgiades and Xanthoulis, in: Landmark IP Decisions of the ECJ, p. 281.
[490] Joined Cases C-431/09 and C-432/09 (13.10.2011).
[491] Art. 2, Directive 93/83/EEC.
[492] Vanavermaete, in: Landmark IP Decisions of the ECJ, p. 125.
[493] Case C-461/10 (19.04.2012).
[494] Art. 8, Directive 2004/48/EC.
[495] Hedenquist and Beijer, in: Landmark IP Decisions of the ECJ, p. 203.

6.4 Current Stage of ECJ Practice concerning Copyright

The practice of European Court of Justice in the area of copyright is developing increasingly. Since the adoption of the first copyright act in 1991[496] the increased dynamic is obvious: in the years 1992-2002 there were only six cases concerning copyright examined by the ECJ, while between the years 2007-2012 the number of such cases is 28.[497] The decisions made by the ECJ on the cases related to copyright cover the variety of issues and legal acts, even including the Enforcement Directive,[498] which is generally not considered as EU copyright Directive. However, we have to mention that InfoSoc Directive[499] has been interpreted by the ECJ most frequently during the last 25 years. The cases also differ regarding their applicability for the non-member states: there are the decisions directly aimed towards member-states[500] and there are also the cases examining the legal status of the nationals of non-member states.[501]

Practice of the ECJ in the area of copyright deserved some critical assessments as well. Certain decisions[502] have been criticized[503] for using 'hesitated' approach and leaving the task of creating legal standard to the national courts, instead of taking the responsibility to harmonize certain aspects of the EU copyright law. Besides that, ECJ has also been criticized for lacking coherent copyright jurisprudence, namely the judges for lacking specialist expertise, reasoning for unpredictability and non-existence of specialist chambers.[504] Accordingly, these critical evaluations also have to be considered by the non-member states willing to harmonize their legislations with EU copyright law, a significant part of which is the Practice developed by the ECJ in the field of copyright.

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[496] Directive 91/250/EEC.
[497] Favale et al, p. 3.
[498] Directive 2004/48/EC.
[499] Directive 2001/29/EC.
[500] I.e. Case C-173/11 (18.10.2012).
[501] Case C-240/07 (20.01.2009).
[502] Case C-293/98 (03.02.2000) and C-518/08 (15.04.2010).
[503] Dreier, in: J. Copyright Soc'y U.S.A, p. 217.
[504] Favale et al, p. 35.

7. Conclusions

One of the significant aims of European copyright harmonization is the 'reconciliation' between the concepts of copyright and author's rights. The creation and methods of development of these concepts differed: copyright emerged in UK at the beginning of the 18th century due to the necessity of regulating the expanding printing industry, while authors' rights developed in France at the end of the 18th century as a result of developing human rights, including personal and 'moral' rights. Despite these differences, they both regulate the same subject matter and share the same place in property rights, namely intellectual property rights. Accordingly, they have the same raisons d'être, including the general justification as property, as well as 'moral' and 'public' justifications. Therefore, based on the common practice in EU law, we use the English word "copyright" in its broad sense, provided that it also includes the concept of authors' rights

EU copyright law has been created due to a variety of impulses that still define the characteristics of this law. Firstly, the economic impulse that led to the creation of European copyright law aimed to remove the differences that hindered the common market,[505] and which still define the market-based character of EU copyright law. As a result, EU copyright legislation has created certain standard characterized by the dominance of economic impulses; responding to the challenges of technology; and finding a balance between copyright and authors' rights, and between public and private interests. The dynamic and changeable character of EU copyright law also results from political factors, both inside and outside the European Union. Objective examination of these defining factors, elements, and characteristics of EU copyright law will lead to the assessment of EU copyright law in terms of its implementation in non-member states.

[505] Recital 4, Directive 91/250/EEC.

The introduction of non-member states' perspectives to the discussion on European copyright law results from the fact that this law is already being implemented in the national legislations of non-member states. Accordingly, we must discuss the relevance of implementing European copyright law in the legislations of non-EU states, which expands the discussion concerning the harmonization of European copyright law. In order to check the relevance of such implementation, a quality assessment is required of the existing acquis communautaire in copyright. We therefore evaluate the relevance of implementing EU copyright law in non-member states from the legal, economic, and political perspectives, namely the legal standard created by European copyright legislation together with the economic objectives and political aspects of harmonization. In this regard, critical approaches have to be considered equally with the positive evaluations, based on which several general recommendations are elaborated for the legislators of non-member states.

An overview of the implementation of European copyright legislation from non-member states' perspective highlights certain characteristics that are typical of the EU copyright Directives and which are viewed differently from the member-state perspective. In order to highlight these characteristics, we examined all nine Directives adopted in the field of EU copyright do date. We have also marked the distinctive character of the last two Directives,[506] focusing on the protection of public interests, which makes them different from the previous seven Directives. Each of these Directives is evaluated according to their relevance for implementation in the copyright laws of non-member states. This evaluation assesses the content and feature of the Directive as a whole, and certain norms and provisions in detail.

EU copyright law refers not only to the nine Directives adopted to date, but also to the decisions of the European Court of Justice (ECJ) where these legal acts have been interpreted and the Europe-wide integrated practice in the area of copyright has been created. Moreover,

[506] Orphan Works Directive and CRM Directive.

the development of ECJ practice concerning copyright started twenty years before the adoption of the first EU Directive in the field of copyright. Therefore, the activities of the ECJ have to be divided into the following chronological points: initial development of ECJ practice (years 1971–1991), first wave of ECJ practice concerning copyright following the introduction of EU copyright law (1991–2003), and the second wave of ECJ practice in the area of copyright (2005–present). The increasing character of developing ECJ practice in the field of copyright is obvious when comparing the six cases examined by the ECJ in the years 1992–2002 and the 28 cases examined during 2007–2012. From the current perspective, the InfoSoc Directive[507] prevails among the EU legal acts interpreted by the ECJ. The court performs an increasingly important role in the harmonization of EU copyright law, and its decisions are the subject of discussion and critical evaluation. These evaluations and assessments, both critical and positive, have to be taken into consideration while examining the practice of the ECJ from the perspective of non-member states.

[507]Directive 2001/29/EC.

III Development of Copyright Laws in Post-Soviet Non-EU States: Georgian Case

1. Introduction

Georgian copyright legislation travelled a long road before reaching the level of approximating with European copyright law. The first legal act in the Georgian language concerning copyright was the regulation of Georgian SSR adopted in 1929, which (as in other Soviet republics) was in full compliance with the guidelines of Soviet copyright law. Since then, Georgian copyright legislation has experienced a radical shift from the Soviet system to the contemporary international and EU standards of the copyright law. Nowadays, Georgian copyright legislation closely approximates European law. Therefore, the development of Georgian copyright legislation between the opposed legal systems is also quite a typical example for other post-Soviet states. Accordingly, Georgian copyright law should not be discussed separately, isolated from the other legal systems, but in comparison with them.

The development of Georgian copyright legislation has certain similarities with the development of other post-Soviet laws. Therefore, these legal systems, which share the same contexts, have to be compared to each other, to identify the common trends that are typical for them, as well as certain internal differences. Particularly, with *Armenia* and *Azerbaijan*, Georgia shares the common geographical and historical context of the South Caucasus. On the other hand, in terms of current political, economic, and legal developments, Georgia is most closely related to *Moldova* and *Ukraine*, within the context of the recent EU Association Agreements. Although *Russian* copyright legislation is nowadays quite different

from Georgian copyright law, in the Soviet system Russian legal acts had to be used as the templates for the laws of the other Soviet republics, and therefore the comparison with Russian law manifests these different directions of development. Accordingly, we have selected these five post-Soviet countries, in order to compare their copyright laws with those of Georgia.

In the copyright legislations of all the post-Soviet countries, the concept of 'author's right' (instead of copyright) prevails. In this regard they follow the common standard of the continental European legal systems, in which the doctrine of authors' rights is developed. The difference between these two concepts is obvious: copyright, as the word itself suggests, is more oriented towards the "right to copy", while the continental European doctrine refers to the rights of authors. In this regard, the term 'copyright' might even be inappropriate for the Soviet legislation, which was mostly focused on the moral rights of authors and disregarded the "right to copy". However, referring to the Soviet legislation as the "Soviet copyright law" is a common practice. Although the majority of EU member states employ the continental European system of authors' law, EU legislation still uses the term "copyright law" (rather than the continental European 'author's law') in the Directives and other official texts in the English language. Therefore, the term 'copyright' is also used here, considering it as an English translation of the appropriate terms also covering 'author's rights'.

This section comprises seven chapters reflecting the different levels of developing Georgian copyright legislation to date. The first of these chapters is dedicated to the actual copyright legislation of Georgia, which is compared to the legislations of Armenia, Azerbaijan, Moldova, Russia, and Ukraine. In this regard, three different ways of regulating copyright in the national legislations are to be differentiated from each other: 1) via special legal acts dedicated solely to copyright and related rights, 2) via the civil code, and 3) by mixing both – regulating copyright simultaneously via the civil code and by specific laws. As we will see below, Georgia follows the first approach in this regard.

In Georgia and neighbouring countries, copyright developed differently from Western Europe – in different times and different ways. The concept of copyright (author's right), as such, was created and developed in Western Europe and implemented in Eastern European countries rather later. Accordingly, the comparison between these historical points and ways of development in these regions leads to the explanation of this difference. Furthermore, Georgian legislation has a tradition of implementing different foreign legal systems, balancing them and adjusting them to the local characteristics, which remains the recommended method even now, including the implementation of EU copyright law.

While discussing the development of Georgian copyright law and those of other post-Soviet countries, the Soviet copyright legislation must inevitably be examined (in most cases, the first copyright acts of these countries belong to the Soviet copyright law). In this regard, there are two rather radical approaches to be identified in these post-Soviet countries concerning the discussion of Soviet copyright law: Those texts published before the 1990s praise the Soviet doctrine of copyright as the only righteous approach, whereas those published since the 1990s simply disregard (in most cases) the same Soviet interpretation of copyright or else (in rare cases) are sharply critical from the radical-right perspective of free market economy. Relatively objective analysis of Soviet copyright law is mostly provided in the literatures of non-Soviet countries (basically Western European or U.S.) from the outsider perspective. Since objective analysis of Soviet copyright law from the inside perspective is lacking (if not entirely absent), this makes research based on this objective analysis more important.

Soviet copyright legislation and European copyright law can be considered as the two extremes, radically different from each other. The shift from one to another took place in the 1990s, immediately after the collapse of the Soviet Union. The first level of transition from the Soviet legal system to the European legal standards was quite rapid and, also, radical. Accordingly, certain complications accompanied this process of rapid transition, which need

to be discussed. On the other hand, the overall transition from the Soviet to the contemporary Western system of copyright is ongoing, but has reached more balanced levels that differ between countries, and should therefore be discussed as an ongoing process.

Being a product of this rapid shift from the Soviet to the European system of copyright law, we will examine the legislation of Georgia together with those of other post-Soviet countries, namely Armenia, Azerbaijan, Moldova, Russia, and Ukraine. This parallel examination of the copyright acts of post-Soviet states manifests the common trends which these countries share and the similar directions in which their copyright laws have developed. On the other hand, there are certain differences between the structures and contents of these national laws. The overall picture of developing post-Soviet copyright law can thus be created according to these similarities and differences.

After the adoption of national copyright legislation, another important task was to develop court practice concerning copyright and related rights regulated by the law. Since the law defines general norms and provisions concerning the regulation of copyright in Georgia, the courts interpret these norms and create certain standards that must be used while resolving the practical aspects related to these legal norms. Therefore, in terms of developing national copyright law, the role of court practice is not less important. In this regard, the national court practice of independent Georgia concerning copyright and related rights began developing comparatively late, since the law on copyright was adopted in 1999 (there have also been cases where the court had to use the previous copyright law of Georgian SSR, since the relations to be examined took place before the restoration of independence in 1991). Accordingly, the development of Georgian court practice concerning copyright and related rights is an ongoing process.

The final chapter in this section discusses the differing levels of harmonization between Georgian copyright legislation and EU law. This process can be discussed in two layers: Partnership and Cooperation Agreements (PCAs) between the EC and the post-Soviet

countries in the late 1990s and the subsequent EU Association Agreements (AAs) with Georgia, Moldova, and Ukraine (considered a more advanced step). The first wave of approximation of post-Soviet and EU copyright laws was initiated within the framework of the PCA agreements, and certain significant changes have been made in this regard (the fourth amendment in the Georgian law on copyright and related rights has been mostly important in terms of its harmonization with EU law). The second and more advanced level of harmonization is to be implemented in the near future, within the framework of the Association Agreement.

2. Actual Copyright Legislation of Georgia

Georgian legislation concerning the copyright and related rights mainly involves the Law on Copyright and Neighbouring Rights adopted on 22 June 1999. Georgian Civil Code regulated copyright and related rights before the adoption of this special law 1999, but afterwards the parts regulating copyright and neighbouring rights[508] have been removed from the Code. Besides this law, the following legal acts are also regulating the issues related to copyright: the Constitution of Georgia[509], the Criminal Code of Georgia[510], the Code of the Administrative Offences of Georgia[511] and Georgian Law on Border Measures related to Intellectual Property[512]. Together with these legislative acts, there are also the decrees by the president and the resolutions by the government covering the specific issues related to copyright, which belong to the sub-legislative normative acts (subordinated legislation).

Besides the acts listed above, the provisions of basic international acts are also implemented into Georgian national legislation. In particular, Georgia has ratified the following international acts concerning Copyright: BC - Berne Convention for the Protection of Literary and Artistic Works; WCT - World Intellectual Property Organization Copyright Treaty (1996); WPPT - WIPO Performances and Phonograms Treaty (1996); European Convention on the Cinematographic Reproduction (Strasbourg, 1992); International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, 1961); Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels, 1974); Convention for the

[508] Articles 1017-1099 of the Civil Code of Georgia.
[509] Art. 23, the Constitution of Georgia.
[510] Art. 189, the Criminal Code of Georgia.
[511] Art. 157^1, the Code of the Administrative Offences of Georgia.
[512] Art. 1, Georgian Law on Border Measures related to Intellectual Property

Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (Geneva, 1971).

The Constitution of Georgia guarantees the freedom of intellectual creation and states that the right to intellectual property shall be inviolable.[513] It also states that "the seizure of creative work and prohibition of its dissemination shall be impermissible unless it infringes upon the legal rights of others"[514]. These norms belong to the chapter II, which regulates Georgian citizenship as well as basic rights and freedoms of individual. The general regulation of the intellectual property by the constitution together with the basic human rights and freedoms is a common practice in the former Soviet Union countries. The constitutions of Armenia,[515] Azerbaijan,[516] Moldova,[517] and Ukraine[518] regulate the intellectual property in the similar way.

The model of regulating copyright and related rights with special acts is applied in the former Soviet Union countries (Armenia, Azerbaijan, Moldova, Ukraine). In Armenia and Ukraine, however, copyright is regulated both by Civil Codes and special laws on copyright. As we see, the model of regulating basic rights related to intellectual creation by the certain provisions of the constitution referring to the human rights is applied in these five countries as well. In this regard, the legislations of the post-Soviet countries follow the standard established by the German legislation, which guarantees freedom of expression, prohibits censorship and also guarantees the freedom of art, science, research and teaching.[519] In the constitutions of the post-Soviet countries, as well as other Eastern European countries, the constitutional foundations of copyright law are defined in a similar way. Accordingly, it has been mentioned that German system of copyright law has been used as a model for the

[513] Art. 23 (1), the Constitution of Georgia.
[514] Art. 23 (3), the Constitution of Georgia.
[515] Art. 31, the Constitution of Armenia.
[516] Art. 30, the Constitution of Azerbaijan.
[517] Art.33, the Constitution of Moldova.
[518] Art. 54, the Constitution of Ukraine.
[519] Art. 5, Grundgesetz für die Bundesrepublik Deutschland.

legislations of these countries.[520] Other similarities with German copyright legislation will be discussed below while examining the copyright acts of these post-Soviet non-member states into details.

[520] Matanovac Vučković, in: IIC, p. 31.

3. Overview of the Georgian Legislation before the Soviet Union

The historical sources of Georgian civil law introduce the term 'property', which can be understood as a complete and special dominion of the different goods (objects).[521] The term 'property' ('sakutreba') itself is mentioned for the first time in the source of the 5th century[522]. Georgian law distinguished different types of property according to their character, or the way of their purchase.[523] Semantically, sakutreba includes all forms of property, including movable and immovable, material and immaterial. The concept of differentiating material and mental[524] goods is provided in the source of the 10th century.[525] Georgian law differentiated movable and immovable properties,[526] but the difference between material and immaterial properties was not defined in legal terms.

Although the earliest surviving Georgian literary text dates back to the fifth century[527], the special norms regulating copyright (or authors right) could not be found in the historical sources of Georgian law available so far. This could be explained if we make a comparison between the historical developments of the Western European countries where the concept of copyright (or authors right) has been created, on one hand, and Georgia (as well as the neighbourhood), on the other. Both copyright and authors right have been developed after the invention of the printing press by Johannes Gutenberg in the 15th century.[528] Beforehand the books were written and re-written by hand copying and the audience of literate people was quite limited, while Gutenberg's invention has developed the whole industry of book

[521] Metreveli, Qartuli Samartlis Istoria (History of Georgian Law) p. 310.
[522] Tsurtaveli, part VIII.
[523] Javakhishvili, History of Georgian Law, Book II, p. 249.
[524] German word "geistig" is much closer to the meaning of Georgian word "sulieri" than "mental" or any other English word.
[525] Merchule Giorgi, the Life of Grigol of Khandzta, part 9.
[526] Javakhishvili, History of Georgian Law, Book II, p. 251.
[527] Rayfield, p. 42.
[528] Sreenivasulu N. S, p 483.

printing and created the necessity of regulating this industry even outside of the continental Europe.[529] Accordingly, this necessity led to the creation of the first copyright statute in 1710 - the Statute of Anne[530]. Afterwards the worldwide development of the copyright (authors' rights) legislation has reached the creation of the Berne Convention for the Protection of Literary and Artistic Works in 1886, revised number of times afterwards[531]. As we see, two stages can be differentiated from each other: development of the book printing since the 15th century and, accordingly, the development of copyright (authors right) legislation since the 18th century.

The period since 15th century has been devastating in the history of Georgia: eight invasions by Timur in the years 1386-1403 finally led to the dissolution of the unified state into kingdoms and principalities in the 15th century[532] and the invasions by Shah Abbas in the beginning of 18th century ruined eastern Georgia[533]. In such situation of permanent invasions there were no appropriate conditions in Georgia to develop either the industry of book printing or the legal norms to regulate this industry. Therefore the first Georgian printed book has been published outside of Georgia; this was a Georgian-Italian Dictionary published in Rome, Italy, by Stefano Paolini and Georgian ambassador Nikifor Irbach in 1629,[534] followed by other Georgian books also published in Rome. Georgian King Archil of Imereti, who was in exile in 1682-1688 years, started the foundation of Georgian printing press with the assistance of his friend Johan Gabriel Sparwenfeld – member of Swedish Embassy in Moscow, who asked one of the most eminent makers of typefaces of that time Misztótfalusi Kis Miklós to produce the types.[535] Finally Georgian printing press has been established in

[529] Prasad, Agarwala, p. 118-120.
[530] Deazley, p. 13.
[531] Prasad, Agarwala, p. 142.
[532] Javakhishvili, History of the Georgian Nation, Volume III, p. 296.
[533] Suny, p. 50.
[534] Lombardi, p. 36.
[535] Johanson, p. 106-107.

Moscow and published "Psalter" as the first book in 1705.[536] As we can see, in the 18th century the invasions made it impossible to develop cultural activities in the territory of Georgia and therefore Georgian book-printing has developed outside of the country.

By the beginning of the 18th century the situation in Georgia has become relatively stable, which made it possible to continue the publishing activities. In the years 1708-1709 King Vakhtang IV invited Mihai Ishtvanovich – the Bulgarian master of publishing and pupil of Georgian publisher in Bulgaria Antim Iverieli (who also has sent all the necessary technical equipment from Bulgaria to Georgia) to establish the first Georgian printing house in Georgia in the years 1708-1709.[537] One of the aims of establishing this publishing house was to publish religious literature and spread them among Georgian churches.[538] As we see, the main audience for the published books was still the religious figures and Georgian church. Most of the 19 books printed by the Georgian publishing house in the years 1709-1722 were religious books, one of the exceptions was "the Knight in the Panthers Skin" by Shota Rustaveli printed in 1712.[539] Therefore we can conclude that the printing industry in Georgia by the beginning of XVIII century was not spread so widely to create the necessity of its regulation. In 1722 the publishing activities were stopped because of the Turkish invasion, but in 1749 the publishing house had been renewed by the Georgian King Heraclius II and the Catholicos Patriarch of Georgia Anton I.[540] In 1795 the publishing house has been destroyed together with the whole infrastructure of Tbilisi by the invasion of Aga-Mohammed-Khan.[541] Afterwards there were the publishing activities conducted in western Georgia, but in Tbilisi the publishing works were aborted before 1830s.[542]

[536] Gvaramadze, p. 16.
[537] Imerlishvili, p. 155.
[538] Diasamidze, p. 8.
[539] Imerlishvili, p. 155.
[540] Sarajishvili, p. 5.
[541] Bruchhaus, p. 19.
[542] Khvedelidze, p. 19.

Another significant event organized also by King Vakhtang VI was the codification of Georgian law in the years 1703-1709.[543] King Vakhtang VI established the commission of the scholars who collected the sources of Georgian law available by that time and also elaborated new regulations.[544] Besides the Georgian legal sources, the commission also applied comparative method and translated the Greek (which, itself, was the reception of the Roman law), Hebrew and Armenian legal sources as well, in order to elaborate complete collection from the legal systems available by that time[545]. The norms of intellectual property law, or the copyright law, were not available in any of these sources. The aim of all this work was the elaboration of new and more comprehensive legislation.[546] Moreover, King Vakhtang VI declares that the norms of the foreign laws are not appropriate for Georgia, "as Georgian rules and behaviours are different and they are not similar to the rules and behaviours of other countries… the laws of other sources are incomplete and their codes are not applicable for us, - do not impute it as self-respect and I consider this code as the best of all the others because of its applicability for this country"[547]. As we can see, the applicability for Georgia and relevance to the actual reality in Georgia is considered as a basic principle for the implementation of the norms of foreign legal systems and the elaboration of Georgian legislation. Although the circumstances of harmonizing Georgian legislation with foreign laws by the beginning of XVIII century significantly differs from the current challenges of legal harmonization, the approach used by King Vakhtang VI and his commission three centuries ago still remains worth considering.

After the abolition of the Treaty of Georgievsk and gradual annexation of Georgian territories in 1801-1804 years, Georgia finally became the part of the Russian Empire[548]. Since then the laws of the Russian Empire were operated in Georgia, including the copyright

[543] Feldbrugge, p. 303.
[544] Javakhishvili, History of Georgian Law, Book I, p. 86.
[545] Metreveli, p. 32-40.
[546] Feldbrugge, p. 310.
[547] Javakhishvili, History of Georgian Law, Book I, p. 87-88.
[548] Suny, Armenia, Azerbaijan and Georgia, p. 159.

legislation. In fact, the development of Russian copyright legislation started in the same period. However, the development of copyright law in Russia had a specific character which differentiated it from the way of developing copyright in the West. The first Russian legal act containing the provisions about copyright was the Statute on Censorship (ustav o tsenzure) issued in 1828.[549] The issue of censorship has been very significant in Georgia, as a colony, and affected Georgian literature of the 19th century, as even a short deviation from the official policy has been strictly censored.[550] In this regard, the basic difference between the ways of development is that in the West copyright has been created in order to protect the private interests of the publishers and authors, while in Russia the very first copyright provisions protected the interests of the state. The fact that Russia did not join the newly drafted Berne Convention in 1880s[551] also highlights the typical character of Russian copyright legislation and its difference from the signatories of the Berne Convention. However, the 1880s have been the turning point for Russian copyright legislation, after which it has been developed towards the direction oriented to the West and, as a result, a new comprehensive copyright legislation has been promulgated in 1911.[552] This new law "On Authors Rights", based on Western European principles,[553] can be characterized as quite progressive for the time it has been adopted.[554] Nonetheless, six years later the October Revolution abolished all of the 'tsarist' laws and started to create new legislation where the role of the state as a controller should prevail.

With the declaration of independence in 26 May 1918 the period of being colonized should have been finished and from now on Georgia would have possibility to create the national legislation on its own. This process has started after the declaration of independence and in a period shorter than three years – on the 21st of February 1921 the Constitution of the

[549] Herceg Westren, p. 146.
[550] Kilanava, p. 63.
[551] Štrba, p. 23.
[552] Herceg Westren, p. 163.
[553] Rajan, Copyright and Creative Freedom, p. 87.
[554] Sudarikov, p. 47.

Democratic Republic of Georgia came into effect[555]. We have to mention that the ruling party in the government of Georgia during these years was the Social Democratic Party, which generally implemented its ideas quite demonstratively, even when they were not in compliance with the interests of Georgia[556]. The ideology of Georgian Social Democratic Party was reflected not only in the political processes,[557] but also in the text of the constitution. The rights of the citizen of Georgia defined in the constitution[558] basically involves the civil and social rights. The chapter of "social-economical rights"[559] is also basically oriented on the social rights, mostly on the labour rights. There is only one article in this chapter dedicated to the property right, declaring that "the coercive deprivation of the property or the limitation of the private initiative is possible only for the state and cultural necessity, and, according to the rule defined in the special law, the appropriate remuneration for the deprived property will be paid unless defined otherwise by the law"[560]. As we can see, the constitution of 1921 is basically oriented on the social rights, while the priority was given to these rights and not to the right of private property, which complied with the ideology of the ruling party. Therefore the constitution did not guarantee the protection of copyright and other intellectual property rights. The constitution of the Democratic Republic of Georgia was actually operating only during four days (sic), since on the 25th of February 1921 Georgia has been occupied once again, this time by Soviet Russian forces, and the history of colonialism, including the legislative colonialism, started over.

The similar approach towards the private property is reflected in the Constitution of the Ukrainian National Republic of 1918 as well as in the Constitution of RSFSR[561] of the same year. This approach itself is derived from the Communist view of the private property.

[555] Demetrashvili, p. 6.
[556] Meskhi, p. 17.
[557] Avalishvili, p. 35.
[558] The Constitution of the Democratic Republic of Georgia, Chapter 3.
[559] The Constitution of the Democratic Republic of Georgia, Chapter 13.
[560] The Constitution of the Democratic Republic of Georgia, Article 114.
[561] Russian Soviet Federative Socialist Republic.

According to the Communist Manifesto, "the theory of the Communists may be summed up in the single sentence: abolition of private property"[562]. Therefore, as we have seen, in Georgian constitution there was only a slight indication towards private property, stating that its deprivation is possible for the state and cultural necessity[563]. However, even this approach seems more liberal and less strict comparing to the provision of RSFSR constitution, according to which the private property on the land had been abolished[564]. The same Russian constitution disregards the private property rights while aiming to equalize "all citizens of Russia in the production and distribution of wealth"[565]. In this distinction we also see the difference between the "Bolshevik" and "Menshevik" approaches towards the private property, while the Russian constitution in this regard is much more radical than Georgian. In the Constitution of the Ukrainian National Republic there is also a slight indication to the property within the context of the equality of the citizens regardless to their properties[566] and the statement concerning the state property[567]. On the other hand, the Russian constitution of 1906 (called "Russian Fundamental Laws") regulated the issue of private property in completely different way. Namely, according to these Fundamental Laws: "private property is inviolable. Forcible expropriation of immovable property, when it is required for State or public use, is permissible only upon just and proper compensation"[568]. As we can see, Georgian regulation concerning the private property is much closer to that of the Russian Fundamental Laws of 1906, than to the RSFSR Constitution of 1918. Moreover, such approach is much more balanced and close to the contemporary regulations of the private property in most of the countries, than the radical "Bolshevik" approach of the RSFSR Constitution of 1918.

[562] Marx / Engels, Manifest der Kommunistischen Partei, p. 24.
[563] The Constitution of the Democratic Republic of Georgia, Article 114.
[564] The Constitution of the Russian Socialist Federated Soviet Republic, 1918, Article 3, part (a).
[565] The Constitution of the Russian Socialist Federated Soviet Republic, 1918, Article 79.
[566] The Constitution of the Ukrainian National Republic, 1918, Article 12.
[567] The Constitution of the Ukrainian National Republic, 1918, Article 45.
[568] Russian Fundamental Laws 1906, Article 77.

Comparing the legislations of Armenia, Azerbaijan, Georgia, Moldova, Russia and Ukraine we have the following picture: prior to the 20th century there is no copyright legislation available in any of these countries except Russia. The possible explanation for this could be the differences in the developments of this region, on one hand, and Western Europe where the concepts of copyright and authors right have been created, on the other. This includes the state of permanent warfare and invasions, as well as the lower level of developing printing industry. Even in Russia the development of copyright legislation has started in 1828 and, accordingly, this Russian copyright legislation was applied in the rest of the countries. Independence in the years 1918-1921 was not enough for these countries to develop their national legislations on their own. As for the constitutions, there are only Russian, Ukrainian, and Georgian constitutions to be compared to each other. All of them are influenced by the Marxist ideology and are therefore less oriented on the private property (RSFSR constitution of 1918 is mostly radical in this regard), which makes them different from the Russian Fundamental Laws of 1906 guaranteeing the inviolability of the private property. As the intellectual property (including copyright) belongs to the private property, they were disregarded in the abovementioned constitutions as well.

While reviewing the development of Georgian legislation, we can highlight the *tendency of aspiration towards developing the own national law*, whenever being relieved (for a short term) from the permanent invasions and the state of warfare. This tendency is presented most explicitly in the principles of codification of Georgian laws in 1903-1709 organized by King Vakhtang VI. The first typical characteristic of this codification is the *elaboration of the currently available legal systems, adjusting them to each other* (even obviously different legislations such as Greek and Hebrew laws) and *providing their synthesis*. The second important principle expressed in the declaration by King Vakhtang VI is that this codified and synthesized *law has to express the local specificities, be relevant for Georgian reality and*

be applicable in Georgia.[569] Even in the constitution of Georgian Democratic Republic of 1921 we see this principle expressed, while, regarding the regulation of the private property[570], the legislator tries to find a balance between the radicalism of RSFSR constitution of 1918 and the liberal approach of Russian Fundamental Laws of 1906, as well as the Marxist ideology of the ruling Social Democratic Party and the actual reality in Georgia by that time. This principle of Georgian scholars' commission for codification should be considered even nowadays while implementing the foreign legal systems and legislations.

[569] Javakhishvili, History of Georgian Law, Book I, p. 87-88.
[570] The Constitution of the Democratic Republic of Georgia, Article 114.

4. Copyright Law in Georgian Soviet Socialist Republic (Georgian SSR)

Georgia belonged to the USSR for 70 years (from its occupation on 25 February 1921 until the restoration of independence on 9 April 1991). Accordingly, Soviet legislation prevailed in Georgia during this period. Formally, the Georgian SSR had its own legislation, including the constitution, codes, and other normative acts. However, this legislation belonged to the common "network" of the Soviet law, in general. The Soviet law was an original phenomenon, having its own ideological backgrounds. These backgrounds and tendencies extended to all the legislations of the union republics, including the Georgian SSR.

4.1. Ideological Backgrounds of the Soviet Copyright Law

The Soviet legislation, including copyright and the law of intellectual property rights, in general, was based on the ideological backgrounds of the Communist Party of the Soviet Union, which was defined as Marxism-Leninism. General communist attitude towards the private property is expressed most laconically in the Communist Manifesto, stating that "the theory of the Communists may be summed up in the single sentence: Abolition of private property"[571]. The ideology of communism challenges the whole concept of private property, since it exists only in the relations based on the capital (capitalist society).[572] Because of the logic of historical development of the society, the private property is seen as a threat to the social order, an abolition of which is therefore inevitable.[573] According to Marx, this abolition (Aufhebung) of the private property is considered as the emancipation of human

[571] Marx / Engels, Manifest der Kommunistischen Partei, p. 24.
[572] Marx, Manuskripte, p. 90.
[573] Engels, Grundsätze des Kommunismus, p. 23.

senses and qualities.[574] After this abolition the society is supposed to "take all forces of production and means of commerce… out of the hands of private capitalists and will manage them in accordance with… the needs of the whole society"[575].

As we can see, an ultimate goal of communism is to reach the ideal condition of the society (communist society) where the private property is even useless. From this perspective the communist ideology challenges not only the concept of private property, but also the concept of the law. In the Communist Manifesto the law is referred as one of the "bourgeois prejudices"[576] enforced upon the proletariat. Moreover, in the same Manifesto, while addressing the bourgeoisie, the law is defined in a following manner: "your jurisprudence is but the will of your class made into a law for all, a will, whose essential character and direction are determined by the economic conditions of existence of your class"[577]. Considering this, the general concept of copyright is challenged by the communist ideology from two perspectives: first, because it belongs to the private (although intellectual) property and, second, because it belongs to the law. It is also worth mentioning, that originally copyright has been invented as a tool of censorship.[578] According to Marxist view, copyright has been created and used by early capitalism.[579] Therefore the copyright, in general, is harshly challenged by the Communist view.

The Communist society, however, is considered an ultimate goal which can not be reached at one stroke, but with the gradual transformation.[580] Logically, there is a certain period to be overcome from the capitalist to the communist society, where there is not even a need either for the private property or for the law and, accordingly, copyright. During this transformation period from capitalism to ultimate communism, according to Marx, the state

[574] Marx, Manuskripte, p. 91.
[575] Engels, Grundsätze des Kommunismus, p. 27.
[576] Marx / Engels, Manifest der Kommunistischen Partei, p. 20.
[577] Marx / Engels, Manifest der Kommunistischen Partei, p. 27.
[578] Rajan, Copyright and Creative Freedom, p. 1.
[579] Söderberg, Copyleft vs. Copyright, History of Copyright.
[580] Engels, Grundsätze des Kommunismus, p. 26.

should be defined as the revolutionary dictatorship of the proletariat[581]. However, Marx does not describe the details of functioning of this 'revolutionary dictatorship', neither the practical issues, nor the legislative foundations. Therefore, after the October Revolution in 1917, the complicated task of adopting the legislation of the newly created 'revolutionary dictatorship' was left up to the Bolshevik leaders.[582] Lenin had to define the directions of the development before "withering away of the state"[583], based on the experiences of 1905 and 1917 revolutions. He also had a practical task of adopting the legislation of the newly created state, including the numerous decrees on copyright and author's rights protection in the years 1917-1922.[584] Lenin differentiated two basic stages of communism: the first was an immediate state following a revolution and the second was the "higher phase of communism"[585] which should lead to the withering away of the state, in general. Contrary to other Marxist theoreticians (i. e. Bukharin)[586], Lenin insisted on strengthening "the apparatus of coercion, that is, the state machine"[587] during this first stage. Although the legislation is not directly mentioned by Lenin in "State and Revolution", it is apparent from the theoretical system of Lenin and other Bolshevik theoreticians, as well as from the practice since the revolution of 1917, that 'the apparatus of coercion' and 'the state machine' meant legal control as well.[588]

An obvious modification of Marxist ideals of the Communist society (if not a deviation from it) according to the practical needs of the newly created Soviet state, lately referred as Marxism-Leninism, was reflected in the Soviet copyright doctrine as well. This general legal doctrine allowed to compromise temporarily from the 'orthodox' Marxism, in order to strengthen the post-revolutionary Soviet state. This compromise doctrine was 'justified' in

[581] Marx, Kritik des Gothaer Programms, p. 29.
[582] Mamlyuk, p. 539.
[583] Lenin, p. 121.
[584] Mamlyuk, p. 538.
[585] Lenin, p. 136.
[586] Mamlyuk, p. 540.
[587] Lenin, p. 67.
[588] Mamlyuk, pp. 540-541.

the Soviet intellectual property law complied with the following logic: "protecting intellectual property rights was indispensable to attract trade, and trade was indispensable to strengthening the Soviet state; likewise, whatever was necessary to strengthen the Soviet state was consistent with Marxist-Leninist tenets"[589]. Accordingly, "the consolidation and development of the socialist economic system and socialist property, the creation of the material-technical basis for communism and the greater satisfaction of the material and spiritual needs of citizens"[590] has been considered the aim of the Soviet civil legislation, in general, and the Soviet copyright law, in particular.

Although an existence of the copyright law has temporarily been allowed for the 'initial phase of communism' in the Soviet Union, this law had its original character which differentiated it from the 'capitalist' copyright law. This difference was the following: Soviet copyright primarily had to serve to the public, instead of private interests. Namely, instead of "boosting the ego of the author…", it had to "assure a planned growth of culture and to influence a public opinion"[591]. Moreover, according to Lenin, "literature and art could not be private matters, but, rather, were a means to educate the populace into new Soviet people".[592] In other words, copyright law should serve not to the private needs of the certain author, or other owner of the copyright, but to the public needs and interests. In this regard the Soviet doctrine of *avtorskoye pravo*[593] is so much different from the concept of 'copyright', as such (which semantically and also conceptually means "right to copy" in the context of the printing press[594]), that it is not quite adequate to refer to it as a copyright, even in English language. Continental European concept of 'authors right' (French *droit d'auteur,* or German *Urheberrecht*) is much more relevant for the Soviet *avtorskoye pravo*, as it emerges with the

[589] Mamlyuk, p. 562.
[590] The Project of the Principles of Civil Legislation of the Soviet Union and the Union Republics, Section I.
[591] Levitsky, Introduction to Soviet Copyright Law, p. 15.
[592] Elst, p. 11.
[593] Authors right (Rus).
[594] Newcity, p. 3.

creation of the work, regardless of its registration.[595] At the same time the original censoring feature of copyright[596] had been maintained and even steepened by the Soviet copyright regime, since it differentiated the socially useful works of copyright from the works which were "socially useless" and "socially dangerous"[597]. Based on this, Soviet copyright legislator aimed at the following results: first, to create a system of incentives in order to stimulate the creation of new works of high quality and, second, to establish certain legal prerequisites ensuring the widest possible dissemination of these works.[598]

Due to the characteristics of developing Soviet copyright law we have to differentiate the initial stage from the late phase. At the early stage, Soviet law, including copyright, was considered a temporary tool of strengthening the state before reaching the "higher phase of communism"[599], or, at least, before the creation of socialist international law[600]. At the later stage it became obvious that none of these occasions were predictable, at least in the nearest future, and Soviet copyright legislation had to come to certain compromises, such as the accession of the USSR to the Universal Copyright Convention in 1973 and adjusting Soviet copyright law to the UCC principles thereof.[601] In the initial phase the same regime was applied to the domestic and foreign works, while later on, after the accession to the UCC, the dual system was created which treated the domestic and foreign works differently.[602] Therefore the Soviet accession to the UCC was considered a turning point of historical significance, after which USSR established reciprocal relations with over 60 nations and had to accept the international standards.[603] The legal manoeuvre of adopting the UCC before the 1971 Paris amendments (which gave even more exclusive rights to the authors and restricted

[595] Levitsky, Introduction to Soviet Copyright Law, p. 11.
[596] Rajan, Copyright and Creative Freedom, p. 1.
[597] Levitsky, Introduction to Soviet Copyright Law, p. 14.
[598] Levitsky, Introduction to Soviet Copyright Law, p. 12-13.
[599] Lenin, p. 136.
[600] Mamlyuk, pp. 541-442.
[601] Newcity, p. 44.
[602] Mamlyuk, p. 564.
[603] Newcity, pp. 44-45.

licenses)[604] did not help much, since the trend of being urged to accept the 'capitalist' international standards became inevitable.

We can observe an obvious contradiction between the orthodox Marxism, on one hand, and Leninism, lately developed to Bolshevism, on the other. According to Marxism, law[605] and property[606] are the instruments of capitalism and they both have to be abolished. According to Bolshevik practice and even theory, the state is super-strengthened and the same state is the owner-in-chief of the properties, including the intellectual property and copyright. As for the copyright, its censoring character[607], claimed to be created by capitalism[608], is also super-strengthened by the Soviet state and it is harshly restrictive at the same time. Besides that, it was impossible even theoretically to exist in the 'capitalist' world network of law and private property without having any of them. It referred also to the copyright law, since an accession of the USSR to the UCC created numerous legal and practical problems[609] and caused historical changes[610] in Soviet copyright law. Creation of a communist law and Bolshevik legal order on the international level, or a socialist international law, which should resolve this theoretical crisis and self-contradiction[611], did never happen. The prediction of Marx and Engels of creating the communist society, or even Lenin's prediction of reaching the "higher phase of communism"[612], never came true either. On the contrary: the practice of the Soviet state as a strict legal watchdog and owner-in-chief of the property rights, including copyright, contradicted increasingly with the ideals of the Communist society preached by Marx and Engels. Besides that, the compromises by the USSR to the 'capitalist' world, one of the examples of which was the reform of the Soviet copyright law for the

[604] Mamlyuk, p. 564.
[605] Marx / Engels, Manifest der Kommunistischen Partei, p. 27.
[606] Marx / Engels, Manifest der Kommunistischen Partei, p. 24.
[607] Rajan, Copyright and Creative Freedom, p. 1.
[608] Söderberg, Copyleft vs. Copyright, History of Copyright.
[609] Mamlyuk, p. 564.
[610] Newcity, p. 44.
[611] Mamlyuk, pp. 541-442.
[612] Lenin, p. 136.

accession of USSR to the UCC, became more and more obvious. Accordingly, Soviet copyright theory and law appeared to deviate from the 'orthodox' Communist ideas of Marx and Engels and, with this regard, become self-contradictory.

4.2. Copyright Legislation in the Soviet Union

October Revolution of 1917 entailed historical social change in the former Russian empire including the radical modification of the law. The new revolutionary government disregarded all obligations undertaken by the previous imperial as well as provisional governments[613] and started the new legal history of the newly emerged state. Literature and art, in general, because of its influence on the public, was considered important by the Bolshevik party and it was also important to make it serve the purposes of the proletarian movement.[614] Therefore an adoption of new Soviet copyright legislation has been started as early as on 29th December 1917, when the first Soviet copyright decree "On State Publishing" had been issued by the Central Executive Committee.[615] With this first decree the State Committee on Education nationalized the works of certain Russian authors and declared a state monopoly on their publication, in other words – took these works "from the sphere of private property to the sphere of the community"[616]. This first Soviet legislative text concerning copyright already shows the trend which the Soviet legislation was going to follow for the upcoming years and decades. The same decree initiated the flow of nationalization of the objects of copyright.

The trend of nationalizing the works of Russian authors was continued by another decree issued on 26 November 1918, according to which the government nationalized "all works of science, literature, music, or art, whether published or unpublished, no matter in whose

[613] Levitsky, the Beginnings of Soviet Copyright Legislation, p. 49.
[614] Newcity, p. 17.
[615] Levitsky, Introduction to Soviet Copyright Law, p. 28.
[616] Newcity, p. 17.

possession they were"[617]. The difference between these first and second decrees is that the second one applied to all works of science, literature, music and art of the authors, both living or deceased.[618] According to this decree, the publication, circulation, or public performance of all the nationalized works needed an express permission of the People's Commissariat of Education.[619] The decree created the basis for the issuance of several other decrees during the next years in which the works of the prominent Russian musicians were declared to be the objects of the state monopoly.[620] This flow of decrees was generally intended to nationalize the works of art, literature, and music, by which it expressed the basic communist idea of owning the intellectual property not by the creator of this work, but by the Socialist society, at large.[621]

In its early years the newly emerged Soviet state faced numerous challenges in national and international levels which were reflected in the legislative acts of that period as well. In the international arena of 'capitalist' world RSFSR was a single actor with its different ideology and, therefore, it had to accept the common international standards, at least during the relations with other states. In the domestic level the country faced significant economic problems, so that in March 1921 Lenin had to initiate the New Economic Policy (NEP) in order to revive the economy, although it caused controversy within the state because of its incompatibility with the Marxist theory, while it allowed the cooperation with the hostile 'capitalist' countries.[622] Therefore, the imposition of NEP was a significant compromise and deviation from the 'orthodox' communist ideology which caused certain ambiguity and self-contradiction. The NEP tendency of approximating the law to Western standard was also reflected in the Soviet copyright legislation,[623] since in May 1922 the laws governing

[617] Levitsky, the Beginnings of Soviet Copyright Legislation, p. 51.
[618] Newcity, p. 18.
[619] Levitsky, Introduction to Soviet Copyright Law, p. 32.
[620] Newcity, p. 19.
[621] Levitsky, Introduction to Soviet Copyright Law, p. 69.
[622] Mamlyuk, p. 546.
[623] Czychowski, p. 122.

invention and copyright were revised in order to provide property incentives to the enterprising inventor and author.[624] Accordingly, an ambiguity and contradiction in the ideology of the newly emerged state caused by NEP also affected copyright legislation.

In 1923 the Civil Code of RSFSR was enacted (adopted in October 1922, came into effect in January 1923), but it did not contain any part about copyright.[625] Therefore, in order to satisfy the need of codifying the copyright law, a draft of the fundamental principles of copyright law was endorsed in 1925 by the Central Executive Committee and the Council of the People's Commissars, which officially embodied the Communist concept of copyright[626] and based on which the Soviet republics promulgated their own copyright acts, and the RSFSR itself issued its own copyright act in October 1926.[627] Although the tendency of softening the radicalness of the Communist ideology was reflected in this act as well, it also reflected several principles which were typical for the Soviet concept of copyright, such as "freedom of translation" principle, inherited from Tsarist copyright law, according to which the government intended to unify the diverse national cultures available in multiple languages, which necessitated a policy of total freedom of translation.[628] These basic principles were left intact in the new copyright act of 1928, which although introduced certain new rules, such as an extension of the copyright protection from twenty-five years to the entire lifetime of the author, and a distribution of the jurisdiction between the federation and the union republics.[629]

The copyright act of 1928 stayed in force during more than three decades. However, the new developments caused several changes in it and the act had been amended until it became obvious that the attempts to modernize this act were no longer adequate.[630] This led to the

[624] Newcity, p. 20.
[625] Levitsky, the Beginnings of Soviet Copyright Legislation, p. 59.
[626] Bohmer, p. 1.
[627] Levitsky, Introduction to Soviet Copyright Law, p. 34.
[628] Newcity, p. 22.
[629] Levitsky, Introduction to Soviet Copyright Law, p. 36.
[630] Newcity, p. 29.

fundamental reform of the civil legislation in the beginning of 1960-ies[631], as a result of which the Fundamentals of Civil Legislation was promulgated in 1961 and came into force in May 1962.[632] With an adoption of the Fundamentals the early stage of the Soviet copyright legislation was ended and the basis for next level had been created. Like the previous one (adopted in 1928), these new Fundamentals were also aimed to provide the basis for the new civil codes of the fifteen republics in the Soviet Union.[633] An adoption of these fundamentals has to be considered a part of reforms initiated in the Soviet copyright law before the accession to the UCC.

Accession of the USSR to the Universal Copyright Convention in 1973 had been a turning point for the development of the Soviet copyright law. As the USSR had been the world's largest producer and consumer of printed works by that time,[634] this accession certainly was an event of an international significance. In order to be accessed to the UCC, certain fundamental amendments had to be made in the Soviet copyright legislation. These amendments turned out to have disruptive effect on the domestic copyright system, since it questioned the validity of certain fundamental concepts introduced in 1961-1964, and also caused unexpected difficulties regarding their interpretation.[635] Although the USSR exercised a legal manoeuvre and joined the UCC before the 1971 Paris amendments went into force, which made the exclusive rights and license rules even stricter,[636] it did not help much to save the Soviet copyright legislation from the necessity to make hasty and incomplete changes,[637] which finally caused the greater inconsistence and ambiguity in the Soviet copyright law. One of the results of these changes, for example, was a creation of dual system, according to which Soviet legislation applied for the domestic works while the

[631] Levitsky, Soviet Copyright Law at the Crossroads p. 16.
[632] Levitsky, Introduction to Soviet Copyright Law, p. 58.
[633] Levitsky, Copyright, Defamation, and Privacy in Soviet Civil Law, p. 3.
[634] Newcity, p. v.
[635] Levitsky, Soviet Copyright Law at the Crossroads p. 5.
[636] Mamlyuk, p. 564.
[637] Levitsky, Soviet Copyright Law at the Crossroads p. 6.

foreign works were governed by the international law.[638] Due to these changes and amendments, Soviet copyright law deviated even further from its initial Communist ideology and principles.

A typical nature of Soviet copyright law is also expressed in the rule of distributing the jurisdiction between the federation and the union republics. According to the Copyright Act of 1928 the republics were empowered to establish their own rules concerning the variety of issues.[639] The Fundamentals of Civil Legislation of 1961 also empowered the union republics to establish their own rules.[640] This might create an impression that the union republics were able to define their domestic laws independently. However, there was a supremacy clause in the Soviet Constitution, according to which, "in case of contradiction between a law of a Union Republic and a law of the Union, the law of a Union should prevail",[641] and, accordingly, in practice, the principles dictated by the USSR government had to be adopted by the union republics.[642] Therefore, although the union republics had an official right to define their domestic legislations on their own, in fact these legislations did not significantly differ neither from the law of the union, and, accordingly, nor from each other.

4.3. Copyright Legislation of Georgian SSR

Differently from the content and the general title of the whole chapter ("Copyright Law in Georgian Soviet Socialist Republic") referring to the copyright legislation *in* Georgian SSR, here we refer to the copyright legislation *of* Georgian SSR. The difference between "in" and "of" is important due to the variety reasons. First, copyright legislation of Georgian SSR was just a product of the developments in Soviet copyright law and implementation of the

[638] Mamlyuk, p. 564.
[639] Levitsky, Introduction to Soviet Copyright Law, p. 36.
[640] Levitsky, Introduction to Soviet Copyright Law, p. 58.
[641] 1936 Constitution of the USSR, Article 20.
[642] Newcity, p. 29.

guideline copyright principles of the Soviet Union. Besides that, the union Fundamentals were indirectly applied in Georgian SSR as well. Therefore, *copyright legislation in Georgian SSR* does not equal to the *copyright legislation of Georgian SSR*: the former is relatively broader and includes the latter.

Being a union republic, the Georgian SSR was entitled to adopt its copyright legislation on its own. However, it was obligatory to comply with the union Fundamentals which was considered the basis for the domestic legislations.[643] Georgian act on copyright was adopted in 30th of August 1929.[644] Full name of the act was the "Ordinance of the Central Executive Committee and the Soviet of People's Commissariat of Georgian SSR on the Approval and Enactment of the Copyright", which enacted "Regulation on Copyright". This is the first Georgian act concerning copyright in Georgian language, which had to define legal vocabulary and terms in the field of copyright law, intended to be used during the following decades and even nowadays. Although several terms have been changed or added due to the development of technology (such as "audiovisual work"[645] instead of "film tape"[646]), most of the language and vocabulary used in this regulation is still usable in Georgian copyright legislation even nowadays.

The Regulation on Copyright comprises 47 articles and has significantly consistent structure, comparing to the RSFSR Copyright Act of the previous year which was applied as a sample. In the beginning the regulation applies the 'territoriality principle' and refers to the works which are published or expressed in any objective form only on the territory of Georgian SSR and the union of other SSR's.[647] This territoriality principle was applied in the Soviet copyright law before the creation of the dual system because of the accession to the UCC.[648]

[643] Levitsky, Introduction to Soviet Copyright Law, p. 35.
[644] Newcity, p. 24.
[645] Art. 4, b), Georgian Law on Copyright and Neighboring Rights.
[646] Art. 4, Regulation on Copyright of Georgian SSR.
[647] Art. 1, Regulation on Copyright of Georgian SSR.
[648] Mamlyuk, p. 564.

According to the Regulation, copyright applies to scientific, literary, and artistic works,[649] not to the related rights, unlike contemporary Georgian copyright legislation[650]. Being in compliance with the Fundamentals of 1928, which significantly deviated from the 'orthodox' Communist view, the Regulation allows an author to use his/her name in order to receive material profit[651]. On the other hand, it excludes the translation of a work from the infringement of copyright[652], according to the general principle of Soviet copyright law which guaranteed freedom of translation[653]. Another typical rule of the Soviet copyright law, which is reflected in this act, is the provision concerning the royalty, which had to be not less than a minimum rate.[654] The Regulation defines several terms of protection for theatrical, cinematographic (10 years),[655] photographic works (5 years) and their collection (10 years),[656] as well as a general lifetime protection, and the protection during 15 years after the death of the author.[657] The Regulation defines the regime of formation of the publishing contract[658] and the staging contract[659], which is typical for the Soviet copyright system. Finally, it imposes criminal law sanctions for the infringement of copyright, as well as financial sanctions. [660]

The Regulation on Copyright of 1929 was not the only act regulating the issues concerning copyright in Georgian SSR. There were several other acts such as the Regulation by the Peoples Commissariat of Education on the rule of paying royalties to the authors (adopted in 1932). Generally, the issue of royalty was considered significant as it was the only source of income for the authors, commonly defined as a monetary remuneration to the individuals, or

[649] Art. 4, Regulation on Copyright of Georgian SSR.
[650] Art. 45, Georgian Law on Copyright and Neighboring Rights.
[651] Art. 8, Regulation on Copyright of Georgian SSR.
[652] Art. 10, Regulation on Copyright of Georgian SSR.
[653] Newcity, p. 22.
[654] Art. 24, Regulation on Copyright of Georgian SSR.
[655] Art. 12, Regulation on Copyright of Georgian SSR.
[656] Art. 13, Regulation on Copyright of Georgian SSR.
[657] Art. 18, Regulation on Copyright of Georgian SSR.
[658] Art. 22, Regulation on Copyright of Georgian SSR.
[659] Art. 29, Regulation on Copyright of Georgian SSR.
[660] Art. 45, Regulation on Copyright of Georgian SSR.

to the organizations, which are the subjects of copyright[661]. Although the concept of Soviet 'authors right' is independent of registering the work,[662] the fact of registration was still considered as a proof for calculating the date of its origin,[663] and therefore the rule of registration was defined by the separate acts of Peoples Commissariat of Education. The same Commissariat issued numerous circulars concerning copyright. The Civil Procedures Code of Georgian SSR attributed the authors and their heirs to the first category of the claims.[664] The Criminal Code imposed sanctions for the infringement of copyright.[665]

The Regulation on Copyright of 1929, with its attributed legislation discussed above, consisted of the copyright law in the Georgian SSR during the initial stage of the Soviet copyright. The following stage was marked by the adoption of the Fundamentals of Civil Legislation in 1961. Accordingly, the union SSRs adopted their domestic copyright legislations. However, this time the legal technique was different: instead of adopting the separate copyright acts, most of the union republics inserted the parts regulating the issues of copyright in their civil laws. Georgian SSR also followed this trend and enforced the Civil Code in 1965, the fourth chapter of which was dedicated to the copyright law. This chapter was structurally similar to the Copyright Regulation of 1929, although certain novelties have been added: in the beginning it defined the objects of copyright and types of work; then it imposed the territoriality principle; afterwards it referred to the rights of authors, co-authors and compilers; the issues of duration was regulated in the following part; it differentiated the license contract and contract on delivering the work; finally, it referred to the graphic works, architectural, engineering and other technical plans.[666]

[661] Barabadze, p. 3.
[662] Levitsky, Introduction to Soviet Copyright Law, p. 11.
[663] Art. 17, Regulation on Copyright of Georgian SSR.
[664] Art. 310,a),4, the Civil Procedures Code of Georgian SSR,.
[665] Art. 196, the Criminal Code of Georgian SSR.
[666] Dzamukashvili et al, pp. 8-12.

The copyright legislation of Georgian SSR is *mostly criticized from the viewpoint of free market economy*, since it reduced the economic rights of the authors only to the royalties[667] and did not refer to the neighbouring rights of the authors[668]. The concept of neighbouring rights refers to the rights of performers, producers of phonograms or videograms, and broadcasting organizations.[669] Georgian copyright legislations (both of 1929 and 1965) certainly could and did not protect the rights of performers. On the other hand, the concepts such as phonograms and videograms came into existence according to the development of modern technology, while the Soviet legislation stayed old-fashioned in this regard. The trend of reducing the economic rights to the royalties was purely ideological and derived from the common Soviet understanding of royalty as the only source of income for the socially useful work performed by the author.[670] Therefore, such criticism should be directed not only to the copyright legislation of the Georgian SSR, but generally to the Soviet copyright law.

4.4. Copyright Legislations of the Soviet Socialist Republics

A typical character of Soviet copyright law is reflected in the rule of its adoption, which was the following: at first, the USSR Central Executive Committee and Council of People's Commissars had adopted the first copyright statute in 1925, repealed and replaced by a new statute in 1928[671]. This statute formed the fundamental principles of the copyright law all over the union, according to which the union republics have enacted their domestic copyright acts.[672] As a result, these republics were entitled to develop their own copyright legislations, but they, on the other hand, had to be in compliance with the all-union

[667] Dzamukashvili et al, p. 7.
[668] Dzamukashvili et al, p. 12.
[669] Art. 46,1, Georgian Law on Copyright and Neighboring Rights.
[670] Levitsky, Introduction to Soviet Copyright Law, p. 70.
[671] Newcity, p. 23.
[672] Levitsky, Introduction to Soviet Copyright Law, p. 35.

fundamentals. RSFSR was surely the pioneer to adopt domestic copyright act in October 1928, and then the rest of the republics followed: Ukrainian SSR adopted its domestic copyright act in February 1929, followed by Georgian SSR in August of the same year, and Armenian SSR adopted the copyright act in February 1930.[673] Azerbaijan SSR, however, chose the different tactic and inserted the copyright legislation as a part of the Civil Code (sections 461-468).[674] Moldavian SSR, which was formed in 1940, applied the copyright law of Ukrainian SSR of February 1929[675].

As we can see, RSFSR was the first among the union republics to adopt its domestic copyright act and this act had practically been used as a sample by the rest of the republics. This copyright act, which consists of 31 articles, is adopted by the Central Executive Committee and the Soviet of the National Commissars. It starts with the regulation concerning royalties,[676] which was one of the basic elements of the soviet copyright law, then it defines the term of regulation,[677] afterwards it regulates another typical element of the Soviet copyright law which is the publishing contract,[678] and finally it defines the rules for transferring the copyright.[679] Being the first domestic copyright act ever adopted in the Soviet Union, it has certain defects such as an ambiguous structure and inconsistency. In fact, if we compare the copyright act of RSFSR with that of the Georgian SSR, we will find the latter much more consistent and relatively broader - it consists of 47 articles and covers certain issues, which are missed in the former (such as the duration of copyright after the death of the author).

[673] Newcity, p. 24.
[674] Levitsky, Introduction to Soviet Copyright Law, p. 35.
[675] Newcity, p. 24.
[676] Art. 2, RSFSR copyright act.
[677] Art. 8, RSFSR copyright act.
[678] Art. 17, RSFSR copyright act.
[679] Art. 30, RSFSR copyright act.

The following stage of the Soviet copyright law was started by the adoption of the Fundamental Principles of the Civil Legislation in 1961.[680] This stage, however, was characterized by a different tactic implying the insertion of the copyright legislation in the civil codes, just like in the civil code of Azerbaijan SSR did before[681]. RSFSR was a pioneer at this stage as well and adopted its Civil Code in 1964, part IV of which was entirely dedicated to copyright. These provisions are much broader (comprising 44 articles) and more consistent than the previous copyright legislation of RSFSR. Part IV starts with defining the works subject to copyright.[682] Afterwards, it applies the territoriality principle,[683] co-authorship,[684] copyright of organizations,[685] and the issue of translation[686]. Unlike the previous RSFSR copyright legislation, it also regulates the issue of duration of the copyright[687]. Finally it defines the rules for author's contract[688] and the liability for the infringement of copyright[689]. Like the initial stage of the development of Soviet copyright law, the law of RSFSR had been used as a sample also during the late stage and, as we can see, the structure and content of the copyright legislation in the civil code of Georgian SSR is quite similar to that of the RSFSR.

In spite of the discretion of the union republics to define their domestic copyright legislations on their own, it is obvious that the Soviet copyright law was a unified system with common basic principles reflected in all of the domestic laws. Therefore, while comparing the copyright legislations of the union republics to each other, we see the similarities both in terms of structure and content. The ideological crisis, which started in the first stage of developing Soviet copyright law and deepened on the next stage, is typical for each of the domestic copyright legislations as well. At the first stage, a symptom of this crisis

[680] Newcity, p. 29.
[681] Levitsky, Introduction to Soviet Copyright Law, p. 35.
[682] Art. 475, RSFSR Civil Code.
[683] Arts. 477-478, RSFSR Civil Code.
[684] Art. 482, RSFSR Civil Code.
[685] Art. 484, RSFSR Civil Code.
[686] Arts. 489-490, RSFSR Civil Code.
[687] Arts. 496-498, RSFSR Civil Code.
[688] Arts. 503-507, RSFSR Civil Code.
[689] Arts. 511-512, RSFSR Civil Code.

was the deviation from the Communist ideology and creation of a copyright legislation, although with its typical provisions and principles. At the later stage, the Soviet legislation had to deviate even from these typical provisions and principles in favour of the Universal Copyright Convention and other 'capitalist' standards. Such inconsistencies and self-contradictions became more frequent in not only copyright legislation, but also in the Soviet law, in general and, moreover, in the Soviet ideology, which finally led first to Perestroyka and, afterwards, to the collapse of the Soviet Union.

5. Shift from the Soviet Legislation to the Law of independent Georgia

Perestroika under Mikhail Gorbachev, the last General Secretary of the Central Committee of the Communist Party of the Soviet Union, had been the final compromise and deviation from Communist ideology before the full collapse of the Union and, at the same time, an attempt at reforming the existing socialist system of state ownership and management towards political and economic liberalization.[690] However, this restructuring did not save the Soviet Union from collapse in 1991, after which the newly independent republics faced the necessity of adopting their own national legislations to be compliant with international standards. The international pressure to bring these national legislations into line with Western legal (including copyright) standards was significant.[691] Therefore, the revision of existing laws and the adoption of new national legislations occurred quite rapidly in these newly independent states during the early 1990s. On the other hand, the changes during this period were also indigenous, with reform proposals originated from the local working groups.[692] Accordingly, the reforms of the early 1990s can be characterized by two driving impulses: on one hand, the 'natural' need to revise the legal systems of the previous regimes, and international (namely Western) pressure, on the other.[693]

The following stage of transitions, started in late 1990-ies, had been characterized as *legal transplantation* and *vertical harmonization*.[694] "Legal transplantation" is a term developed by Alan Watson in comparative law[695] and refers to borrowing law from another legal system[696]. "Vertical harmonization" refers to "transformation of abstract upper layer requirements into

[690] Stephan, p. 35.
[691] Haigh, p. 251.
[692] Mamlyuk, p. 566.
[693] Pilch, p. 82.
[694] Mamlyuk, pp. 566-567.
[695] Cairns, p. 638
[696] Chen-Wishart, p. 1.

more concrete lower layer requirements"[697]. Two basic elements typical for the previous stage of reformation had been significant in this new stage as well. Firstly, the new types of relations and the recent developments in the post-Soviet society inevitably needed to be regulated by the new legislation, while the previous Soviet laws were unable to regulate them any longer. On the other hand, the pressure from the international society, in order to implement their rules and harmonize national legislations of the newly independent countries with their established standards, was also significant and depended on the international positions of these countries. In the field of intellectual property and copyright it basically referred to the principles of TRIPS Agreement and Berne Convention, as well as the standards of the WTO[698].

Russian Federation – the central state of the former Soviet Union had to follow this new trend of transitions as well. In July 1993 the law of the Russian Federation on Copyright and Related Rights was adopted. This law had been amended in December 2002.[699] Currently the field of intellectual property rights, including copyright, is regulated by the Civil Code.[700] Similarly to Russian Federation, Ukraine and Moldova also adopted their national copyright legislations in 1993 and 1994.[701] However, later on Moldova adopted new Law on Copyright and Neighboring Rights in July 2010 while Ukraine amended the law of 1993 several times[702]. In Armenia the Law on Copyright and Related Rights was first adopted in May 1996 and afterwards the draft of the new Civil Code also provided the provisions regulating the same field, but finally the decision has been made in favour of the new and adequate law on Copyright and Related Rights adopted in December 1999, which was once again replaced by a new law in 2006.[703] The law of Azerbaijan Republic on Copyright and Related Rights have

[697] Yngström & Carlsen, p. 33.
[698] Mamlyuk, p. 567.
[699] O'Connor, p. 1013.
[700] Civil Code of the Russian Federation, Part IV.
[701] Pilch, p. 83.
[702] Law of Ukraine on Copyright and Related Rights.
[703] Abovyan, p. 13.

been adopted in June 1996 and amended several times since then, the final amendment of which took place in April 2013.[704]

Georgia followed the same trend in the 1990s. Although Georgia is considered the first country among the post-Soviet republics which has adopted the acts regulating the property rights,[705] the copyright legislation, in particular, has been adopted later on. The fourth part of the Civil Code of Georgia, which was adopted on June 1997, regulated the field of intellectual property including copyright.[706] Although structurally the later Soviet and early post-Soviet copyright legislations seem likewise, since in both versions of the Civil Codes the intellectual property right and copyright were regulated by the fourth parts, the contents of these codes and provisions were significantly different from each other. However, two years later the regulation of copyright and related rights in a separate act has been considered the better method. As a result, the provisions of the Civil Code were cut-pasted in the new act and the Law on Copyright and Related Rights of 1999 has been adopted.[707] Since then several amendments were made in this law, the last of which took place in June 2015.[708]

While observing the process of shifting from the Soviet copyright legislation to the laws of the newly independent states, there are certain similarities to be marked between these states. It is obvious, that all of them changed their legislations from Soviet to Western-oriented standards and principles quite rapidly. Partially this was stipulated by the general trend of the 1990-ies stating that the communist ideology did not succeed, accordingly the Soviet legislation was useless, and Western standard was the only one to be implemented. The enthusiasm of harmonizing Western or European standards in the legislations depended on the foreign policy vectors of the newly independent states and differed therefore from country to country. The legal techniques of adopting the new copyright legislations were

[704] Law of Azerbaijan on Copyright and Related Rights.
[705] Jorbenadze, Dictionary, p. 4.
[706] Arts. 1017-1099, the Civil Code of Georgia.
[707] Dzamukashvili et al, p. 13.
[708] Law of Georgia on Copyright and Neighboring Rights.

also different in the beginning: some countries preferred to have it in the Civil Codes and the others issued separate acts thereof. However, by now five from these six countries have their copyright regulations in the separated acts dedicated to copyright and related rights. Another similarity between the post-Soviet countries in this regard is, that, although they implemented Western standards quite rapidly, in reality the levels of copyright protection in Western (i.e. European) states, on one hand, and in the post-Soviet countries, on the other, still remain significantly different.

6 Georgian Law on Copyright and Neighbouring Rights

The first separated copyright act of the independent Georgia was adopted on 22 June 1999 and remains in force, although it has been amended nine times since its adoption (among which the fourth amendment has been mostly important in terms of EU harmonization). By transferring the copyright norms from the Civil Code to the separate act, the Georgian legislator has chosen to regulate copyright through a single law. This trend is widespread among other post-Soviet states: Armenia, Azerbaijan, Moldova, and Ukraine also have single acts regulating copyright and related rights; only in the Russian Federation copyright law is a part of the Civil Code.[709] However, Armenia, Moldova, and Ukraine have replaced their initial copyright acts by new laws, while in Azerbaijan and Georgia the initial legal acts concerning copyright and related rights remain in force.

6.1. Structure of the law

Georgian Law on Copyright and Neighbouring Rights is divided into ten parts with the following order: I general provisions; II Copyright; III Limitations on economic rights; IV Terms of protection of copyright; V Transfer of copyright; VI Related rights; VII Rights of makers of databases; VIII Terms of protection of related rights and of the rights of maker of database; IX Protection of copyright, related rights and makers of databases; X Administration of economic rights on a collective basis; XI Transitional provisions; XII Final provisions. This makes Georgian law structurally different from Armenian and Ukrainian laws, which are divided into six sections: I General provisions; II Copyright; III Related rights; IV Administration of rights (in Armenia), Collective management of copyright and

[709] Civil Code of the Russian Federation, Part IV, chapter 70.

related rights (in Ukraine); V Protection of copyright and related rights; VI Final provisions. Law of Azerbaijan on copyright, which is divided into five sections, as well as chapter 70 of Russian Civil Code, which is not divided into such sections, are both structurally different from Georgian law. The law of the Republic of Moldova on copyright is mostly similar to the Georgian law, since the former is divided into ten chapters and the sequence of these chapters are relatively similar to that of the Georgian law. Namely the titles of the first three chapters in these laws are identical and chapters V, VI, VII of the Moldovan law are similar to chapters VI, VII and X of the Georgian law.

The first chapter of the Georgian law on copyright defines the *object and the scope of the law*, as well as the terms used in the law. It also defines the rule stating that, if the norm of an international agreement, to which Georgia is a party, differs from the law, then the international agreement should prevail.[710] Such rule is contained also in the copyright laws of other countries: in the copyright acts of Armenia, Azerbaijan, and Moldova it is stated also in Article 2, in Ukrainian act it is mentioned in Article 5, and in Russian Civil Code it is defined in Article 7. Georgian law also states that it governs the relations which "arise upon creation and use of scientific, literary and artistic works"[711] and such regulation is provided also in Armenian,[712] Azerbaijani,[713] Moldovan,[714] and Ukrainian[715] laws, as well as in Russian Civil Code[716]. This concept of defining scientific, literary, and artistic works as an object of protection by the copyright law is similar to the definition provided in Berne Convention.[717] The first chapter of Georgian law also provides the definitions of the terms used in the law[718] and so does the first chapters of Azerbaijani, Moldovan, and Ukrainian laws, while in

[710] Art. 2, Georgian Law on Copyright and Neighboring Rights.
[711] Art. 1.a, Georgian Law on Copyright and Neighboring Rights.
[712] Art. 1.a, Law of the Republic of Armenia on Copyright and Related Rights.
[713] Art. 1, Law of the Republic of Azerbaijan on Copyright and Related Rights.
[714] Art. 1,2, Law of the Republic of Moldova on Copyright and Related Rights.
[715] Art. 4, Law of Ukraine on Copyright and Related Rights.
[716] Art. 1255,1, the Civil Code of the Russian Federation.
[717] Art. 2.1, Berne Convention.
[718] Art. 4, Georgian Law on Copyright and Neighboring Rights.

Armenian law and Russian Civil Code there are no specific articles which define all of the terms, since the basic terms are defined throughout the whole text of the law / chapter, which makes them similar to French and German copyright laws.

The largest chapter of the Georgian law is the second one and it defines the *basic rights of the author*. In the beginning it reaffirms that copyright applies to the scientific, literary and artistic works, as well as requires their expression in an objective form.[719] The law specifies the scientific, literary, and artistic works mentioned above to literary (including computer programs), dramatic, dramatic-decorative, dramatic-musical, musical, audiovisual, architectural, photographic, decorative-applied art, derivative, and composite works, as well as the works of sculpture, painting, fine arts, maps, plans, illustrations, collections and other works.[720] Such specifications are provided in the respective copyright laws of Armenia, Azerbaijan, Moldova, Russia and Ukraine. It is worth mentioning, that all of these laws attribute computer programs to literary works, excluding Ukrainian law[721] and Russian Civil Code[722], which separate these two sorts from each other. Georgian law also defines the severability of copyright, its commencement and the works which are not protected by copyright. While regulating the authorship, Georgian law provides the separate norms concerning the presumption of authorship, co-authorship, rights of the authors of composite work (compiler) and derivative work. The law grants exclusive rights to publishers, as well as differentiates copyright in an audiovisual work from the copyright in a work created in the course of employment. Finally, chapter II covers moral and economic rights of the authors, as well as the economic rights in computer programs and databases.

The third chapter of Georgian law is dedicated to the *limitations on the economic right*. In this regard Georgian and Moldovan laws are related to each other, since the third chapter of

[719] Art. 5, Georgian Law on Copyright and Neighboring Rights.
[720] Art. 6, Georgian Law on Copyright and Neighboring Rights.
[721] Art. 8,1, Law of Ukraine on Copyright and Related Rights.
[722] Art. 1259,1, Civil Code of the Russian Federation.

the latter also contains "exceptions to, and limitations on, economic rights"[723]. Armenian, Azerbaijani, and Ukrainian laws do not contain such separate chapter dedicated to the limitations (however, they contain the articles concerning limitation[724]). In this regard Georgian and Moldovan laws are structurally more similar to German copyright act, which contains the separate chapter concerning limitations. However, German copyright act defines the limitations more generally as the "limitations on copyright"[725], while in Georgian and Moldovan laws the limitations are more specified and they refer only to the economic rights. These limitations are important, as they balance the rights of the copyright holders with the rights of the users of copyrighted works. In this respect, the 'right-oriented' character of the copyright itself, aspiring to protect the property rights of the copyright holder, is balanced by the 'left-oriented' limitations to these rights, aiming at protecting the rights of the users of copyrighted works, as well as the society, in general. Georgian law allows the reproduction of a work by natural persons for personal use, and also reprographic copying of a work by libraries, archives, and educational institutions. For certain purposes, the law also allows the use of a work without the consent of the author and without paying remuneration. Furthermore, Georgian law also allows public performance of a musical work at ceremonies, reproduction of a work for court proceedings, ephemeral recording of a work by a broadcasting organization, free use of a computer program (decompilation), and free use of database. Georgian law also sets the limitations to the rights of an owner of a computer program and database. However, Georgian law does not define the general criteria for the application of exceptions and limitations, unlike Moldovan law, where this criteria is defined, stating that these limitations and exceptions may be applied if they "do not contravene the normal use of the works and do not prejudice the legitimate interests of the authors and other holders of copyright"[726].

[723] Chapter III, Law of the Republic of Moldova on Copyright and Related Rights.
[724] I.e. Art. 42, Law of Ukraine on Copyright and Related Rights.
[725] Abschnitt 6 Schranken des Urheberrechts, Urheberrechtsgesetz.
[726] Art. 24, Law of the Republic of Moldova on Copyright and Related Rights.

The fourth chapter of the Georgian law defines the *term of protection* of copyright. In this regard Georgian law is structurally similar to the Azerbaijani law, which also contains the separate chapter concerning the duration of copyright[727]. On the other hand, the copyright acts of Armenia,[728] Moldova,[729] and Ukraine,[730] as well as Russian Civil Code,[731] have different structure: they define the durations of copyright (economic rights) and related rights separately, in the relevant chapters. Regardless to this structural difference, all of these laws are in compliance with the Directive 2006/116/EC ("Term Directive"). Georgian law defines the rules of commencement and duration of copyright and terms of protection of copyright, also the copyright of unlimited duration and the use of expired copyright.

Chapter V of the Georgian law deals with the *transfer of copyright*. Also in this respect Georgian law is structurally similar to the Azerbaijani law, which defines the author's contract and transfer of copyright in the separate chapter IV, while Armenian, Moldovan, Ukrainian, and Russian laws define the rules of transfer in the separate articles. At first, Georgian law defines the grounds for the transfer of copyright. Afterwards, it allows the transfer of economic rights of an author. Georgian law also defines the rules of licensing and the forms of license, namely an exclusive license, non-exclusive license, use of a work after granting of an exclusive license, and, finally, the license agreement. The fifth chapter also regulates copyright agreement for commissioned work and defines an obligation to compensate the damages.

Chapter VI of the Georgian law is dedicated to the *related rights*. In this respect the laws of Georgia, Armenia (chapter III), Azerbaijan (section III), Moldova (chapter V), and Ukraine (chapter III) are structurally similar to each other, since all of them assign separate chapters for the related rights. Regulation of the related rights separately from copyright is the

[727] Chapter III, Law of the Republic of Azerbaijan on Copyright and Related Rights.
[728] Arts. 37 and 61, Law of the Republic of Armenia on Copyright and Related Rights.
[729] Arts. 28 and 44, Law of Ukraine on Copyright and Related Rights.
[730] Arts. 23 and 39, Law of the Republic of Moldova on Copyright and Related Rights.
[731] Arts. 1281 and 1327, Civil Code of the Russian Federation.

common approach in the continental European copyright legislations, expressed also in French,[732] Italian,[733] and German[734] copyright acts. Georgian law defines the concept of related rights and the holders of these related rights at first. Afterwards, it defines in separate articles the rights of performers, exclusive rights of a phonogram and videogram producer, as well as broadcasting organization. Georgian law also defines the rules of free use of subject matter of related rights, use of phonograms published for commercial purposes, and ephemeral (short-term) fixation of the broadcast by broadcasting organization. Chapter VII of the Georgian law defines the rights of the database-makers and it includes the four norms: definition of the database maker, deposit of a database, rights and obligations of the lawful user of database and limitation on the rights of the maker of database. The following chapter VIII defines the terms of protection of the related rights and includes only one article.

Protection of copyright, related rights and maker of databases is regulated by chapter IX of the Georgian law. This chapter is similar to chapter IX of the Moldovan law, section V of the Azerbaijani law, chapter V of Armenian law, and paragraph V of Ukrainian law, since all of them deal with the enforcement (protection) of copyright, related rights and other rights. Georgian law regulates the infringement and protection of copyright, related rights and makers of database, including the measures and remedies for protection. It also regulates the counterfeit copies and defines the state policy in the field of copyright and related rights. Chapter X of the Georgian law regulates the administration of economic rights on a collective basis. In this regard Georgian law is structurally similar to Moldovan law, chapter VII of which also deals with the collective administration of the copyright and related rights. Georgian law regulates the establishment of an organization that administers economic rights on a collective basis, as well as its activities, rights and duties. Chapters XI and XII of the Georgian law contain transitional and final provisions.

[732] Livre II: Les droits voisins du droit d'auteur, Code de la propriété intellectuelle.
[733] Titolo II. Disposizioni sui diritti connessi all'esercizio del diritto d'autore, Legge 22 aprile 1941, n. 633.
[734] Teil 2 Verwandte Schutzrechte, Urheberrechtsgesetz.

Comparative analysis of Georgian copyright law with the copyright legislations of Armenia, Azerbaijan, Moldova, Russia, and Ukraine gives us the possibility to detect similarities and differences between Georgian legislation and other five legislations, on one hand, as well as between these five legislations, on the other. As we have seen, structurally Georgian law is mostly similar to the Moldovan and Azerbaijani laws. With Moldovan legislation Georgian law shares the common structure of regulating the limitations on the economic right and the collective administration of copyright and related rights. Law of Azerbaijan is structurally similar to the Georgian law regarding the regulation of the term of protection and the transfer of copyright. On the other hand, Armenian and Ukrainian laws are structurally similar to each other and different from the other four legislations. What these five legislations have in common is the regulation of the basic rights of authors, protection of copyright and the related rights, as well as sharing the continental European approach of dividing related (neighbouring) rights from the author's rights. Russian copyright legislation is different from all of the others, since it is not a law but a part of a Civil Code,[735] divided only into articles and not into chapters, or any further units. However, the continental European trend of division between the authors' rights and related rights is shared by the Russian copyright legislation as well.

6.2. Changes and Amendments in the Law

The dynamic character of the copyright law is reflected in the changes it has to make according to the social, political, as well as the technological developments. Copyright law is therefore considered one of the dynamically developing fields of the law. Together with these general trends, European copyright law, on the regional level, is changing more dynamically, since it has to reflect the political process of the European integration and harmonize the laws of the member states as closely, as possible. On the other hand, the

[735]Chapter 70, Civil Code of the Russian Federation.

copyright legislations of the post-Soviet countries, created during the last two decades and aspiring to be in compliance with modern international as well as regional European standards, face the challenge of being developed most rapidly and dynamically.

As a result of the multiple challenges of developing the national copyright legislations rapidly and implementing the international and European standards, the copyright legislations of the post-soviet countries are characterized with the variety of changes in the short periods of time. Russian copyright law has been developed from the single act adopted in 1993 and amended in December 2002[736] to the final solution of regulating the copyright by the Civil Code.[737] Ukraine has also adopted its national copyright legislation in 1993 and amended it several times[738]. Moldova adopted its first copyright law in 1994 and the current Law in 2010[739]. Armenia adopted the first copyright law in May 1996 and afterwards the draft of the new Civil Code including the copyright norms (like Russian Civil Code), but finally the separated copyright law was adopted in December 1999, which was once again replaced by a new law in 2006.[740] Copyright law of Azerbaijan has been adopted in June 1996 and amended several times since then, with the final amendment in April 2013.[741]

The same trend of rapid and dynamic changes is typical for Georgian copyright legislation as well. Since taking the copyright norms out from the Civil Code to the newly adopted law on copyright and related rights in 1999, up to the present day, this law has been amended 9 times already. The first amendment was made two months after the adoption of the law and added special reference to the periodicals and publications in press or other means of mass media[742]. The second change underlined the role of National Intellectual Property Center ("Sakpatenti") in terms of registration, defining the amount of royalty, protecting the

[736] O'Connor, p. 1013.
[737] Civil Code of the Russian Federation, Part IV, chapter 70.
[738] Law of Ukraine on Copyright and Related Rights.
[739] Law of the Republic of Moldova on Copyright and Related Rights.
[740] Abovyan, p. 13.
[741] Law of Azerbaijan on Copyright and Related Rights.
[742] Amendment to The Law on Copyright and Neighboring Rights, number: 2388-Is, date: 1999-09-09.

transferred copyright and conducting the state policy.[743] The third amendment added Geology to the field of scientific, literary and artistic works[744]. The fourth amendment was the mostly important step towards harmonization of the Georgian Copyright legislation with that of the European Union, since it implemented most of the standards of European copyright law.[745] The fifth[746] and the sixth[747] changes regulated the issue of establishment of the organization administering economic rights on collective basis.

Together with the tasks of developing national copyright law and following international standards, Georgian legislation has been aspired towards harmonizing itself with European law since the beginning of its development. In the initial stage, this harmonization was started within the framework of Partnership and Cooperation Agreements (PCAs) with the European Community. Later on, Georgia has reached an upper level of European integration formed with an Association Agreement (AA). Nowadays the process of legal approximation (including copyright law) in Georgia, Moldova, and Ukraine is going on in compliance with the Association Agreement with these countries. Accordingly, these two agreements (PCAs and AAs) can be considered as the legal basis for the changes and amendments in Georgian copyright legislation made so far, as well as to be made in the future.

[743] Change to The Law on Copyright and Neighboring Rights, number: 651-Is, date: 2000-12-05.
[744] Amendment to The Law on Copyright and Neighboring Rights, number: 1693-Is, date: 2002-10-10.
[745] Amendment to The Law on Copyright and Neighboring Rights, number: 1585, date: 2005-03-06.
[746] Change to The Law on Copyright and Neighboring Rights, number: 5423-IIs, date: 2007-10-26.
[747] Change to The Law on Copyright and Neighboring Rights, number: 1975-IIs, date: 2009-11-03.

7. Development of the Case Law

Georgian case law in the field of copyright began to develop immediately after the adoption of the law on copyright and neighbouring rights in 1999. In the following year (2000), the Georgian Supreme Court already examined four cases on copyright, and has subsequently examined 83 cases on copyright and related rights.[748] While reviewing these cases, we observe the development of the practice of the Georgian court since the very beginning, when it had to interpret the basic terms defined by the newly adopted Georgian law on copyright, up to the present date, when the court has to define more specific issues also derived from the Georgian law on copyright and neighbouring rights.

7.1. Initial Decisions

The first case referred to copyright infringement. The court also examined the issue of applying the rights of the author of a derivative work and the economic rights, namely the author's exclusive right to use a work in any form.[749] One of the important formulations defined by the court in this decision was the statement that "the right to indicate the name is the personal non-economic right of the author which belongs to the author independently from his/her economic rights".[750]

Another significant decision was made in 2002 and dealt with copyright on the song, and claiming author's remuneration. This decision is important, since it refers to the copyrighted work created in 1940-ies, when the Regulation on Copyright of Georgian SSR of 1929 was in

[748] Decisions by the Supreme Court of Georgia in the field of copyright (available at: http://prg.supremecourt.ge/CaseCivilResult.aspx).
[749] Art. 18.1, Georgian Law on Copyright and Neighboring Rights.
[750] Decision by the Supreme Court of Georgia made on 21/04/2000 (N: 3ვ-121-2000).

force. This regulation differentiated the publication and creation of the work in an objective form.[751] According to the interpretation by the court, the creation of the disputable song in 1945 and its reproduction during the public performance in 1948 can be considered as the creation of the work in an *objective form*.[752] Another important issue referred by this decision is the protection of the copyright by the successors of the author. In this regard, the court had to interpret the Civil Code of Georgian SSR, according to which, the successors of the author can protect the non-economic rights of the author[753]. In this decision the court made an important statement and defined the standard, according to which, "in order to have the copyright, *registration* of the work or any other formalities are *not necessary*. A person, who created the work as a result of intellectual creative work, can be considered an author, regardless to the aim, quality, content, genre, length or the form of expression… It is decisive, that the work has to exist in a form, which gives the possibility to be perceived and reproduced by the third person"[754]. Another important aspect is that in this decision the court applies the duration of copyright, which lasts during 70 years after the death of the author, according to the current Georgian law on copyright[755] (which, itself, repeats the standard established by the "Term Directive"[756]). In this regard the case is significant, since it refers to all of the Georgian copyright laws: started with the Regulation on Copyright of Georgian SSR of 1929, continued with the Civil Code of Georgian SSR of 1964 and finished with the actual Georgian law on copyright and neighbouring rights, also including the standard established by the "Term Directive" of the European Union.

This decision has been referred by the Supreme Court 10 years later, in another decision, which also dealt with the subject matter of copyright.[757] The court once again interpreted

[751] Art. 1, Regulation on Copyright of Georgian SSR.
[752] Decision by the Supreme Court of Georgia made on 03/01/2002 (3ჯ/885-01).
[753] Art. 512, the Civil Code of Georgian SSR.
[754] Decision by the Supreme Court of Georgia made on 03/01/2002 (3ჯ/885-01) motivational part.
[755] Art. 31.1, Georgian Law on Copyright and Neighboring Rights.
[756] Art. 1.1, Directive 2006/116/EC.
[757] Decision by the Supreme Court of Georgia made on 23/10/2012 (ას-733-689-2012).

Georgian law on copyright,[758] stating that the work is protectable, if it is expressed in an objective form, which makes it perceivable and reproducible; there is no standard concerning the form.[759] Furthermore, in this decision the court also interprets the norm of Georgian law which defines that "copyright shall not apply to ideas, methods, processes, systems, means, concepts, principles, discoveries and facts, even if they are expressed, described, explained, illustrated or embodied in a work"[760]. Therefore the court had to mark the difference between the work (which is protected by copyright) and idea (which is not protected). In this decision the court defined the concept of "idea" and found out that the disputable subject belonged to the concept of copyrighted "work", and not to the notion of "idea".[761] In this decision the court created an important standard of differentiating the protectable and non-protectable subject matters.

Since Georgian law on copyright was adopted in 1999, the initial decisions by the Supreme Court mostly dealt with the facts and relations which took place before the adoption of the law. Another decision made by the Supreme Court in 2002 is important in this regard, since it defines the applicability of the Georgian law on copyright, according to which the law applies to "the relations associated with the creation of the subject-matter of copyright and related rights objects that originated after entry in the force of this Law"[762], which means – after 22nd of June 1999. The court examined the case where such relations took place in 1995 and, accordingly, decided that the examination of the relations of 1995 with the current law on copyright adopted in 1999 was unlawful[763]. With this decision the court created the standard according to which Georgian law on copyright does not apply to the relations taken place before its adoption (22.06.1999).

[758] Arts. 9.1 and 5.2, Georgian Law on Copyright and Neighboring Rights.
[759] Decision by the Supreme Court of Georgia made on 23/10/2012 (ას-733-689-2012), motivational part.
[760] Art. 5.3, Georgian Law on Copyright and Neighboring Rights.
[761] Decision by the Supreme Court of Georgia made on 23/10/2012 (ას-733-689-2012), motivational part.
[762] Art. 67.1, Georgian Law on Copyright and Neighboring Rights.
[763] Decision by the Supreme Court of Georgia made on 20/11/2002 (3ჯ/829-02) motivational part.

Another decision by the Georgian Supreme Court, which deals with the relations before the adoption of the Georgian law on copyright as well as Georgian Civil Code (adopted in 1997), is made in 2003[764] and interprets the Civil Code of Georgian SSR of 1964. The disputable relations between the parties took place in the years 1991-1994, when Georgia has already been independent, but had not adopted the Civil Code and the law on copyright. The disputable subject matter was the work created in the course of employment. Unlike the actual Georgian copyright legislation, which defines that "copyright in a work created in the course of fulfilment of the employer's order shall belong to the employer"[765], the Civil Code of Georgian SSR of 1964 stated that the copyright in such work should belong to the author, but the rule of remuneration was defined by the legislation of USSR and Georgian SSR.[766]

The issue of the work created in the course of employment is regulated in a completely different manner by the actual Georgian copyright legislation, according to which the copyright in such cases belongs not to the employee but to the employer.[767] This norm has been interpreted by the Supreme Court of Georgia stating that the rights of the employer contain not only the economic rights but also the right to have the name indicated while using the work.[768] This decision is also significant for the definition concerning the subject matter of copyright in it. The court interprets Georgian copyright law[769] in this regard once again, and states that the work belongs to the evaluation category, and implies an object formed as a result of the creative process.[770]

[764] Decision by the Supreme Court of Georgia made on 25/11/2003 (3ჯ/637-03).
[765] Art. 16.1, Georgian Law on Copyright and Neighboring Rights.
[766] Art. 496, the Civil Code of Georgian SSR.
[767] Art. 16.1 and 6, Georgian Law on Copyright and Neighboring Rights.
[768] Decision by the Supreme Court of Georgia made on 03/01/2013 (ას-1036-971-2012) motivational part.
[769] Art. 5.1, Georgian Law on Copyright and Neighboring Rights.
[770] Decision by the Supreme Court of Georgia made on 03/01/2013 (ას-1036-971-2012) motivational part.

7.2. Subject Matter of Copyright

Georgian Supreme Court has created a common standard while defining the subject matter of copyright. Georgian law on copyright defines "scientific, literary and artistic works which are the result of the intellectual and creative activity"[771] as a subject matter of copyright, which is in compliance with Berne Convention[772]. While interpreting this norm, the court stated that the scene plan does not belong to the subject matter of copyright.[773] Furthermore, the court also interpreted the legal definition of audiovisual work, according to which it refers to "a work consisting of a series of images whether or not accompanied by sound that imparts the impression of motion and can be seen and/or heard"[774]. Accordingly, the court decided that the scene plan, which was the disputable matter of the case, did not belong to the audiovisual work, nor to the general subject matter of copyright, and differentiated it from the script.[775] While examining the scene plan, the court also referred to the norm of the Georgian law, according to which "copyright shall not apply to ideas, methods, processes, systems, means, concepts, principles, discoveries and facts, even if they are expressed, described, explained, illustrated or embodied in a work"[776].

Another step towards the specification of the subject matter of copyright was the decision by the Supreme Court concerning Georgian design of the "coca-cola" trademark.[777] Georgian law defines the subject matter of the copyright only as "the result of the intellectual and creative activity"[778] and provides the specifications[779], but it does not define the *level of creativity* needed for the work protected by copyright. This was the task of the court and it defined the creativity in a manner that "a work has to be a result of intellectual (creative)

[771] Art. 5.1, Georgian Law on Copyright and Neighboring Rights.
[772] Art. 2.1, Berne Convention.
[773] Decision by the Supreme Court of Georgia made on 17/06/2003 (3ჯ/324-03) motivational part.
[774] Art. 4.b, Georgian Law on Copyright and Neighboring Rights.
[775] Decision by the Supreme Court of Georgia made on 17/06/2003 (3ჯ/324-03) motivational part.
[776] Art. 5.3, Georgian Law on Copyright and Neighboring Rights.
[777] Decision by the Supreme Court of Georgia made on 25/11/2003 (ას-527-1201-03).
[778] Art. 5.1, Georgian Law on Copyright and Neighboring Rights.
[779] Art. 6.1, Georgian Law on Copyright and Neighboring Rights.

activity and exist in an objective form. The intellectual character of the work is expressed in its originality, meaning that the work has to be distinctive by its *individuality* and have certain creative level. This does not mean the literary or artistic quality of the work, but the individuality implies the *originality* of the form of expression and not the content"[780].

Georgian law also defines photographic works to the scientific, artistic, literary works and, therefore, subject matter of copyright.[781] However, the law does not define the preconditions based on which a work can be considered the photographic work. Therefore the Supreme Court of Georgia states that not all of the photographic pictures are the objects of copyright and legal protection.[782] The court also refers to the norm of the law according to which the law applies to the works and not to all of the creatures, as well as these works have to be the products of "intellectual and creative efforts"[783]. Accordingly, the court concludes that not every photographic picture is an object of copyright protection but only the work created by intellectual and creative efforts, which has to be evaluated by the court in each individual case (such as this case), based on the expert opinions of the specialists of photographic arts.[784] More broad and general reasoning is provided in another decision by the court, stating that the law does not provide an exact definition of the work, since such definition would have highlighted particular characteristics of the work and, besides that, it is impossible to separate literary, artistic, or scientific works from each other, since one work can have the features of several categories (i.e. literary and scientific together), so these *categories have to be considered jointly and the burden of evaluation lies on the opinions of the judges*.[785]

[780] Decision by the Supreme Court of Georgia made on 25/11/2003 (ას-527-1201-03) motivational part.
[781] Art. 6.1.i, Georgian Law on Copyright and Neighboring Rights.
[782] Decision by the Supreme Court of Georgia made on 13/11/2009 (ას-470-782-09) motivational part.
[783] Arts. 3a and 4a, Georgian Law on Copyright and Neighboring Rights.
[784] Decision by the Supreme Court of Georgia made on 13/11/2009 (ას-470-782-09) motivational part.
[785] Decision by the Supreme Court of Georgia made on 01/12/2009 (ას-468-780-09) motivational part.

7.3. Moral Rights

Moral rights of the authors are interpreted in the decision made by the Supreme Court in 2005.[786] According to the Georgian law on copyright, the author is entitled "to authorize other persons to make modifications to the work, either to the work (title) itself, or to the author's name, also to object the making of unauthorized modifications to the work (the right of integrity)"[787]. On the other hand, the plaintiff argued that the edition of the building could be considered as a modification to the work, while the court argued, whether such change caused the defamation of author's honour, dignity, or reputation, since "the object of the personal non-economic relations of the author is the honour, dignity, and reputation of the author"[788]. In this decision the court created another standard of considering author's honour, dignity, and reputation the basis of his/her moral rights.

7.4. Exclusive Licence

The issue of an exclusive license has been interpreted by Georgian Supreme Court as well. According to the Georgian law on copyright, "under an exclusive license agreement, the author or other owner of copyright shall grant the exclusive right to use a work in a definite form and within the scope defined by the agreement solely to the licensee and shall entitle the licensee to prohibit such use of the work by other persons (including the author)".[789] According to this norm, the court states, that only the author, or other holder of copyright, is entitled to issue such license, namely such right can be granted by the author, as well as his/her successor, or other holder of copyright.[790] Besides that, the transferee of such right is obliged to get this right from the person who holds this right legally – such obligation derives

[786] Decision by the Supreme Court of Georgia made on 21/09/2005 (ას-277-602-05)
[787] Art. 17.1.d, Georgian Law on Copyright and Neighboring Rights.
[788] Decision by the Supreme Court of Georgia made on 21/09/2005 (ას-277-602-05), motivational part.
[789] Art. 37.1, Georgian Law on Copyright and Neighboring Rights.
[790] Decision by the Supreme Court of Georgia made on 25/11/2008 (ას-568-798-08), motivational part.

from the Berne Convention[791]. Therefore, the court states that the transferee of the copyright is obliged to consider, that the copyright should get only from the licensor, an authority of whom has to be certified by the proper evidence - exclusive license agreement.[792]

In another important decision made concerning the exclusive license the Supreme Court of Georgia states, that, although Georgian law guarantees the protection of author's rights, modern technical progress and rapid development of using and spreading the work makes it impossible to protect these rights only by the author or the right holder, and therefore the collective management organizations have been created.[793] In the same decision the court refers to the Berne Convention, which allows the authors to enjoy "any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one"[794]. The court states, that Georgian law is in full conformity with Berne Convention in this regard, stating that the exclusive right of the author means to exercise, authorize, or prohibit "communication to the public of the work, including the first transmission and/or retransmission by wire or wireless means, so that it may be accessed by any person at a time and place chosen by him/her (the right of communication to the public)"[795]. Accordingly, the court concludes that the copyright contains any kind of transmission of the work, including cable transmission, if this is connected to the business activities and profit.[796]

[791] Arts. 7 and 14, Berne Convention.
[792] Decision by the Supreme Court of Georgia made on 25/11/2008 (ას-568-798-08), motivational part.
[793] Decision by the Supreme Court of Georgia made on 02/12/2008 (ას-564-794-08), motivational part.
[794] Art. 11bis.1.ii, Berne Convention.
[795] Art 18.2.f, Georgian Law on Copyright and Neighboring Rights.
[796] Decision by the Supreme Court of Georgia made on 02/12/2008 (ას-564-794-08), motivational part.

7.5. Specific Issues

With these decisions Georgian Supreme Court has established certain practice concerning the cable transmission and re-transmission of the works protected by the copyright. However, the case examined by the court in 2010 differed from this practice and it dealt with the cable transmission of the musical works without the license agreement.[797] In this regard, the court refers to the presumption provided in the Georgian law, according to which "a collective management organization shall be also authorized to represent all owners of copyright and related rights unknown to it, or whose identity cannot be established, and to include their works and other protected subject-matter in licenses issued to the users…" and, accordingly, "in the absence of proof to the contrary, all works or subject-matter of a related rights being publicly performed, transmitted on the air or by cable, or otherwise made available to the public… shall be assumed as included in the repertoire of an organization that administers economic rights on a collective basis. In such a case, the burden of proof shall be with the user."[798]. Accordingly, the court concludes that all of the unknown and unidentified holders of copyright and related rights are presumed to belong to the repertoire of the collective management organization.[799]

The Supreme Court of Georgia also interpreted the norm of the Georgian law which defines that "the author of a composite work (compiler) shall enjoy a copyright in the selection and arrangement of material, which represents the result of his/her intellectual and creative activity[800] in the recent decision made in 2015[801]. On the other hand, Georgian law also states that "the compiler shall not infringe the copyright of the authors of the works included in the compilation"[802]. By collating these two provisions, the court came to the reasoning that

[797] Decision by the Supreme Court of Georgia made on 07/03/2011 (ას-1029-965-2010).
[798] Art. 65.2 and 3, Georgian Law on Copyright and Neighboring Rights.
[799] Decision by the Supreme Court of Georgia made on 07/03/2011 (ას-1029-965-2010), motivational part.
[800] Art 12.1, Georgian Law on Copyright and Neighboring Rights.
[801] Decision by the Supreme Court of Georgia made on 30/03/2015 (ას-173-162-2014).
[802] Art 12.2, Georgian Law on Copyright and Neighboring Rights.

the author of a part of compiled work is entitled to use his/her work in order to create another compiled work, unless he/she refused such right and, on the other hand, the enforcement of this right should not infringe the rights of the authors of other works, which are also parts of the compiled work.[803]

Another significant and most recent decision by the Georgian Supreme Court deals with the architectural work.[804] It interprets the appropriate norms of Georgian law on copyright[805] as well as the provisions of Berne Convention[806]. Furthermore, the court also refers to the specific Georgian legislation in order to define the notion of the architectural work properly and defines the disputable subject matter as an architectural work.[807] Within the framework of Berne Convention, the court also interprets Georgian legislation concerning the commencement of copyright[808] and decides that the protection of the work, which is a subject matter of copyright, is connected to the fact of its creation, and there are no other formalities to be fulfilled by the author, nor the existence of protection in the country of origin is necessary for protection.[809] This decision is one more step towards defining the *specific subject matters* of copyright protection.

7.6. Summary

Although the development of Georgian court practice has started relatively later, since the Georgian law on copyright and related rights was adopted in 1999, it has developed quite rapidly and dynamically. In the beginning Georgian courts had to deal with the relations started before the adoption of the current law on copyright and, therefore, they had to

[803] Decision by the Supreme Court of Georgia made on 30/03/2015 (ას-173-162-2014) motivational part.
[804] Decision by the Supreme Court of Georgia made on 11/03/2016 (ას-924-874-2015).
[805] Arts. 1.a, 3.e and 6.1.h, Georgian Law on Copyright and Neighboring Rights.
[806] Arts. 5.2 and 18.1, Berne Convention.
[807] Decision by the Supreme Court of Georgia made on 11/03/2016 (ას-924-874-2015) motivational part.
[808] Art. 9, Georgian Law on Copyright and Neighboring Rights.
[809] Decision by the Supreme Court of Georgia made on 11/03/2016 (ას-924-874-2015) motivational part.

interpret Georgian soviet legislation, which was in force during the start of these relations (Civil Code of Georgian SSR adopted in 1964 and even the regulation on copyright adopted in 1929). However, Georgian courts have been basically oriented on the actual Georgian law on copyright. The issue, which has become a matter of interpretation by the court most often, is the *subject matter of copyright protection*. The Supreme Court of Georgia has made a number of significant decisions concerning the definition of the copyrighted work discussed above since the year 2002 up until now. In these decisions the court tends to consider each of the cases individually and tries to avoid the elaboration of generally applicable common standard. In this regard, the practice of Georgian court differs from the decisions of European Court of Justice,[810] and Munich Higher Regional Court,[811] which have established such standards. Besides the subject matter of copyright, Georgian Supreme Court has also developed the important standards concerning the variety of issues from the general aspects of the work created in the course of employment, collective management organizations and exclusive license, to the specific issues such as cable retransmission. Since the practice of Georgian courts concerning copyright has started recently, the development of this practice is an ongoing process and Georgian courts still have to establish several basic standards to be used in the future.

[810] European Court of Justice, 16 July 2009, Case C-5/08 (Infopaq v. DDF).
[811] OLG München Urteil vom 14.07.2016, 29 U 953/16.

8 Steps towards Harmonization of Georgian Copyright Legislation with EU Law

The actual Georgian law on copyright was aimed towards European standards when adopted in 1999. However, the process of further implementing European law has been going on since its adoption, whereas certain standards of the EU law have not been implemented into Georgian law initially. In addition, EU copyright law itself has developed quite dynamically since 1999, and because Georgian law had to follow this development, several amendments were required to this law. Initially, the Partnership and Cooperation Agreement (PCA) between Georgia and the European Community formed the legal basis for the harmonization process. Recently, the process of Georgia's European integration has reached a more advanced level, reflected in the Association Agreement (AA) in 2014, which provides the framework for the subsequent process of legal harmonization. Therefore these two agreements (PCA and AA) can be considered as two basic steps in the process of harmonizing Georgian and EU copyright law.

8.1 Partnership and Cooperation Agreement

The Partnership and Cooperation Agreement between the European Community and Georgia, which was signed on 26 April 1996 in Luxembourg and entered into force on 1 July 1999[812], since then has been the main legal basis for the general process of harmonizing Georgian legislation with the European Union law. The agreement aimed at strengthening the economic links between the signing parties and, therefore, "the approximation of Georgia's existing and future legislation to that of the Community"[813] has been one of the main objectives of this agreement. Particularly, the agreement named several fields of law

[812] Protocol to the PCA between the EC and Georgia.
[813] Art. 43.1, Partnership and Cooperation Agreement between Georgia and EC, 1 July 1999.

which should be harmonized, including the intellectual property.[814] More precisely, the intellectual property comprized "in particular, copyright, including the copyright in computer programs, and neighbouring rights"[815]. Such Partnership and Cooperation Agreements have been formed also with other former USSR countries: the first agreement was formed with Russian Federation in 1.12.1997, afterwards with Ukraine (1.3.1998) and Moldova (1.7.1998), the agreements with Armenia, Azerbaijan and Georgia entered into force on the same date - 1 July 1999. All of these agreements contained the similar reference to the intellectual property rights and, particularly, to copyright and related rights.

PCA agreement between the EC and Georgia declared, that, by the fifth year after its entry into force, meaning – by the end of 2004, "Georgia shall accede to the multilateral conventions on intellectual, industrial and commercial property rights… to which Member States are parties or which are de facto applied by Member States…"[816]. This statement accelerated the process of approximating Georgian law with the EU standards. After the signature of the PCA Georgian government started to take the important measures for its implementation.[817] Parliament of Georgia has adopted the resolution, according to which; "all laws and other normative acts adopted by the Georgian Parliament from 1 September 1998 shall be compatible with the standards and rules established by the European Union"[818]. The government of Georgia adopted the resolution in order to form a commission for the promotion of partnership and cooperation between Georgia and the European Union.[819] In September 2003 the national program for harmonizing Georgian legislation with the law of

[814] Art. 43.2, Partnership and Cooperation Agreement between Georgia and EC, 1 July 1999.
[815] Joint Declaration concerning Article 42, Partnership and Cooperation Agreement between Georgia and EC, 1 July 1999.
[816] Art. 42.2, Partnership and Cooperation Agreement between Georgia and EC, 1 July 1999.
[817] Kereselidze, p. 11.
[818] Resolution by the Parliament of Georgia N: 828-IS, 2 September 1997.
[819] Resolution by the President of Georgia N 317, 24 July 2000.

the EU has been initiated, which also included the strategy of harmonizing Georgian intellectual property and copyright law with that of the EU.[820]

It was declared in the national program of harmonization (2003), that Georgian law was in compliance with the international standards in terms of the intellectual property law.[821] The accession of Georgia in the World Trade Organization in June 2000 supported the implementation of international intellectual property standards into Georgian legislation. Due to this accession, Georgia has harmonized its legislation with the international acts in the field of the intellectual property rights (including copyright) named above.[822] As for the EU standards, the national program of harmonization stated that although Georgian legislation still needed further improvements in the field of intellectual property rights, basically it was in compliance with the proper legal documentation of the EU.[823] The program also referred to the "difficult situation"[824] in the practical aspects of protecting the intellectual property rights. Recommendations for harmonizing Georgian law with the EU standards had been provided in this program as well. Based on these recommendations, the process of implementing these standards particularly in the Georgian law on copyright and related rights has been started.

[820] Intellectual Property Rights, the National Program for harmonizing Georgian Legislation with the Legislation of the European Union.
[821] Intellectual Property Rights, 1 Introduction, 1.1 Review of the Sector, National Program for harmonizing Georgian Legislation with the Legislation of the European Union.
[822] See p. 97.
[823] Intellectual Property Rights, 1 Introduction, 1.2 comparison of Georgian and European laws, National Program for harmonizing Georgian Legislation with the Legislation of the European Union.
[824] Recommendation 2.1, National Program for harmonizing Georgian Legislation with the Legislation of the European Union.

8.1.1 The Fourth Amendment

As we will see below, the fourth amendment[825] in the Georgian law on copyright and related rights has been mostly important among all of the nine changes and amendments made so far in terms of its approximation with the EU copyright law. This amendment deals with all of the issues of EU copyright law available for the time of its adoption (2005). It has to be considered the first and, so far, the only step towards harmonizing Georgian law on copyright and neighbouring rights with European copyright law. In this regard the fourth amendment symbolizes the trend of Georgian copyright legislation aspired towards being harmonized with the European copyright law within the framework of Partnership and Cooperation Agreement (PCA) between Georgia and the EU.

The fourth amendment, the content of which consists of several parts[826], adds or changes the absolute majority of the existing 69 articles of the Georgian law and comprises 54 paragraphs.[827] According to the issues covered by this amendment, it can be divided into seven parts, which coincide with the seven Directives of European copyright law available in 2005. The first part deals with the use of copyright and the related rights in the internet, part II is dedicated to the rights of the authors of audiovisual works, the third part defines the 'new' rights which did not exist in the field of copyright before, part IV deals with the terms used in the law, the fifth part regulates the issue of database, part VI defines the procedures of registering the work in Georgian National Intellectual Property Center (sakpatenti), and the last seventh part is dedicated to the collective management organization.[828]

Partnership and Cooperation Agreement (PCA) between Georgia and the EU, according to which Georgia had to harmonize its intellectual property legislation with the European law

[825] Changes and amendments to The Law on Copyright and Neighboring Rights (03.06.2005 #1585).
[826] Explanatory Note of changes and amendments to the Georgian Law on Copyright and Neighboring Rights (3 June 2005).
[827] Changes and amendments to The Law on Copyright and Neighboring Rights (03.06.2005 #1585).
[828] Explanatory Note of changes and amendments to the Georgian Law on Copyright and Neighboring Rights (3 June 2005).

and establish the level of protection similar to the EU level by the end of 2004[829], was the legal base for adopting the fourth amendment. Besides that, the fourth amendment has also made certain improvements to the law not necessarily connected to EU Directives: i.e. terminological changes: introducing "communication to the public" (Georgian: "sadjaro gatsnoba") as a new term and substituting the term "issuance" ("gatsnoba") with "publication" ("gamoqvekneba"), which is more appropriate[830]. Although Georgian law on copyright and related rights was generally in compliance with the EU standards in copyright law by the time of its adoption (June 1999), since then the EU copyright law itself had developed and in the year 2005 there was a need of certain upgrade of the Georgian law according to this development. Accordingly, while the EU copyright law has been developed further since 2005 (two new Directives have been adopted in 2012[831] and 2014[832]), nowadays there is a need of new amendment in Georgian law on copyright and related rights, which should reflect the novelties in EU copyright law and should be considered as the second step towards harmonizing Georgian copyright legislation with that of the European Union.

8.1.2 The Term of Protection

The issue of the term of protection has been an object of several changes even during the Soviet ruling in the copyright legislation of Georgian SSR. Before June 1973 (when the Soviet Union joined the UCC - Universal Copyright Convention), the term of protection lasted up to 15 years after the death of the author.[833] Afterwards the term was increased to 25 years, according to the standard established by the Universal Copyright Convention.[834] In May 1995

[829] Art. 42, Partnership and Cooperation Agreement (PCA) between Georgia and the EU.
[830] Part IV, Explanatory Note of changes and amendments to the Georgian Law on Copyright and Neighboring Rights (3 June 2005).
[831] Directive 2012/28/EU.
[832] Directive 2014/26/EU.
[833] Art. 18, Regulation on Copyright of Georgian SSR.
[834] Art. IV.2, Universal Copyright Convention.

Georgia, which was already an independent republic by that time, joined the Berne Convention and implemented its standard[835], according to which the term of protection had been increased to 50 years and this term was indicated in the initial version of Georgian Civil Code[836].

When Georgian law on copyright and related rights was adopted in 1999, it was already in compliance with the EU standard in this regard, defining 70 years as the term of protection *post portem auctoris*[837]. With this norm Georgian law has implemented the "Term Directive" (93/98/EEC),[838] which was the actual legislation by the time of the adoption of Georgian law. Although the Directive 93/98/EEC was repealed and replaced by the new Directive 2006/116/EC, the norms that were harmonized by Georgian law remained the same. Basically, the law implemented the EU standard regarding the general terms of protection for Copyright and related rights. It also implemented the rule of calculation of the term, according to the Article 8 of the same Directive[839]. Furthermore, the law implemented Article 3 of the Directive as well, according to which the term of protection for the related rights is determined to 50 years.[840] However, it did not harmonize the other terms, such as the term of protection for critical and scientific publications and photographic works, neither in the initial version, nor afterwards.

The EU standard defining 70 years as the term of protection *post portem auctoris* has been implemented in the legislations of the other post-soviet countries as well. This issue is regulated in a similar manner particularly in the copyright laws of Armenia,[841] Azerbaijan,[842]

[835] Art. 7, Berne Convention.
[836] Art. 1062, the initial version of Georgian Civil code, 27 June 1997.
[837] Art. 31.1, Georgian law on copyright and neighboring rights.
[838] Art. 1.1, Directive 93/98/EEC.
[839] Art. 31.2, Georgian Law on Copyright and Neighboring Rights.
[840] Art. 57, Georgian Law on Copyright and Neighboring Rights.
[841] Art. 37.1, Law of the Republic of Armenia on Copyright and Related Rights
[842] Art. 25.1, Law of the Republic of Azerbaijan on Copyright and Related Rights.

Moldova,[843] Ukraine,[844] and the Russian Civil Code[845]. Accordingly, it seems that the argumentation for increasing the term of protection, which refers to strengthening the position of the author during his lifetime and covering two generations in the "increasing average lifespan"[846], has been commonly shared in the legislations of the non-member states of the EU. Although the second argument (increasing average lifespan) initially referred to the EU, nowadays the European standard of protecting author's rights during the 70 years *post mortem auctoris* is widely spread in the post-Soviet countries which are not the members of the EU.

8.1.2 Protection of Computer Programs

The protection of computer programs, the regulation of which has been the first European copyright Directive[847] and which has been highly controversial issue, is reflected in Georgian copyright legislation as well. Georgian law on copyright and neighbouring rights implemented the initial version of the computer program Directive, which has been amended by the new Directive in 2009. However, the basic norms implemented in the Georgian law stayed intact also in the Directive, regardless to the amendment of 2009. The first and mostly important requirement of this Directive is to "protect computer programs, by copyright, as literary works"[848]. This equalization of computer programs to the literary works has been a subject of controversy because of the obviously different characteristics of these two subject-matters.[849] However, Georgian legislator shared the attitude towards computer

[843] Art. 23.1, Law of the Republic of Moldova on Copyright and Related Rights.
[844] Art. 28.3, Law of Ukraine on Copyright and Related Rights.
[845] Art. 1281.1, Civil Code of the Russian Federation.
[846] Tritton, p. 515.
[847] Directive 91/250/EEC.
[848] Art. 1.1, Directive 2009/24/EC.
[849] Walter, in: Walter/Lewinski, p. 93.

programs equalized to the literary works and reflected it in the text of the law[850]. In this regard Georgian legislation followed the examples of the prominent copyright legislations such as German Copyright Act,[851] or Italian Copyright Law,[852] where the computer programs are equalized to the literary works. This approach is commonly shared in the copyright laws of other post-Soviet countries as well, but the manners of equalization are slightly different: in Armenian[853] and Azerbaijani[854] copyright acts, like in Georgian copyright law, literary and scientific works are indicated in one sentence (according to German Copyright Act[855]), while in Moldovan[856] and Ukrainian[857] copyright acts, as well as in Russian Civil Code,[858] the computer programs and literary works are indicated in separate sentences.

The definition of the term 'computer program' is not provided in the EU Directive. This has been justified based on an argument that, due to the dynamic development of the technologies, such definition would become outdated.[859] However, in Georgian law computer program is defined as "a set of instructions expressed in words, codes, schemes, or in any other machine-readable form, which activates a computer in order to bring forth a particular result"[860]. Similar definitions are also provided in the copyright acts of Azerbaijan,[861] Moldova,[862] Ukraine,[863] and Russian Civil Code[864]. Only the definition provided by the Armenian copyright act is slightly different, defining computer programs as "programs

[850] Art. 6.1.a, Georgian Law on Copyright and Neighboring Rights.
[851] Art. 2.1.1, Urheberrechtsgesetz.
[852] Art. 1, Disposizioni sui diritti connessi all'esercizio del diritto d'autore, Legge 22 aprile 1941, n. 633.
[853] Art. 2.4.a, Law of the Republic of Armenia on Copyright and Related Rights.
[854] Art. 6.1, Law of the Republic of Azerbaijan on Copyright and Related Rights.
[855] Art. 2.1.1, Urheberrechtsgesetz.
[856] Art. 7.2.a, Law of the Republic of Moldova on Copyright and Related Rights.
[857] Art. 8.1.3, Law of Ukraine on Copyright and Related Rights.
[858] Art. 1225.1.2, Civil Code of the Russian Federation.
[859] Bentley, in: Dreier/Hugenholtz Concise Copyright, p. 216.
[860] Art. 4.j, Georgian Law on Copyright and Neighboring Rights.
[861] Art. 4, Law of the Republic of Azerbaijan on Copyright and Related Rights.
[862] Art. 2, Law of the Republic of Moldova on Copyright and Related Rights.
[863] Art. 1, Law of Ukraine on Copyright and Related Rights.
[864] Art. 1261, Civil Code of the Russian Federation.

expressed in any form, including preparatory design materials for their creation"[865] which is similar to the provision of the German Copyright Act[866].

Furthermore, Georgian legislation also implemented the regulations of the EU Directive concerning the economic rights in computer programs. According to these regulations, the author of a computer program is entitled to do, authorize, or prohibit "reproduction of a computer program by any means and in any form, in whole or in part; such reproduction shall be subject to authorization by the author if this is necessary for loading, displaying, running, transmitting or storing of the computer program"[867]. This repeats the wording of the EU Directive[868] with slight changes. Besides that, the author of a computer program can also do, authorize, or prohibit "translation of a form, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof without prejudice to the rights of the person who alters the computer program",[869] which also repeats the regulation of the EU Directive.[870] The initial version of Georgian law also included the component of distributing the program or its copies, according to the Directive,[871] but this provision was repealed by the amendment of 03/06/2005.

Georgian law implemented the regulation of the EU Directive concerning the limitations on the rights of computer program owners as well. According to this regulation, a person who lawfully owns a copy of a computer program is entitled "to make alterations to the computer program or database where they are necessary for the functioning of technical facilities of the user, as well as to carry out any act related to the functioning of the computer program or database, including loading and storing in the computer memory (for one computer or one network user), as well as correction of apparent errors, unless the copyright agreement

[865] Art. 35.1, Law of the Republic of Armenia on Copyright and Related Rights.
[866] Art. 69a.1, Urheberrechtsgesetz.
[867] Art. 19.1.a, Georgian Law on Copyright and Neighboring Rights.
[868] Art. 4.1.a, Directive 2009/24/EC.
[869] Art. 19.1.b, Georgian Law on Copyright and Neighboring Rights.
[870] Art. 4.1.b, Directive 2009/24/EC.
[871] Art. 4.1.c, Directive 2009/24/EC.

provides otherwise"[872], which implements the provision of the EU Directive[873]. Such lawful owner of a copy of computer program is also entitled to "make a back-up copy of the computer program or database, provided that this copy is designated for archival purposes only and for replacement of the lawful owner's copy that has been lost, destroyed or become unusable"[874], which repeats the wording of the EU Directive[875]. However, the following provision of the Directive concerning the right of such legal owner "to observe, study or test the functioning of the program"[876] is not implemented in Georgian law.

Another regulation of the EU Directive implemented by the Georgian law is the provision concerning the free use of a computer program (decompilation). According to this provision, the lawful owner of a copy of the computer program is entitled to decompile this program, meaning – "to reproduce and transform the objective code into the initial text"[877], which is in compliance with the Directive[878]. Besides that, Georgian law also sets the further conditions of decompilation to be performed by the entitled person, previously unavailable information, interoperability of the parts of decompiled program and non-disclosure rules,[879] which are in compliance with the regulation of the Directive[880]. However, the reference towards Berne Convention and the requirement concerning the legitimate interests of the rightholder provided in the Directive[881] is not implemented in Georgian law.

[872] Art. 28.1.a, Georgian Law on Copyright and Neighboring Rights.
[873] Art. 5.1, Directive 2009/24/EC.
[874] Art. 28.1.b, Georgian Law on Copyright and Neighboring Rights.
[875] Art. 5.2, Directive 2009/24/EC.
[876] Art. 5.3, Directive 2009/24/EC.
[877] Art. 29, Georgian Law on Copyright and Neighboring Rights.
[878] Art. 6.1, Directive 2009/24/EC.
[879] Art. 29, Georgian Law on Copyright and Neighboring Rights.
[880] Art. 6.2, Directive 2009/24/EC.
[881] Art. 6.3, Directive 2009/24/EC.

8.1.3 Protection of Databases

"The Database Directive"[882] is widely implemented in Georgian copyright legislation. The definition of database, provided in Georgian law on copyright and neighboring rights ("a collection of works, data or other material arranged in a systematic or methodical way and individually accessible by electronic or other means"[883]), is almost literal translation of the definition provided in the Directive,[884] only the word "independent" is missing. In Armenian law the first part of the definition of database is also similar to the definition provided in the Directive, but afterwards the following element is added to this definition: "the acquisition, verification or presentation thereof shall require substantial qualitative and (or) quantitative contribution"[885]. Russian Civil Code defines database in rather different manner, stating that "database is an aggregate, presented in an objective form, of independent materials (articles, calculations, normative acts, court decisions and other similar materials) which are systematized so that these materials can be found and processed by means of a computer",[886] and the definition in the Azerbaijani law is similar, but the following element is added: "the selection and placement of components result from creative work"[887]. The definition in the Ukrainian law[888] contains the elements of both of these definitions, and Moldovan law, also adding several elements to the definition given in the Directive, provides the following version: "database means a compilation of data or other materials irrespective of whether or not they are protected by copyright or related rights, both in a machine - readable form and in other form, arranged in a systematic or methodical way and individually accessible by electronic or other means"[889].

[882] Directive 96/9/EC.
[883] Art. 4.m, Georgian Law on Copyright and Neighboring Rights.
[884] Art. 1.2, Directive 96/9/EC.
[885] Art. 58.1, Law of the Republic of Armenia on Copyright and Related Rights.
[886] Art. 1260.1, Civil Code of the Russian Federation.
[887] Art. 4, Law of the Republic of Azerbaijan on Copyright and Related Rights.
[888] Art. 1, Law of Ukraine on Copyright and Related Rights.
[889] Art. 2, Law of the Republic of Moldova on Copyright and Related Rights.

Besides this definition, the entire chapter of the Georgian law (Chapter VII – Rights of makers of database) is dedicated to the *sui generis* rights of database makers. In this regard Moldovan law is slightly similar to Georgian law, where one chapter is dedicated to the public domain and database (referred as "other rights")[890]. Such separation of the rights of database makers underlines the *sui generis* character of these rights, since, in this regard, the database "is not a copyright and does not as such fit into any other general category of intellectual property right"[891]. This *sui generis* right is defined in Georgian law in the following manner: "the maker of a database (which does not represent a work), who proves that there has been qualitatively and/or quantitatively substantial investment in either the obtaining, verifying or presenting of the contents of the database, shall enjoy the exclusive right to prevent extraction and/or re-utilization of the whole or substantial part, evaluated qualitatively or quantitatively, of the contents of that database",[892] which implements the provision of the EU Directive[893]. The terms 'extraction' and 're-utilization'[894] are also defined in Georgian law similarly as it is provided in the Directive[895].

Furthermore, in the chapter of the Georgian law dedicated to database the legislator also defines the rights and obligations of a lawful user of database, in order to balance them with the rights of a maker of database, according to which "the maker of a database which is published or made available to the public may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purpose whatsoever"[896]. On the other hand, this lawful user "may not perform acts which prejudice the legitimate interests of the maker of the

[890] Chapter VI, Law of the Republic of Moldova on Copyright and Related Rights.
[891] Hugenholtz in: Dreier/Hugenholtz Concise Copyright. p. 327.
[892] Art. 54.2, Georgian Law on Copyright and Neighboring Rights.
[893] Art. 7.1, Directive 96/9/EC.
[894] Art. 54.1, Georgian Law on Copyright and Neighboring Rights.
[895] Art. 7.2, Directive 96/9/EC.
[896] Art. 55.1.s1, Georgian Law on Copyright and Neighboring Rights.

database",[897] as well as "may not infringe rights of owner of copyright and related rights contained in the database"[898]. As we see, here the rights of a lawful user are balanced with the rights of the maker of database, as well as with the rights of owner of copyright and related rights. Such balanced approach is provided in the Directive itself and the regulation provided in the Georgian law is identical with this provision of the Directive[899]. The limitations to the rights of the database maker, which are in fact the rights of a lawful user to extract and/or re-utilize the database contents/parts for private or scientific (non-commercial) purposes as well as for the purposes of public security or court procedure[900], are defined in Georgian law also similarly to the Directive[901].

The provision about the deposit of a database has been added to the Georgian law by the fourth amendment in 2005, according to which the database maker may deposit the original or a copy of a database with Georgian National Intellectual Property Center "Sakpatenti".[902] Besides this novelty, the fourth amendment has been important in terms of protecting the databases since it has strengthened the two-tier protection regime for the databases while separating two types of database from each other: a database which is a copyrighted personal intellectual creation as a result of selection and systematization (referred as the first type) and a database which is not a 'work' in the sense of personal intellectual creation, but the rights of its maker still has to be protected.[903]

Besides the definitions of terms and the separated chapter VII especially dedicated to the rights of database makers, the other parts of Georgian law also reflect the provisions provided by the Directive which regulate the copyrighted database (and not the *sui generis* right).

[897] Art. 55.2, Georgian Law on Copyright and Neighboring Rights.
[898] Art. 55.3, Georgian Law on Copyright and Neighboring Rights.
[899] Art. 8, Directive 96/9/EC.
[900] Art. 56, Georgian Law on Copyright and Neighboring Rights.
[901] Art. 9, Directive 96/9/EC.
[902] Art. 54^1.1, Georgian Law on Copyright and Neighboring Rights.
[903] Part V, Explanatory Note of changes and amendments to the Georgian Law on Copyright and Neighboring Rights (3 June 2005).

While regulating the economic rights in databases (as well as in computer programs) Georgian law grants the author of database an exclusive right to exercise, authorize, or prohibit temporary or permanent reproduction, translation, adaptation, arrangement, and any other alteration of the database and reproduction, distribution, communication to the public, as well as display or performance to the public,[904] as it is provided in the Directive[905], only the territory of the community is replaced by the territory of Georgia. Furthermore, the law sets limitations to the rights of an owner of database together with the rights of an owner of computer programs,[906] as it is regulated in the "Database Directive"[907] and the "Computer Programs Directive"[908]: here the provisions of the Database and Computer Program Directives are unified in one article. Besides that, Georgian law enables the free use of database[909], where it uses the analogy of its previous article concerning the decompilation of the computer programs[910].

In this regard Georgian legislator has used an interesting technique of unifying the provisions of "Computer Programs Directive" and "Database Directive" into the single Articles – 19 and 28. In Article 19 of the Georgian law the first part reflects the provisions of the "Computer Programs Directive"[911] while the second part repeats the norms of the "Database Directive"[912]. Although this article has been criticized for "not creating any legally important and new norm to the law"[913], it still should be considered that this provision unifies the important provisions of the two EU Directives. Article 28 of the Georgian law also reflects the norms of Computer Programs[914] and Database[915] Directives but, unlikely to the Article 19

[904] Art. 19.2, Georgian Law on Copyright and Neighboring Rights.
[905] Art. 5, Directive 96/9/EC.
[906] Art. 28, Georgian Law on Copyright and Neighboring Rights.
[907] Art. 6, Directive 96/9/EC.
[908] Art. 5, Directive 2009/24/EC.
[909] Art. 30, Georgian Law on Copyright and Neighboring Rights.
[910] Art. 29, Georgian Law on Copyright and Neighboring Rights.
[911] Art. 4 Directive 91/250/EEC.
[912] Art. 5 Directive 96/6/EC.
[913] Dzamukashvili, p. 132.
[914] Art. 5 Directive 91/250/EEC.

where the provisions are divided into first and second parts, this article provides more consolidated version of the norms, where the limitations of rights for computer program owner and database owner are unified. Such 'combined' technique demonstrates an interesting approach of the Georgian legislator in terms of legal methodology.

8.1.4 Copyright in the Information Society

The EU Directive on the harmonization of certain aspects of copyright and related rights in the information society (so-called "InfoSoc Directive")[916] has been implemented into Georgian law in 2005 by the fourth amendment[917]. Particularly, the right of communication to the public of works and right of making available to the public other subject-matter defined by the Directive[918] is introduced in Georgian law in the respective articles dedicated to the rights of performers (right to authorize or prohibit the "transmission of the performance fixed in phonograms, by wire or wireless means, in such a way that a person may access it from a place and at a time individually chosen by him")[919], the exclusive rights of a videogram producer (right to authorize or prohibit the transmission of the videogram in a same way)[920] and the exclusive rights of a broadcasting organization (right to authorize or prohibit the transmission of the broadcast recording in a similar manner)[921]. In this regard Georgian legislation applies the method of distributing one article of the Directive into several articles of the law.

Besides the rights and exclusive rights, Georgian legislation has also implemented certain definitions from the Directive. Namely, technological measure is defined as "any technology,

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[915] Art. 6 Directive 96/6/EC.
[916] Directive 2001/29/EC.
[917] Changes and amendments to The Law on Copyright and Neighboring Rights.
[918] Art. 3, Directive 2001/29/EC.
[919] Art. 47.2.g, Georgian Law on Copyright and Neighboring Rights.
[920] Art. 49.2.f, Georgian Law on Copyright and Neighboring Rights.
[921] Art. 50.2.h, Georgian Law on Copyright and Neighboring Rights.

device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorized by the rightholder of any copyright or any right related to copyright",[922] similarly to the definition provided in the Directive[923]. Circumvention of technological measures is also defined as "the application of a device or its component or/and other means for neutralizing technological measures"[924] according to the Directive[925]. The definition of rights-management information provided by the Georgian law ("any information which identifies the author or any other rightholder of a work or other subject-matter protected by this Law, or information about the terms and conditions of use of the work or other subject-matter protected by this Law, and any numbers or codes that represent such information, when any of these items of information is associated with a copy of, or appears in connection with the communication to the public"[926]) is also in compliance with the Directive[927]. Technological measure and rights-management information are also defined in Armenian[928] and Azerbaijani[929] laws according to the Directive. However, such definitions are not provided in Moldovan and Ukrainian laws, nor in the Russian Civil Code.

8.1.5 Rental and lending Right

"The Rental and Lending Right Directive"[930] is also implemented into Georgian law on copyright and related rights by the fourth amendment. Although after the implementation

[922] Art. 4.s, Georgian Law on Copyright and Neighboring Rights.
[923] Art. 6.3, Directive 2001/29/EC.
[924] Art. 4.s[1], Georgian Law on Copyright and Neighboring Rights.
[925] Art. 6.1, Directive 2001/29/EC.
[926] Art. 4.t, Georgian Law on Copyright and Neighboring Rights.
[927] Art. 7.2, Directive 2001/29/EC.
[928] Arts. 67.2 and 68.2, Law of the Republic of Armenia on Copyright and Related Rights.
[929] Art. 4, Law of the Republic of Azerbaijan on Copyright and Related Rights.
[930] Directive 92/100/EEC.

this Directive was repealed and replaced by the new one[931], the norms implemented in the Georgian legislation were not affected by this change. As a result of this implementation, in the economic rights of author, the rental and lending or otherwise distribution of ownership does no longer belong to the general right of distribution, as it was in the initial version of the Georgian law. In the current version of the law, the right to exercise, authorize, or prohibit the "renting of the original or copies of the work, or/and to transfer ownership otherwise"[932] is defined in a separate sentence. Besides that, the Directive also affected the regulation of related rights in Georgian law, particularly the rights of performer, which were broadened to the extent of "direct or indirect reproduction of a performance recorded on a phonogram without any conditions precedent"[933]. According to the current version of the law, performers are entitled to authorize or prohibit "the distribution of the original and copies of their performances fixed in phonograms through rental or other transfer of ownership"[934].

8.1.6 Resale Right

Another EU Directive implemented in the Georgian law on copyright and related rights by the fourth amendment is the "Resale Right Directive"[935]. Current version of the Georgian law states that "the author or his/her legatees are entitled to remuneration for the resale of originals of works of fine art and photography, including through a professional intermediary",[936] which is in compliance with the Directive[937]. Furthermore, Georgian law also defines the special rates of the royalty provided to the author in the same article, where

[931] Directive 2006/115/EC.
[932] Art. 18.2.i, Georgian Law on Copyright and Neighboring Rights.
[933] Chumburidze, in: Georgian Law Review, p. 299.
[934] Art. 47.2.e, Georgian Law on Copyright and Neighboring Rights.
[935] Directive 2001/84/EC.
[936] Art. 20.2, Georgian Law on Copyright and Neighboring Rights.
[937] Art. 1.1, Directive 2001/84/EC.

the amounts given in Euros by the Directive[938] are converted into Lari (Georgian national currency)[939]. However, the percentage indicated in the Directive[940] remains the same. The rate of the resale price is five percent in Armenian[941], Azerbaijani[942], Moldovan[943], and Ukrainian[944] laws, while in Russian Civil Code the interest rate is to be defined by the government.[945]

8.1.7 Satellite and Cable

"The Satellite and Cable Directive"[946] has also been implemented into Georgian law on copyright and related rights by the fourth amendment. According to this Directive, granting or refusing authorization to a cable operator for a cable retransmission may be exercised only through a collecting society[947]. Certain changes have to be made in the Georgian law in order to implement this regulation. As a result, in the current version of the law "the amount of the remuneration, its calculation and payment procedure for any use of the work shall be determined under an agreement concluded between the author, other owner of copyright or the organizations that administers economic rights on a collective basis on the one hand and the user on the other hand"[948]. As for the related rights, "the collection and distribution of the remuneration shall be carried out by one of the organizations that administer economic rights of performers and phonogram producers on a collective basis, under an agreement

[938] Art. 4, Directive 2001/84/EC.
[939] Art. 20.2, Georgian Law on Copyright and Neighboring Rights.
[940] Art. 4, Directive 2001/84/EC.
[941] Art. 27.3, Law of the Republic of Armenia on Copyright and Related Rights.
[942] Art. 16.2, Law of the Republic of Azerbaijan on Copyright and Related Rights.
[943] Art. 20, Law of the Republic of Moldova on Copyright and Related Rights.
[944] Art. 27, Law of Ukraine on Copyright and Related Rights.
[945] Art. 1293.1, Civil Code of the Russian Federation.
[946] Directive 93/83/EEC.
[947] Art. 9.1, Directive 93/83/EEC.
[948] Art. 18.7, Georgian Law on Copyright and Neighboring Rights.

made between them"[949] and "the remuneration amount and its payment procedure shall be specified by an agreement concluded between the users of the phonogram, on the one hand, and an organization that administers economic rights of phonogram producers and performers on a collective basis, on the other hand".[950] The element of "the transmission of a phonogram on the air or retransmission by cable"[951] has been added to the general activities of using a phonogram as well.

8.2 The Association Agreement

Association Agreements have established a high level of cooperation between EU on one side, and Ukraine, Georgia, and Moldova, on the other, both in political and economical levels[952]. The agreement has been negotiated since 2007[953] and, together with the basic economic issues, it also represents the political agreement between the EU and the three countries. The innovatory model nature[954] of this agreement opens new perspective of the upper level of European integration for Georgia, Moldova, and Ukraine. This, together with the involvement of these three countries in the process of European integration, inevitably involves legislative harmonization across a variety of areas, including trade-related matters. Intellectual property — and particularly copyright and related rights — are significant parts of these trade-related matters, and are therefore regulated in much greater detail in the Association Agreements than in previous agreements between the EU and these three countries, namely the Partnership and Cooperation Agreements (PCAs) discussed so far.

[949] Art. 52.2, Georgian Law on Copyright and Neighboring Rights.
[950] Art. 52.3, Georgian Law on Copyright and Neighboring Rights.
[951] Art. 52.1.b, Georgian Law on Copyright and Neighboring Rights.
[952] Spiliopoulos, p. 256.
[953] Pastore, p. 6.
[954] Tyushka, p. 56.

Since the trade and related matters have been significant issues in relations between the EU and non-member states (including Georgia), the main pillar of this Association Agreement is the previous Deep and Comprehensive Free Trade Area (DCFTA), around which the Association Agreements are centered[955]. Generally, the DCFTAs are "promoted as a template for substantial reforms leading to closer regulatory integration between the EU and its partners… for the countries that are not only politically committed to a higher level of integration, but are also ready to translate their commitment into political reforms"[956]. Accordingly, the Association Agreements are aimed to set up DCFTA which should lead to "gradual and partial integration of Ukraine, Moldova and Georgia into the EU Internal Market"[957]. Therefore the DCFTA is expected to bring economic benefits to Georgia.[958] Accordingly, one of the declared aims of the Association Agreements is to make Georgian economy more business-attractive by "stimulating structural changes in the economy and expanding exports to the huge EU internal market in long term"[959]. In this regard, legal harmonization is considered as a tool in order to reach these economical aims.

If we compare these three Association Agreements with the other EU Association Agreements, we will notice that these three are more "voluminous and ambitious"[960]. On the other hand, while comparing them to each other, it is noticeable that, despite significant differences in the content and scheme of the sub-sections and specific articles, the structure of the three Agreements with Ukraine, Georgia, and Moldova are the same, comprising two basic parts: the first part — including the first, second and third titles of the Agreement —is dedicated to political issues, namely: political dialogue and reform, political association, cooperation and convergence in the fields of foreign and security policy, as well as justice, freedom, and security. The second part, which is primarily dedicated to economic aspects,

[955] Kawecka-Wyrzykowska, p. 78.
[956] Koeth, p. 1.
[957] Petrov, p. 155.
[958] Chagelishvili-Agladze et al., p. 34.
[959] Kawecka-Wyrzykowska, p. 79.
[960] Petrov, p. 155.

comprises titles IV, V, and VI. The provisions concerning intellectual property are located in this second part, namely in title IV, dedicated to trade-related matters. This second part starts with title IV, regulating trade-related matters between these two actors. The area of regulation is quite broad, including intellectual property, which is considered one of the most important trade-related issues. On the other hand, copyright and related rights, which are also considered among the most important aspects of intellectual property, are regulated by the separate sub-section 1.

There are some similarities as well as certain differences between the texts of the national Association Agreements. The Agreements with Georgia and Moldova are almost identical. Although the structure and sequence of the Agreement with Ukraine is similar to those with the other countries, the composition of certain articles and sub-sections is distinctly different from the Georgian and Moldovan versions. The Agreement with Ukraine includes articles regulating the protection of previously unpublished works; critical and scientific publications; photographs; fixation, distribution and reproduction rights; as well as articles dedicated to the protection of computer programs and databases[961], which are not present in the Georgian and Moldovan versions. Generally, in terms of intellectual property rights - and particularly copyright - the Agreement with Ukraine is broader and regulates certain issues in greater detail.

The disparities between the Ukrainian version, on one hand, Georgian and Moldovan versions, on the other, might be explained by the fact that, since Ukraine represents a much more significant market, legislators were more interested in ensuring more detailed regulation in the Agreement with Ukraine and more general provisions relating to Georgia and Moldova. Accordingly, several articles from EU copyright Directives have been transcribed into the Ukrainian Agreement. In contrast, Georgian and Moldovan versions are the products of a more "combined" approach, wherein the provisions of several articles (and

[961] Arts. 165, 166, 167, 169, 171, 173, 180 and 185, Association Agreement between the EU and Ukraine.

sometimes several Directives) are compiled into a single article. Therefore, in terms of legal technique, the Georgian and Moldovan versions are similar, but, at the same time, more complex and complicated, than that of the Ukrainian version.

The legal framework regulating trade and trade-related matters is provided in the Association Agreements with Georgia[962] and Moldova[963]. Among the variety of trade-related aspects, this Title regulates the issues of intellectual property, in general; and copyright, as well as related rights, in particular. Similarly to the Association Agreement with Ukraine, the issues concerning copyright and related rights are contained in Title IV, Chapter 9, Section 2, Sub-section 1. In spite of the significant structural and content-related differences, there are also certain similarities between the Ukrainian and Georgian-Moldovan versions of the Agreements, one of which is that all three Agreements include several norms of EU copyright law. Besides that, the regulations of broadcasting in Georgian[964] and Ukrainian[965] versions are similar to each other. In this regard Georgian version is slightly broader and deals with the different means of broadcasting[966], whereas the Ukrainian version simply states that "each Party shall provide the author with an exclusive right to authorize the communication to the public by satellite of copyright work"[967]. The similarity between the regulation of the right to a single equitable remuneration in Georgian[968] and Ukrainian[969] versions is also significant and, besides that, they both reflect the provision of the Rental and Lending Rights Directive.[970]

The regulation of copyright in the Association Agreement between Georgia and the EU comprises twelve articles and has the following structure: at first it refers to the international

[962] Title IV, Association Agreement between the EU and Georgia.
[963] Title IV, Association Agreement between the EU and Moldova.
[964] Arts. 157 and 158, Association Agreement between the EU and Georgia.
[965] Arts. 191 and 170, Association Agreement between the EU and Ukraine.
[966] Art. 157, Association Agreement between the EU and Georgia.
[967] Art. 191, Association Agreement between the EU and Ukraine.
[968] Art. 158, Association Agreement between the EU and Georgia.
[969] Art. 170, Association Agreement between the EU and Ukraine.
[970] Art. 8.2, Directive 2006/115/EC.

legal acts in the field of copyright such as Berne Convention, Rome Convention, TRIPS Agreement and WIPO Copyright Treaty, as well as WIPO Performances and Phonograms Treaty.[971] Afterwards it refers to the rights of the authors, performers, and producers of phonograms, each of them separately.[972] The issue of broadcasting is regulated in the following two articles dedicated to broadcasting organizations and the communication to the public.[973] Afterwards, the agreement, while referring to the "Term Directive"[974], regulates the term of protection and sets the appropriate durations.[975] The agreement also regulates the protection of technological measures and the protection of rights management information.[976] Another EU Directive referred by the agreement is the "Resale Rights Directive"[977] while defining artists' resale right in works of art[978]. Finally, the agreement regulates the cooperation on collective management of rights[979]. Certain limitations and exceptions to the rights of authors, performers, broadcasting and communication to the public, as well as term of protection, are also defined by the agreement.[980]

If we compare the levels of regulation, then we should place the Association Agreements between the EU Directives and the Partnership and Cooperation Agreements (PCAs). On one hand, the Partnership and Cooperation Agreements just referred to "copyright, including the copyright in computer programs and neighboring rights"[981]. EU Directives, on the other hand, provide detailed regulation concerning the specific fields they are dedicated to. Therefore, the level of regulating copyright by the Association Agreement is between these two: it provides twelve articles concerning copyright and related rights, which is much

[971] Art. 153, Association Agreement between the EU and Georgia.
[972] Arts. 154-156, Association Agreement between the EU and Georgia.
[973] Arts. 157 and 158, Association Agreement between the EU and Georgia.
[974] Directive 2011/77/EU.
[975] Art. 159, Association Agreement between the EU and Georgia.
[976] Arts. 160 and 161, Association Agreement between the EU and Georgia.
[977] Directive 2001/84/EC.
[978] Art. 163, Association Agreement between the EU and Georgia.
[979] Art. 164, Association Agreement between the EU and Georgia.
[980] Art. 162, Association Agreement between the EU and Georgia.
[981] Joint Declaration concerning Article 42, Partnership and Cooperation Agreement between Georgia and EC, 1 July 1999.

higher level of regulation comparing to the brief indication given by the Partnership and Cooperation Agreements, but, at the same time, it is not as detailed and comprehensive as the regulations provided in the EU Directives.

In the process of harmonizing Georgian copyright law with the EU legislation the Association Agreement between Georgia and the EU can be considered the next and advanced step after the Partnership and Cooperation Agreement. Besides that, this agreement is concluded only three countries (Georgia, Moldova and Ukraine), while the PCA was formed with ten post-soviet countries including them. Accordingly, the level of copyright protection within the framework of the Association Agreement should be higher comparing to that of the PCA. The recent developments in the EU copyright law, particularly the adoption of two new Directives[982] during the last five years also motivates to make another step forward to the harmonization of the copyright legislations of these three countries with that of the EU. This new wave of harmonization should be implemented within the framework of the Association Agreements and the EU copyright Directives (including the recent two Directives), where the former should be considered as the legal basis for the harmonization process, while the latter should serve as the guidelines and templates.

[982] Directive 2012/28/EU and Directive 2014/26/EU.

9. Conclusions

Georgia represents an example of an East European post-Soviet country that has shifted its copyright legislation from the Soviet system to the EU standards. Accordingly, the process of developing national copyright legislation in Georgia has to be discussed not separately but in comparison with the appropriate legislations of Armenia and Azerbaijan (as the Southern Caucasian countries), Moldova and Ukraine (as participants of the recent Association Agreement), as well as Russia (the central state of the Soviet system). In these countries, copyright is regulated in three different ways. In Azerbaijan, Georgia, and Moldova there are special acts dedicated solely to copyright and neighbouring rights. This approach is more oriented towards disambiguation and regulating all copyright-related issues within a single act. There is also another method, reflected in Russian legislation, where copyright and related rights are regulated by the civil code. Since the field of intellectual property, including copyright, is within the civil law, this approach also seems reasonable. There is also a third, rather original, 'combined' method of regulating copyright via both the civil code and special laws in combination, which is applied by the legislations of Armenia and Ukraine.

The concept of copyright (author's right) is one of the doctrines created and developed in the Western European countries and implemented in Georgia and neighbouring countries much later. This difference can be explained by the distinctive historical developments in these two regions, including the development of the printing industry. As the implementation of the Western European system of copyright is still an ongoing process, the tradition of Georgian legislation in terms of implementing different foreign legal systems has to be taken into consideration. According to this tradition, the available different legal systems have to be elaborated, balanced with each other, and – most importantly – adjusted to local specificities, in order to be relevant and applicable.

Soviet copyright legislation is a significant part of the development of copyright laws in Georgia and other post-Soviet countries. The attitudes towards Soviet copyright law have mostly been quite radical: it has been either praised or completely disregarded. Accordingly, an objective analysis of the Soviet copyright law, especially from the 'insider perspective' is quite rare and, therefore, important. The copyright law of the USSR has mostly been criticized from the right-oriented view of the free market economy. On the other hand, Soviet copyright law can also be criticized from the Marxist perspective, since it significantly and progressively deviated from the Marxist doctrine of copyright.

The permanent deviations and compromises towards Western legal standards finally led to the collapse of the Soviet system, including Soviet copyright law, leading immediately to the necessity of shifting from the collapsed to the prevailing system. This was a rather practical necessity, since new sorts of relations started to develop that could no longer be regulated by the former Soviet copyright legislation. Accordingly, the rapid process of radical transition from one to another extremely different legal system had started in the 1990s. The complicated and convoluted development of national copyright laws of the former Soviet states was caused by the radical and rapid nature of this transition, which was also reflected in the copyright legislations of the newly independent states.

Comparative analysis of the copyright legislations of post-Soviet countries creates an overall picture of their development, with certain common trends as well as structural and content-related differences between them. Structurally, Georgian law is mostly similar to the Moldovan and Azerbaijani laws: In common with Moldovan legislation, Georgian law regulates the economic rights and the collective administration of copyright and related rights, while with the law of Azerbaijan it is related in regulating the term of protection and the transfer of copyright. On the other hand, Armenian and Ukrainian laws are structurally similar to each other and different from the other four legislations. What the copyright laws of these five countries (Russian copyright law is part of a civil code and is therefore different

from the other five) have in common is regulating the basic rights of authors, protection of copyright and related rights, as well as sharing the continental European approach of dividing the related (neighbouring) rights from the author's rights.[983]

The development of Georgian national court practice only commenced following adoption in 1999 of the Georgian Law on Copyright and Related Rights. However, Georgian courts were still able to develop certain general standards in this short period of time. The most frequently examined issue in this regard is the subject matter of copyright protection. The Georgian Supreme Court has made a number of significant decisions concerning the definition of copyrighted work since the year 2002. In these decisions, the court tends to consider each of the cases individually and attempts to avoid elaborating on a common standard that should be commonly applicable. Generally, the development of Georgian court practice concerning copyright is an ongoing process and a significant part of the development of Georgian copyright law.

The Partnership and Cooperation Agreement between the EC and Georgia and EU Association Agreement with Georgia can be considered as two general documents, based on which the harmonization of Georgian copyright law with the EU legislation has been ongoing. Accordingly, the two levels of harmonization can be differentiated in this regard. The first wave of harmonization was based on the PCA, and covered ten post-Soviet countries, including Armenia, Azerbaijan, Moldova, Russia, and Ukraine together with Georgia. The second and more advanced level of harmonization is based on the AA, and comprises Moldova and Ukraine together with Georgia. The fourth amendment in the Georgian law on copyright, adopted in 2005, symbolizes the harmonization process based on the PCA. On the other hand, the further process of implementing EU copyright law into Georgian legislation should be based on the Association Agreement and is to be realized in the future.

[983] Wandtke, p. 157.

IV Recommendations and Proposals concerning the Harmonization of the Copyright Laws in the Post-Soviet Non-EU States with European Copyright Law

1. Introduction

We have examined European copyright law on one hand, and the copyright legislations of the post-Soviet non-member states on the other. At this point, both of these components have to be examined in an interrelated and critical manner in order to evaluate them objectively. Consideration of these critical points leads to the development of other proposals that should be taken into account as alternatives to these criticized components. The consideration of these elements (positive evaluations, critical assessments, and alternative options) will inform subsequent recommendations and proposals for the process of further harmonizing the copyright legislations of post-Soviet non-member states with that of the EU.

In order to develop a synthesis of both these main elements (European and post-Soviet copyright laws), we will apply the 'synthesizing approach' based on the critical evaluations of these two elements. Accordingly, we consider European copyright law as the first component, and Soviet copyright law together with the other alternative approaches to copyright as the second component. We examine the problematic aspects of both of these components, after which we develop a third component, to be considered as a synthesis of the previous components, and which at the same time should serve as a proposal for the theoretical background to the process of future implementation of European copyright law in post-Soviet non-member states.

The first critical evaluation examines European copyright law, which itself contains several components. At first, it refers to both concepts of 'copyright' and 'authors' rights', originally

developed in Europe in the 18th century.[984] In addition, it refers to the EU copyright law, often used even as a synonym for it. EU copyright law itself comprises EU copyright legislation (nine Directives) and ECJ practice. Accordingly, we must evaluate each of these elements to assess European copyright law from a critical perspective. This critical perspective should be based on the applicability of European copyright law for non-EU members.

A similar critical approach is adopted towards copyright laws in the post-Soviet non-EU states. In these countries, the development of copyright laws starts from the Soviet copyright legislation (excluding Russia, which has adopted its first copyright act "Statute on Censorship" in 1828).[985] Accordingly, we first examine Soviet copyright law from a critical perspective. Subsequently, another significant historical event, namely the shift from the Soviet to the Western system of copyright law, must also be evaluated. Since all of these countries developed their own national copyright legislations following the breakup of the Soviet Union in 1991, these national copyright legislations must also be critically examined. Finally, the ongoing process of harmonizing these national copyright laws with the European copyright law is critiqued.

After criticizing both of the main elements, we propose certain alternatives. The recently developed concept of 'copyleft' as well as an initiative to raise the role of moral rights should be considered as such alternative approaches. The proposed alternatives will be based on a balanced approach, which has been the essence of the copyright law since the very beginning of its development,[986] including the EU copyright legislation,[987] and which should refer to the aim of achieving a balance between private and public interests, as well as between international and domestic needs. These theoretical observations should be used in

[984] Berger, in: United in Diversity, p. 91.
[985] Herceg Westren, p. 146.
[986] Part IV and V, Statute of Anne.
[987] Hugenholtz, in: Harmonization of European IP Law, p. 60.

order to develop 'practical' proposals for implementing European copyright law in the legislations of the post-Soviet non-member states.

The practical recommendations refer to the general process of developing copyright laws in the post-Soviet non-EU states. After the initial stage of adopting the national legislations and the second stage of amending them, the third stage of deeper and more comprehensive reform is approaching. Accordingly, these proposals should contain 'theoretical' and 'practical' parts. The theoretical component should examine the applicability of the balance-based approach and the relevance of alternative views mentioned above. This theoretical analysis will be followed by more practical recommendations regarding the style of regulating copyright (by special act or by civil code) and the structures of copyright laws. It should also check the 'balance-based theory' in practice, in terms of its implementation in the copyright provisions. Finally, the basic definitions of copyrighted work should be compared between the copyright laws of the PSNEUSs as well as prominent Western European copyright legislations (namely the German Copyright Act, which has been used as a model for post-socialist copyright laws)[988].

Finally, based on the theoretical observations and practical proposals developed so far, the recommendations for further implementation of the EU copyright legislation into the copyright laws of the post-Soviet member states will be elaborated. In order to do so, we have to examine all of the nine EU Directives adopted in the area of copyright so far. Some of these acts (chronologically, the first seven Directives) are already implemented in the post-Soviet countries, while the last two Directives adopted in recent years have not been implemented at all. We also have to consider the Association Agreements formed with three of the post-Soviet non-member states, which provide the framework for further harmonization. Finally, we will define the frontiers of the future harmonization process, namely providing recommendations and setting limitations to this further harmonization. In

[988] Matanovac Vučković, in: IIC, p. 31.

both cases, we apply the balance-based approach, aimed at balancing the diverse interests, including the international requirements and domestic needs.

2. Problematic Aspects of European Copyright Law from the Perspective of its Implementation in the Non-Member States

The common concept of copyright, which covers the authors' rights as well as the related rights, has the European origin and, therefore, the general critique of copyright also refers to the European copyright doctrine. On the other hand, this concept has gone beyond the borders of Europe, reached the international level and has been modified according to the local characteristics of each countries or regions it is applied. Therefore, differentiating itself from the international concept of copyright, on one hand, and harmonizing the national copyright legislations of the European countries, on the other, EU copyright law has its unique place, character and the way of development. Accordingly, the critique of European copyright law should refer to the European common concept of copyright as well as the EU copyright legislation adopted up until now. Since the term 'European copyright law' refers to the European doctrine of copyright, as well as the EU copyright law including the legislation (Directives) and the practice of the European Court of Justice in the area of copyright, the critique of European copyright law should be directed to each of these elements. Thes critical evaluation should be based on the perspective of applicability of this European copyright law for the countries which do not belong to the European Union.

2.1 Critique of the Doctrine of Copyright

Although the concepts of copyright and authors' rights refer to the similar subject matter in the system of the law of intellectual property, they have rather different origins and characteristics which are typical for each of them. One of the aims of the process of

European copyright law harmonization is to reach balance between these two systems.[989] However, the difference between the doctrines of copyright and authors' rights remains significant. Therefore at first they have to be the objects of the critical evaluation separately and, afterwards, they both will be subjected to the common critique. Besides that, since copyright (including authors' right) has the European origin, the general critique of copyright, as a concept, also has to be aimed at this European copyright doctrine including its all elements.

2.1.1 Critique of the Concept of Copyright

The creation of copyright, as such, was caused by the necessity to control and regulate the increasing development of book printing. Copyright has initially been emerged as a tool of censorship[990] after the printing industry has developed so broadly that copyright had to control and, to certain extent, censor the spread of the printing literature (this censoring character of copyright was expressed also in Russia, where the first copyright act was the Statute on Censorship issued in 1828[991]). Although copyright is claimed to promote the creation of literary, artistic, and scientific works, it can also be used as a tool of censorship.

The semantic meaning of the word itself suggests that it defines and regulates "the right to copy". Accordingly, copyright is more oriented to control the commercial exploitation of the works.[992] Although the first copyright act – the Statute of Anne is quite balanced in this regard protecting also the interests of the public[993], the later development of the copyright doctrine shows that it is more oriented to protect the commercial interests and private property rights than the interest of the public. In this regard copyright is rather different

[989] Mogel, p. 27.
[990] Rajan, Copyright and Creative Freedom, p. 1.
[991] Herceg Westren, p. 146.
[992] Berger, in: United in Diversity, p. 92.
[993] Parts IV and V, Statute of Anne.

from the concept of authors' rights which has initially been more oriented on the personal 'moral' rights of the author.

2.1.2 Critique of Authors' Rights Doctrine

The concept of authors' right (droit d'auteur) emerged and developed rather differently from copyright. After the French revolution in 1789 the struggle for human rights has entered a new phase and the law on "authors' rights" was introduced in 1791.[994] The concept of authors' "moral right" (droit morale) developed even earlier, in 1777.[995] Being a successor of the struggle for human rights and development of moral rights, French doctrine of authors' rights was more oriented on the personality rights and protecting the personality of the creators rather than controlling the commercial exploitation. Later on this French doctrine of authors' rights spread throughout all continental Europe in the XIX century.[996] Besides that, together with the moral rights and protection of creators' personality, it also covered the property rights. However, in French law the moral rights and exploitation rights are still strictly separated from each other,[997] according to the 'dualistic system', while in other continental European copyright laws (i.e. German Copyright Act) these two rights are kept undivided, according to the 'monistic approach' unifying the component of personal rights as well as the element of property rights[998]. Although in dualistic system the rights are divided and, generally, the doctrine of authors' rights is much more oriented on the personality and moral rights than copyright, the commercial element and the exploitation rights are still the significant part in the authors' rights concept as well.

[994] Berger, in: United in Diversity, p. 91.
[995] Rajan, Moral Rights, p. 53.
[996] Berger, in: United in Diversity, p. 91.
[997] Titre II, Code de la propriété intellectuelle.
[998] Hansen, p. 25.

2.1.3 Common Critique

In spite of the significant differences between the copyright and authors right concepts, they still belong to the property (though – intellectual property) rights. Accordingly, the general critique towards the private property also applies to these intellectual property rights as well as to copyright (including authors' rights and related rights). The most radical critique of the private property is provided in the Communist Manifesto insisting on the complete abolition of the private property.[999] This abolition should refer to the intellectual property, including copyright, of course, since the sphere of arts, literature and science is considered incompatible with the commercial exploitation from the Marxist perspective. However, the problem with this Marxist/Communist doctrine, besides radicalism, was that it did not provide the exact plan of its realization in practice. As a result, the communist practitioners deviated from this 'orthodox' approach even immediately after the October Revolution in 1917,[1000] until this deviation and gradual compromise towards the 'capitalist' system went into capitulation and collapse of the Soviet system, including the Soviet copyright doctrine.

However, the fact that Communist model of copyright was not able to be implemented from the theory into reality does not mean that the radical-right commercial and property-based approach towards copyright has to be left without criticism. Although the utilitarian doctrine suggests that a continuing profit to the author guaranteed by copyright gives him/her an incentive to create,[1001] such approach also causes a gross 'propertization' of culture. In this respect 'propertization' should be understood as a state when the relationships in arts, literature, and science are based on property and regulated similarly to property.[1002] If we review the development of copyright in the international level during the last two centuries, we will see that copyright had more culture-oriented rationale in the era

[999] Marx / Engels, Manifest der Kommunistischen Partei, p. 24.
[1000] Lenin, p. 136.
[1001] Stokes, pp. 10-11.
[1002] Siegrist, in: United in Diversity, p. 12.

of Berne Convention[1003], while "current international copyright regime is almost unquestioning in its dedication to the god of commerce".[1004] Such radical commercialization, at the end, should be more hindering for the culture rather than an incentive to be developed. We also have to mention that even after the 25 years since the breakup of the Soviet Union, such extreme commercial approach in the sphere of science, literature and art still remains to be foreign and not acceptable in the former Soviet countries, while, according to the common approach in the Soviet Union, these spheres had to serve public aims and growth of culture, rather than "boosting the ego of the author"[1005]. Accordingly, such a radical shift from the extreme communist to the complete 'commercial' approach towards copyright would not be recommended for the post-Soviet countries.

Another critical argument towards the concept of copyright refers to the 'just rewards theory', according to which a work performed by the author needs to be rewarded properly.[1006] Although this theory is related to the general principle expressed in the Gospel of Luke that "labourer is worthy of his hire"[1007] and seems quite logical at the first sight, it still contains certain notions which need to be specified. First of all, the definition of the work is unclear in this regard, while the creatures in the field of literature and, mostly, arts, are not necessarily the results of diligent works, but they can also be the results of inspiration.[1008] Another critique refers to the first element of the 'just reward theory', namely the concept of 'just'. It is often arguable, what can be considered as 'just reward' and what should be the criteria according to which the reward will be considered just. If these criteria are not solid and the evaluation is not objective, it can lead to the two extremes: when the reward is unjustly low which results the case of discrimination, or when the reward is unjustly high which leads to unjust enrichment. In order to avoid such results, the grounds

[1003] Accepted in 1886.
[1004] Rajan, Copyright and Creative Freedom, p. 25.
[1005] Levitsky, Introduction to Soviet Copyright Law, p. 15.
[1006] Stokes, p. 13.
[1007] Luke 10:7 (KJV).
[1008] Stokes, p. 13.

for evaluation should be defined objectively, which is not an easy task in the area of literature and arts.

The concept of copyright also deserves certain critique from the perspective of public interests. Although it is claimed to promote social integration, economic wealth, political stability, and cultural progress of the society,[1009] which benefits the public interests at the end, it is clear that essentially the doctrine of copyright, as it exists now, is more oriented on the private interests and maximization of private profit than benefiting the general interests of the society. Besides that, it is also clear that copyright can also act (and often does) "as a fetter on those who need to copy the works for desirable purposes such as private study or research".[1010] Accordingly, an orientation on the private commercial rights and radical 'privatization' of copyright should damage the common interests of the society. In this regard the 'balance-based' approach[1011] should prevail, aiming to harmonize public and private interests with each other. A classic example of such balance-oriented copyright law is the Statute of Anne[1012] adjusting the private interests with the societal needs.

2.2 Critique of EU Copyright Law

Unlike the broad concept of 'European copyright doctrine', which covers the doctrine of copyright including authors' rights since its origin in Europe in XVII century and its development up until now expressed in the national copyright legislations of various European countries, the term 'EU copyright law' is rather narrower: it refers to the EU copyright legislation expressed in the nine Directives adopted by the EU in the field of copyright from 1991 up until now (excluding the Enforcement Directive[1013] which refers to

[1009] Siegrist, in: United in Diversity, p. 9.
[1010] Stokes, p. 12.
[1011] Eechoud, p. 299.
[1012] Parts IV and V, Statute of Anne.
[1013] 2004/48/EC.

the intellectual property rights, in general, according to the common practice) and the decisions by the European Court of Justice made referring to these Directives, as well as the decisions made in the area of copyright in general (since ECJ practice concerning copyright started twenty years earlier[1014] before the adoption of the first EU copyright Directive in 1991)[1015], although the latter is based on the former. In brief, EU copyright *law* is equivalent to EU copyright *Directives* + ECJ practice, within the meaning of this research. Accordingly, the critique of EU copyright law should be based on these components, and refer to elements such as the foundations and main characters of EU copyright legislation and its specific features expressed in the Directives, as well as the practice developed by the ECJ to date.

2.2.1 Critique of the Foundations of EU Copyright Law

Since the very beginning of its development, it has been clear that the body of EU copyright law was oriented toward the market. Commercial impulses are considered to have primary importance, as long as this new EU copyright legislation had to remove all differences between the laws of the member states having "direct and negative effects on the functioning of the common market".[1016] In this regard, the harmonization of EU copyright law has been seen as just one of the tools for achieving this common market-oriented goal. This can be explained by the general character of EU law itself, which initially began as "only an economic one, whose primary goal was to create a common market".[1017] This also derives from the general character of copyright based on commercial motives. Accordingly, nowadays, the progress made by EU copyright law is measured by the extent to which these initial market-oriented objectives are fulfilled, and the necessity of its further harmonization also depends on the interests of the European common market. As we can see, the origins of

[1014] Case 78/70 (08.06.1971).
[1015] Directive 91/250/EEC.
[1016] Recital 4, Directive 91/250/EEC.
[1017] Stamatoudi & Torremans, p. 8.

EU copyright law, as well as its current state and the future directions of its harmonization, are entirely dependent on economic motives and objectives. Any deviation from the needs of the common market, even from an academic point of view, leads to "fierce confrontation".[1018]

Such radically commercial and market-based character is the main feature of EU copyright law. Recall that commercial impulses were also the main motives for creating copyright in the UK.[1019] Although the author's right concept differs in origin, it also comprises a large amount of economic rights, both in monistic and dualistic systems.[1020] However, this original commercial character of copyright has been maximized in EU copyright law, since it is based on the European Common Market. Accordingly, the harmonization of EU copyright law within member states is also caused by and dependent on this common market. Furthermore, the implementation of EU copyright law even among non-member states is also driven by market-oriented motives. Although the levels of implementation among non-member states differ from those required of member states, the requirement of providing "a level of protection similar to that existing in the Community"[1021] remains the same for non-member states. Accordingly, the harmonization of EU copyright law, both inside and outside of its borders, is driven by economic and market-related impulses. Therefore, the critique of 'propertizing' the area of culture[1022] refers to EU copyright law even more than to the concept of copyright in general. On the other hand, the copyright systems of the former Soviet countries were based on the entirely different (and, to a certain extent, opposing) grounds of public interest. Accordingly, full implementation of this radically commercial element of EU copyright law in the legislations of post-Soviet countries would cause (and has already caused) significant inconsistencies.

[1018] Synodinou, p. 9.
[1019] Berger, in: United in Diversity, p. 92.
[1020] Hansen, p. 25.
[1021] Art. 42.1, Partnership and Cooperation Agreement between Georgia and the EU.
[1022] Siegrist, in: United in Diversity, p. 12.

2.2.2 Critique of EU Copyright Law from the Perspective of Legal Tactics and Methodology

Unlike the commercial character of EU copyright law, which is usually considered as a natural feature rather than an object of criticism, the tactics and methodologies of EU copyright law have been criticized more often. The general critique of EU law, concerning its complex and overextended procedures, due to which "even a relatively non-controversial Directive takes several years to complete, from its first proposal to its final adoption",[1023] refers also to EU copyright law. Besides that, the dynamic character of developing EU copyright legislation is also problematic. In this regard, the years 1991–2001, when the majority of the EU copyright Directives was adopted, were the most dynamic. The following decade, 2001–2011 mainly witnessed the development of practice by the ECJ, and the replacement and repeal of Directives adopted in the previous decade.[1024] Since 2011 the new wave of copyright Directives has been initiated and two new Directives[1025] have been adopted. This step-by-step approach employed by the EU "has resulted in an almost non-stop process of amending the national laws",[1026] since all of these new Directives, changes, and replacements have to be reflected in the national copyright laws of the member states.

EU copyright law can also be criticized from the perspective of legal certainty, which is important for understanding the 'sense' behind the copyright system[1027]. In this regard the asymmetric normative effect caused by the trend of 'upwards' harmonization, aiming to exceed the minimum international standards of the Berne and Rome Conventions,[1028] is also an object of criticism. Legal uncertainty is also caused by the tentative approach of the EU, the result of which is "a patchwork of measures covering seemingly unrelated (and, in some

[1023] Hugenholtz, in: Harmonization of European IP Law, p. 59.
[1024] I.e. Directive 2009/24/EC, Directive 2011/77/EU.
[1025] Directive 2012/28/EU and Directive on collective management of copyright – 04.02.2014.
[1026] Hugenholtz, in: Harmonization of European IP Law, p. 59.
[1027] Janssens, in: Derclaye, p. 336.
[1028] Hugenholtz, in: Harmonization of European IP Law, p. 60.

cases, apparently unimportant) areas of the law".[1029] Moreover, the bureaucratic nature of the EU institutions and the lack of transparency of the legislative processes are also criticized, since the complicated procedures of law-making and their complexity reduce transparency while inviting lobbying and rent-seeking. As a result, "more often than not, harmonization initiatives are driven by hidden political agendas"[1030]. These critical assessments more or less refer to the EU law in general, not only EU copyright law, which in itself is of course a part of this acquis communautaire.

Being a product of compromise, EU copyright law is inevitably criticized by all actors who are party to this compromise, while it shares the fate of all compromises, when "neither the proponents nor the opponents are perfectly happy with it"[1031]. Although EU copyright law is largely based on this compromise, its "limited potential to provide for true unification of the law"[1032] has also been mentioned. The absence of regulations concerning the private copy[1033] and choice of law,[1034] together with lack of harmonization in the field of collective management[1035] have also been criticized. Moreover, the harmonization of general private laws in Europe as a whole has been characterized as a "highly unrealistic project"; intellectual "insensitivity" towards national jurisdictions has been mentioned; and the problematic character of antagonism between the interests of harmonizing copyright on one hand, and national systems on the other, has been highlighted.[1036]

All these criticized aspects of EU copyright law are surely reflected in its final quality, which is affected by the complex and non-transparent bureaucracy, tentative and uncertain approach, unsatisfactory level of unification, inability to overcome the territoriality

[1029] Tritton, p. 487.
[1030] Hugenholtz, in: Harmonization of European IP Law, p. 61.
[1031] Ohly, in: Derclaye, p. 232.
[1032] Hugenholtz, in: Harmonization of European IP Law, p. 61.
[1033] Dusollier & Ker, in: Derclaye, p. 371.
[1034] Torremans, in: Derclaye, p. 457.
[1035] Frabboni, in: Derclaye, p. 373.
[1036] Rahmatian, in: Derclaye, pp. 315-316.

principle, and several other issues. Based on all these aspects, rather critical judgements have been made, according to which: "twenty years of harmonization of copyright law have not produced a solid, balanced and transparent legal framework in which the knowledge economy in the European Union can truly prosper. Even worse, the harmonization agenda has largely failed to live up to its promise of creating uniform norms of copyright across the European Union".[1037] According to another conclusion, "EU harmonization has failed to produce a comprehensive model of authors' rights for the international arena".[1038] Although such conclusions might seem rather harsh, they summarize the critical assessments made of EU copyright law and its harmonization during the last decades.

2.2.3 Critique of ECJ Practice in the Area of Copyright

Decisions of the European Court of Justice fulfil a very important role of interpreting EU copyright legislation and, generally, shaping EU copyright law concerning the main practical aspects related to copyright. Being a significant part of EU copyright law, the critical assessments of the general content of this acquis communautaire also refer to ECJ practice. The impact of this case law has been referred as "harmonization by stealth" and "filling the gaps", in order to demonstrate the role of the ECJ in attempting to fill the gaps in EU copyright legislation.[1039] Furthermore, there are more specific critical evaluations of the methodology and approaches used by the ECJ in certain cases. Namely, in the case *Egeda v. Hoasa*[1040] decided in 2000, the court stated that, since the notion of 'public' has not been harmonized by the Satellite and Cable Directive,[1041] the issue "consequently must be decided in accordance with national law of the Member States".[1042] In this decision, the 'irresolute'

[1037] Hugenholtz, in: Harmonization of European IP Law, p. 61.
[1038] Rajan, Copyright and Creative Freedom, p. 21.
[1039] Strowel, in: Harmonization of European IP Law, p. 76.
[1040] Case C-293/98 (03.02.2000).
[1041] Directive 93/83/EEC.
[1042] Dreier, in: J. Copyright Soc'y U.S.A, p. 217.

position of the ECJ is visible: the court is unwilling to take sole responsibility for the harmonization effort, therefore leaving the case to be decided by the national courts of member states according to their diverse opinions, thereby leaving the issue unharmonized. The similar 'hesitant' approach has been applied by the ECJ in the well-known case of *Fundación Gala-Salvador Dalí vs. ADAGAP*,[1043] in which the court hesitated to create a common standard, justifying its decision by stating there was "no need to eliminate differences between national laws"[1044] and also left this issue to be decided by the national courts.

Besides these hesitations in creating common standards and harmonizing certain aspects of EU copyright law, there are some general critical assessments towards the ECJ. The basic claim towards the court in this regard is the following: "the Court has failed to develop a coherent copyright jurisprudence (lacking domain expertise, copyright specific reasoning, and predictability)".[1045] In this case, these shortcomings are considered the reason for the failure to create this coherent jurisprudence. Additionally, it has been mentioned that the teleological approach[1046] has prevailed, to date, in ECJ decisions on copyright, together with a "complex pattern of cumulation, often combining teleological, systematic and semantic".[1047] These critical assessments of ECJ practice are significant not only for member states but also for the developing copyright laws of non-member states. Although the decisions of the ECJ are not binding for non-member states and their execution is not mandatory in this regard, such decisions are still used by national courts as the model for deciding similar issues, and as a source while interpreting certain provisions of copyright law. Accordingly, critical evaluations of ECJ practice have to be taken into consideration while referring to its decisions as models and sources.

[1043] Case C-518/08 (15.04.2010).
[1044] Gherghinaru, in: Landmark IP Decisions of the ECJ, p. 64.
[1045] Favale et al., p. 32.
[1046] Based on the purpose.
[1047] Favale et al., p. 33.

2.2.4 Critique of the Applicability of EU Copyright Law for Non-Member States

Since the applicability for non-member states is the fundamental focus when reviewing EU copyright law, such assessments must initially be based on this point. The Acquis communautaire can easily be criticized in this regard, as this law is directed to EU member states. However, it has also been mentioned that EU copyright law "has normative effect not only in the Member States that are obliged to transpose the Directives, but also at the international level".[1048] Additionally, agreements such as PCAs[1049] and AAs,[1050] between the EU and non-member states, create the necessity to implement the acquis communautaire in the legislations of non-member states to the appropriate extent. In this regard, it should be mentioned that the legislators of non-member states have to carefully select norms from EU copyright law in terms of their applicability, since significant amounts of these are directly aimed at EU member states and are designed to be implemented in these member states.

The first critical assessment in this regard refers to the commercial and market-based character of EU copyright law. While critiquing this issue we consider the background of the post-Soviet countries. The Soviet doctrine of copyright can be considered as an antipode of the EU acquis communautaire in this regard, since the former was based on the common interests of the society rather than the private property rights of certain persons.[1051] In EU copyright law, which is based on market-oriented motives, we have a completely different picture, where the propertization and commercialization of the copyright and related issues has reached its maximum. The rapid and radical shift from one system to a completely different one would be (and, to a certain extent, has already been) problematic. Accordingly, the critique of the commercial and market-oriented character of EU copyright law has to be

[1048] Hugenholtz, in: Harmonization of European IP Law, p. 58.
[1049] Partnership and Cooperation Agreements.
[1050] Association Agreements.
[1051] Levitsky, Introduction to Soviet Copyright Law, p. 15.

based on this perspective of the non-member states belonging to the post-Soviet copyright culture.

While implementing laws from a foreign legal system, the progress made by the law in this foreign system has to be observed. It has been mentioned that, apart from the obligatory requirements of the EU agreements, European copyright law has also been implemented in the Eastern European countries voluntarily, as models of "best practice" to be found there.[1052] The same can be said of the post-Soviet states that are not EU members. However, acquis communautaire has been criticized even from the inside perspective. Namely, the criticized characteristics of EU copyright law, such as complex and non-transparent bureaucracy, tentative and uncertain approach, unsatisfactory level of unification and, furthermore, failure to live up to its promise of creating uniform norms of copyright across the European Union",[1053] suggest considering insider critiques of EU copyright law before implementing them 'blindly' in the copyright legislations of non-member states. The same applies to decisions of the ECJ in the field of copyright: before using them as models and sources for national jurisprudences, they should be evaluated critically. It should also be taken into consideration that, among ECJ practice, there are decisions aimed directly at member-states,[1054] while there are also cases examining the legal status of the nationals of non-member states[1055] that are therefore applicable to non-EU countries.

The most important issue to be considered while evaluating the applicability of EU copyright law to non-EU states is the that of enforcement, namely "'law in action' as contrasted to 'law in books'".[1056] There is a risk that even a wholly applicable legal provision that functions perfectly within the EU, while being 'blindly copy–pasted' into the legislation of a non-member state, will remain on paper but never be implemented in practice. In order to avoid

[1052] Dietz, in: Harmonization of European IP Law, p. 105.
[1053] Hugenholtz, in: Harmonization of European IP Law, p. 61.
[1054] I.e. Case C-173/11 (18.10.2012.
[1055] Case C-240/07 (20.01.2009).
[1056] Dietz, in: Harmonization of European IP Law, p. 113.

such blindly transplanted provisions, local characteristics, including historical and cultural backgrounds, must first be considered. In this regard, careful evaluation of the applicability of EU copyright law is needed before implementing it in the national legislations of non-member states.

3. Problematic Aspects of Copyright Law in Post-Soviet Non-EU States

Copyright law in countries which belonged to the Soviet Union and are now implementing EU copyright legislation had to develop between the two opposing systems. These contradictions between the two opposites have and continue to affect copyright law in these countries. Therefore, in order to explain the logic behind the development of copyright law in these post-Soviet states, we have to critically evaluate the levels of this development. In the countries named above (excluding Russia, which issued its first copyright act in 1828),[1057] copyright law has gone through the following levels: Soviet copyright law (which itself also had different levels of development); the shift from the communist to the Western legal system; the development of national copyright laws; and the incorporation of EU copyright legislation in these national laws. Accordingly, all four levels have to be examined.

3.1 Critique of the Soviet Copyright Law

Two opposing views have been dominant while evaluating Soviet copyright law in the countries where it had been developed: it was either praised, or disregarded. Before the breakup of the USSR, Soviet copyright law had been praised as the only correct concept opposed to the 'capitalist' system of copyright. However, following the breakup of the USSR, Soviet copyright law has been harshly criticized as being incompatible with the free market economy and, therefore, disregarded.[1058] As we can see, the approaches towards copyright law have changed quite radically from the orthodox Communist view to the orthodox neoliberal, market-based perspective. The problem with these radical views is that both consider their own position as the ultimate truth. Objective and balanced analysis of the

[1057] Herceg Westren, p. 146.
[1058] Dzamukashvili et al., p. 7.

Soviet copyright law is quite rare and mostly derives from authors outside the post-Soviet countries.[1059] On the other hand, such objective analysis from the 'insider' perspective is needed in order to evaluate, explain, and define the development of copyright law in post-Soviet countries in the past as well as in the future.

We must first consider that the radical-right view of the free market economy is not the only perspective we should rely on while criticizing Soviet copyright law. This radical neoliberal view was dominant in the post-Soviet countries in the initial decades after the breakup of the USSR, while evaluating the 'defeated' communist system from the pedestal of 'victorious' market-based ideology with a certain arrogance[1060]. However, since this euphoria of victory has slowed in recent years, we can now see that the free market economy is not the only perspective from which Soviet copyright law has to be evaluated; and that there are several other perspectives from which to criticize the Soviet concept of copyright, including even the Marxist approach. In this regard, the self-contradictory character of Soviet copyright law is the first point of criticism. This contradiction with communist ideology, to which the Soviet legal system belonged, has been obvious since the very beginning of its development and increased through the decades.

Two levels can be differentiated in the development of Soviet copyright law. Initially the first Soviet copyright decree "On State Publishing" was adopted soon after the October Revolution, on 29 December 1917.[1061] A typical characteristic of Soviet copyright law was that it deviated from the communist ideology as early as the initial years after the October Revolution. According to Marx, both law[1062] and property[1063] were created by capitalism, which used them as instruments that therefore must abolished in the communist society.

[1059] I. e. Rajan, Copyright and Creative Freedom, A Study of post-socialist law reform.
[1060] Rajan, Copyright and Creative Freedom, p. 59.
[1061] Levitsky, Introduction to Soviet Copyright Law, p. 28.
[1062] Marx / Engels, Manifest der Kommunistischen Partei, p. 27.
[1063] Marx / Engels, Manifest der Kommunistischen Partei, p. 24.

However, there was a certain period of gradual transformation to the communist society,[1064] during which the existence of law was acceptable, within the framework of the revolutionary dictatorship of proletariat.[1065] However, Marx and Engels did not indicate how long this transitional period should last, or how this 'revolutionary dictatorship' would function. Facing the challenge of dealing with these practical issues after the October Revolution, Lenin elaborated the theory according to which there were the levels of communism before the final "withering away of the state";[1066] before overcoming these levels, legal control[1067] via "the apparatus of coercion, that is, the state machine"[1068] was necessary. Accordingly, the existence of Soviet law, including copyright law, was justified within the context of legal control by the state. Since private property was strictly inadmissible in communist ideology,[1069] the Soviet concept of copyright was based on 'moral rights' rather than property rights.[1070] According to this logic, the fundamental principles of copyright law were later endorsed in 1925, and the copyright acts of the Soviet states were adopted according to these principles,[1071] which were in force prior to 1961.

The second level of developing Soviet copyright law started with the new Fundamentals of Civil Legislation and continued with the accession of the USSR to the Universal Copyright Convention in 1971, for which fundamental amendments had to be made in Soviet copyright legislation. These amendments represented significant compromises of the Soviet concept of copyright towards Western 'capitalist' standards. Such compromises made clear that, rather than aspiring to the ideal of the communist society, the Soviet Union was increasingly retreating and compromising vis-à-vis the rival Western system. Such changes made Soviet copyright law enigmatic and self-contradictory, since initially it had aimed towards the ideal

[1064] Engels, Grundsätze des Kommunismus, p. 26.
[1065] Marx, Kritik des Gothaer Programms, p. 29
[1066] Lenin, p. 121.
[1067] Mamlyuk, pp. 540-541.
[1068] Lenin, p. 67.
[1069] Marx / Engels, Manifest der Kommunistischen Partei, p. 24.
[1070] Rajan, Copyright and Creative Freedom, p. 148.
[1071] Levitsky, Introduction to Soviet Copyright Law, p. 34.

of the communist society but subsequently capitulated to capitalism. Rather than reaching the "higher phase of communism"[1072] and the "withering away of the state",[1073] the Soviet system was attempting to survive via any means necessary with compromises, including the legal manoeuvre of adopting the UCC before the 1971 Paris amendments, which granted even more exclusive rights to authors and restricted licenses.[1074] Gorbachev's perestroika was the last attempt to survive via compromise, before the final collapse of the Soviet Union.

In this way, a strongly idealistic system was corrupted into an ideology [1075] of strengthening the positions of the state as the owner-in-chief of properties including intellectual property and copyright. At the same time, Soviet law also developed a censorial approach to copyright, which was inherent in Russian copyright law since the adoption of the first copyright act – Statute on Censorship, in 1828.[1076] Since copyright regulated the area of literature, art, and science, which were highly important in the Soviet system for implementing its ideology, the system maximized the censorial character of copyright and added an oppressive element to it.[1077] As a result, even moral rights, which were considered the basis of Soviet copyright law, could not be exercised in this repressive regime.[1078] The case of Georgian writer Grigol Robakidze, whose books were prohibited in the Soviet Union after his emigration to Germany in 1931, and whose work "*Lamara*" was attributed to another Georgian author Vazha-Pshavela,[1079] is an example of deprivation even of the basic authorship right by the Soviet state.

The main criticism of Soviet copyright law can be expressed in a single evaluation: self-contradiction. This self-contradiction is reflected in the fact that the communist ideology had

[1072] Lenin, p. 136.
[1073] Lenin, p. 121.
[1074] Mamlyuk, p. 564.
[1075] Rajan, Copyright and Creative Freedom, p. 89.
[1076] Herceg Westren, p. 146.
[1077] Rajan, Copyright and Creative Freedom, p. 50.
[1078] Rajan, Copyright and Creative Freedom, p. 148.
[1079] Baqradze, p. 106.

moved from the idea of "withering away of the state"[1080] to the practice of making the state owner-in-chief of authors' rights. The same self-contradiction describes the development from the copyright law considered to be oriented toward moral rights to the oppressive regime and practice of depriving even these personal rights. In this regard we see an obvious contradiction from the starting point of orthodox Marxism to Leninism, lately developed as Bolshevism and diverging even further from Marxist ideology. Such self-contradictory character was one of the main reasons for the collapse of the Soviet system, including Soviet copyright law. However, the fact that the Soviet system collapsed does not mean that we should disregard its legacy and impact, which continues in the current copyright laws of former Soviet states. Rather, an objective evaluation of this Soviet background would be helpful to explain post-Soviet developments in these non-member states, including current developments.

3.2 Critique of the Shift from Soviet to Western System of Copyright

The Soviet doctrine of copyright on one hand, and Western concept of copyright on the other, were two radically different, incompatible, and even antagonistic systems by the time of the breakup of the USSR. However, this radical shift from the Soviet- to the Western-style copyright regime took place with unnatural speed – very hastily and rapidly.[1081] After the breakup of the Soviet Union in 1991, the newly independent post-Soviet countries suddenly faced the challenge of developing their own national copyright regimes; subsequently, all of them shifted from the Soviet system to the radically different regime of the Western countries. This unnaturally quick transition has been partially justified by the 'inner' needs, provided that existing Soviet copyright legislation was no longer able to regulate the issues that emerged from the new types of relationships and the reform proposals were originated

[1080] Lenin, p. 121.
[1081] Rajan, Copyright and Creative Freedom, p. 47.

from the local groups[1082]. However, the indigenous needs could not be the only reason for such rapid implementation of international standards.

Another significant feature of the shift to the Western-oriented regime by the newly independent states is the complete dismissal of past approaches and the system of Soviet copyright law,[1083] as though they were starting the development of national copyright legislations from tabula rasa and Soviet copyright law did not exist at all. Soviet copyright law, which had been applied for more than seven decades[1084] and had also been the first copyright legislations for most of the post-Soviet countries, had "surely left a mark on the industries, processes and products of intellectual property"[1085] and should not be disregarded so easily. Although these Soviet provisions might be inadequate[1086] for the new reality that emerged in the newly established free market economies, they still needed to be evaluated thoroughly rather than simply being ignored, since "the uncritical dismissal of past approaches to copyright means that the legal thinking which they represented has been discarded without a proper assessment of their continued relevance to the new system".[1087]

Together with the disregard of the previous legal system, the domestic needs of the transitional countries have also been largely ignored in favour of the requirements of the international copyright regime.[1088] In most cases, the elder Western European copyright laws have been considered as the models,[1089] from which the provisions have been copied. The transitional process in the new national legislations can be defined as legal export,[1090] or legal transplantation,[1091] meaning to 'borrow' the law from another legal system.[1092] Being more

[1082] Mamlyuk, p. 566.
[1083] Rajan, Copyright and Creative Freedom, p. 56.
[1084] Since 29th December 1917.
[1085] Rajan, Copyright and Creative Freedom, p. 56.
[1086] Dietz, in: Harmonization of European IP Law, p. 112.
[1087] Rajan, Copyright and Creative Freedom, p. 56.
[1088] Rajan, Copyright and Creative Freedom, p. 49.
[1089] Dietz, in: Harmonization of European IP Law, p. 102.
[1090] Rajan, Copyright and Creative Freedom, p. 57.
[1091] Mamlyuk, pp. 566-567.

critical, it can also be described as "legal copy–paste", since the provisions from the international treaties as well as from the Western European models have been implemented quite blindly. As a result, "law reform has occasionally taken the form of literally translating provisions from American, or, occasionally, European law into local languages".[1093] Although these law reforms in the former socialist countries have been described as "very fruitful legislative nineties" and deserved commendation for creating "pronouncedly modern copyright laws, often even more so than their models, the elder Western European Laws",[1094] this refers only to the successful rewriting of these Western European copyright provisions. At the same time, these reforms disregarded the domestic needs of the transitional countries, and they were "surprisingly weak from the perspective of policy development".[1095] Therefore, the progress made by the rapid transition from the Soviet to the Western-oriented system of copyright is expressed in the successful transplantation of the international provisions in the national legislations of the post-Soviet countries[1096] and not in the elaboration of independent policies based on the domestic needs of these countries, which would be much more desirable.

The reason for such a rapid, radical, and blind shift from the Soviet to the Western system of copyright, together with the indigenous needs and proposals, originated from the local working groups,[1097] as well as an overwhelmingly important aim of integration in international economic life and participation in the WTO,[1098] was also significant international pressure.[1099] Generally, the attitude towards the 'defeated' socialist system from the pedestal of a 'victorious' Western system, especially after the collapse of the USSR, has

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[1092] Chen-Wishart, p. 1.
[1093] Rajan, Copyright and Creative Freedom, p. 51.
[1094] Dietz, in: Harmonization of European IP Law, pp. 101-103.
[1095] Rajan, Copyright and Creative Freedom, p. 47.
[1096] Dietz, in: Harmonization of European IP Law, pp. 101-103.
[1097] Mamlyuk, p. 566.
[1098] Rajan, Copyright and Creative Freedom, p. 47.
[1099] Haigh, p. 251.

been described as an "aggressively Western approach to reform".[1100] Usually, the progress made by reforming the copyright legislations is measured from the perspective of the Western countries and their market economies, although it has also been mentioned that "the post-socialist legislators had some difficulties to understand the sophisticated new regime on the protection of computer programs",[1101] for example. Generally "the arrogance and self-interest of the international intellectual property community", termed a "nothing to learn attitude", gradually grew into the phenomena called "legal imperialism".[1102] On the other hand, if we consider the situation in the early 1990s and the euphoria of victory over the collapsed Communist ideology by the Western, free market system, such attitudes are not overly surprising. However, more than two decades have passed since then, which should be quite sufficient to calm this euphoria and evaluate more objectively the 1990s transitions in copyright law.

This problem of such a one-sided attitude towards copyright reform during the 1990s is not only the fault of the international intellectual property community. Local legislators in the post-Soviet countries considered the Western perspective as the only appropriate framework for evaluating the transition to a new form of copyright regulation,[1103] and accepted the standards defined by the Western community without criticism. Such 'cooperation' between the "aggressively Western approach"[1104] on one hand, and the 'flexibility' of the local legislations on the other, results in a situation where such blindly copied provisions remain as "law in the books"[1105] and are not properly implemented in reality. In order to avoid this for future reforms, critical perspectives on Western copyright standards are needed, together with consideration of the domestic needs and local preconditions in each of the post-Soviet countries, on which future copyright reforms in these countries should be based.

[1100] Rajan, Copyright and Creative Freedom, p. 64.
[1101] Dietz, in: Harmonization of European IP Law, p. 109.
[1102] Rajan, Copyright and Creative Freedom, pp. 58-59.
[1103] Dzamukashvili et al., p. 7.
[1104] Rajan, Copyright and Creative Freedom, p. 64.
[1105] Dietz, in: Harmonization of European IP Law, p. 113.

3.3 Critique of Copyright Legislations in Post-Soviet Countries

The initial development of national copyright laws in the newly independent post-Soviet states was quite disoriented and unstable. Since the copyright laws were inserted in the Civil Codes according to the common standard in the Soviet Union, it took a long time for the newly independent post-Soviet states to decide whether to adopt single acts dedicated to copyright, or to insert the provisions concerning copyright within their Civil Codes. The Russian Federation was the first country to adopt the single act on Copyright and Related Rights in July 1993 (amended December 2002).[1106] However, Russian legislation has subsequently revised its approach, and nowadays the field of intellectual property rights, including copyright, is regulated by the Civil Code.[1107] Ukraine adopted its copyright law in 1993 and has since amended it several times.[1108] Moldova adopted the law on copyright in 1994 and replaced it by the new Law on Copyright and Neighbouring Rights in July 2010.[1109] Azerbaijan adopted law on copyright in 1996, subsequently amended several times until April 2013.[1110] Armenia also adopted the first copyright law in May 1996, afterwards the draft of the new Civil Code comprising the copyright provisions, but finally decided in favour of the new copyright law (adopted in December 1999 and once again replaced by the new law in 2006).[1111] Georgian legislators also hesitated between the options of regulating copyright by the Civil Code or via a single act, until the law on copyright and neighbouring rights was amended in 1999, which is still in force although with nine amendments.[1112]

[1106] O'Connor, p. 1013.
[1107] Civil Code of the Russian Federation, Part IV, chapter 70.
[1108] Law of Ukraine on Copyright and Related Rights.
[1109] Pilch, p. 83.
[1110] Law of Azerbaijan on Copyright and Related Rights.
[1111] Abovyan, p. 13.
[1112] Law of Georgia on Copyright and Neighboring Rights.

In terms of structure, the copyright laws of these countries differ significantly from each other. They are all more-or-less based on the "five-pillar system of copyright" comprising: "1) substantive copyright law (objects, owners, content in terms of moral and pecuniary rights, duration and limitations of copyright protection); 2) related or neighbouring rights; 3) copyright contract law; 4) comprehensive regulation of collecting societies, and, finally, 5) a comprehensive set of rules on enforcement of copyright".[1113] Armenian and Ukrainian laws, which are structurally similar to each other and both divided into six parts, follow this model most closely, as does Azerbaijani law, although structurally different from the other two. Georgian and Moldovan laws comprise much more structural units (Georgian 12 chapters, Moldovan 10 chapters). The utility of so many chapters is questionable, since one of the chapters in Georgian law, for example, regulates terms of protection of related rights and of the rights of database maker and contains only one article.[1114]

Georgian[1115] and Moldovan[1116] laws also utilize a single chapter to regulate the limitations on economic rights, making them structurally similar to the German Copyright Act[1117] (generally, the German system of copyright law has been used as a model for the legislations of the post-Soviet countries, as well as in other Eastern European countries).[1118] However, comparison of these laws reveals differing numbers of articles in the respective chapters: Moldovan law contains six articles and Georgian law 10 articles, while German law comprises 37 articles in the chapter dedicated to limitations. From the perspective of the 'balance-based' approach, the limitations to copyright balance the economic rights of the copyright holders with those of the users of copyrighted works, as well as the society as a whole. Accordingly, the limitations should be sufficient to balance the rights of the

[1113] Dietz, in: Harmonization of European IP Law, p. 104.
[1114] Chapter VIII, Article 57, Law of Georgia on Copyright and Neighboring Rights.
[1115] Chapter III, Law of Georgia on Copyright and Neighboring Rights.
[1116] Chapter III, Law of the Republic of Moldova on Copyright and Related Rights.
[1117] Teil 1, Abschnitt 6, Urheberrechtsgesetz.
[1118] Matanovac Vučković, in: IIC, p. 31.

copyright holders. Another incompatibility in the copyright laws of the post-Soviet countries is their frequent use of expressions such as "etc." within the legal provisions.

Court practice in the area of copyright has developed quite dynamically during the last two decades. Initially, the courts had to examine the relevant relationships which started during the period when Soviet copyright law was in force.[1119] Furthermore, in certain cases, when the Supreme Courts have had the opportunity to define certain standards according to which copyrighted works must be examined, they have refused to exercise this option.[1120] Rather, they have left such issues to be decided by the courts according to the individual cases. The European Court of Justice has been criticized for using such a 'hesitant' approach where it had to define common standard, and for leaving the issue unharmonized rather than creating such a standard.[1121] However, in case of Georgia, the possible justification might be that the court considered the issue as an individual one, where the burden of evaluation lies with the opinions of the judges after jointly considering all of the categories in joint.[1122]

3.4 Critique of the Implementation of EU Copyright Law in Non-Member States

The critical assessment of the general transition process and reformation of copyright legislation in post-Soviet countries also refers to the implementation of European copyright law in these legislations. Namely, the method of 'blind copy–pasting' is also used when implementing EU copyright legislation. In this regard, practices in the post-Soviet area differ from country to country. The definition of database, for example, which is one of the important norms provided in the Database Directive,[1123] is implemented differently in the copyright laws of the post-Soviet countries. For example, an almost literal translation of this

[1119] I.e. Decision by the Supreme Court of Georgia made on 20/11/2002 (3ვ/829-02).
[1120] Decision by the Supreme Court of Georgia made on 01/12/2009 (ას-468-780-09) motivational part.
[1121] I.e. Case C-518/08 (15.04.2010).
[1122] Decision by the Supreme Court of Georgia made on 01/12/2009 (ას-468-780-09) motivational part.
[1123] Art. 1.2, Directive 96/9/EC.

definition has been inserted in Georgian copyright law.[1124] In Armenian law, the first part of the definition is also similar to that of the Directive, but it subsequently adds a significant element referring to acquisition.[1125] The Russian Civil Code defines a database quite differently from the Directive,[1126] and the definition in Azerbaijani law[1127] is similar to that of the Russian law. The definition in Ukrainian law[1128] contains elements of both of these definitions. Moldovan law, also adding several elements to the definition given in the Directive, provides the compiled version,[1129] which has to be preferred over the exact translation provided in the Georgian law.

Generally, the implementation of EU copyright law in the legislations of post-Soviet countries is stipulated by the variety of preconditions: in certain cases it is applied voluntarily as the "best practice" to be found in Europe.[1130] However, in many cases such implementation is the result of international obligations undertaken under the PCAs or AAs. In the latter cases, the probability of 'blind implementation', when the domestic needs of the local legislations are disregarded, is higher. Furthermore, it leads to the problem of "law in books" and "law in action".[1131] In this regard, most of the provisions implemented from the European copyright law to the post-Soviet legislations remain "in books" without any practical implementation.

[1124] Art. 4.m, Georgian Law on Copyright and Neighboring Rights.
[1125] Art. 58.1, Law of the Republic of Armenia on Copyright and Related Rights.
[1126] Art. 1260.1, Civil Code of the Russian Federation.
[1127] Art. 4, Law of the Republic of Azerbaijan on Copyright and Related Rights.
[1128] Art. 1, Law of Ukraine on Copyright and Related Rights.
[1129] Art. 2, Law of the Republic of Moldova on Copyright and Related Rights.
[1130] Dietz, in: Harmonization of European IP Law, p. 104.
[1131] Dietz, in: Harmonization of European IP Law, p. 113.

4. Proposal for the Future Harmonization

A critical approach towards European copyright law on one hand, and the copyright laws in post-Soviet non-member states on the other (including their background of Soviet copyright law), is needed in order to define the frontiers for future harmonizing of copyright these legislations with European law. To do so, we must first define the concept of "harmonization" itself. We must also clarify the details of the balance-based approach, which we define as a basic element of harmonization. Our method of synthesis, based on the critical evaluations, which is another element of the same proposal for harmonization, must also be defined and clarified. Furthermore, besides the attitudes examined already, there are other significant alternative approaches, including so-called 'copyleft' and a focus on moral rights, which must also be taken into consideration.

4.1 Harmonization

The word "harmonization" is used quite often in the legal literature to describe the "process of revision that makes laws broadly similar to one another".[1132] Within the context of implementing EU law in the legislations of non-member states, harmonization is used, more often than not, to describe a process that would be better described as "legal transplantation", "legal export", or, to be more critical – "legal copy–paste". Namely, while discussing the spread of EU law (including EU copyright law) to non-member states, the term harmonization usually equates to "approximation". On the other hand, the original meaning of this word is rather different. Derived from the Greek '*harmonia*' (ἁρμονία), meaning "joint, fit together", this word is used more often in musical language, meaning "at its

[1132] Rajan, Copyright and Creative Freedom, p. 10.

simplest, the simultaneous sounding of 2 or more notes; in this sense synonymous with chord".[1133] In the musical context, "harmony" refers to the different notes that "enjoy a relationship of compatibility".[1134] Although in a legal context it is considered synonymous with approximation,[1135] the original meaning of harmony depends on difference, not similarity.[1136] Adjustment of the different elements can be considered as the main essence of harmonization.

The process of harmonizing the copyright legislations of post-Soviet non-member states with European copyright law should be based on the 'original' meaning of harmonization. Namely, the incentive of adjusting different legal systems and concepts should prevail, rather than the practice of 'vertical' approximation of all the legislations of non-member states to the European law. In this regard, the habit of 'blind' rewriting, translating, and copy–pasting the 'model' provisions and norms from the 'guideline' legal acts and Directives, referred to as 'legal transplantation'[1137] and 'legal imperialism',[1138] which is the most common practice in post-Soviet non-member states, should be replaced by the 'real' form of harmonization. After past decades of rewriting copyright provisions from Soviet guidelines[1139], and from the EU models since the breakup of the Soviet Union, it is time for these post-Soviet countries to elaborate their own models of copyright law. The original essence of harmonization, which, in the legal context, "should embrace some concept of a mutually complementary relationship, a level of consensus in the international sphere",[1140] can be considered as the basis for reforming the copyright laws of post-Soviet non-member states. Otherwise, there will occur further legal transplantation, legal export, and another form of legal imperialism behind the mask of legal harmonization.

[1133] Kennedy, Rutherford-Johnson, p. 373.
[1134] Rajan, Copyright and Creative Freedom, p. 10.
[1135] Phinnemore, McGowan, Harmonization.
[1136] Rajan, Copyright and Creative Freedom, p. 10.
[1137] Mamlyuk, pp. 566-567.
[1138] Rajan, Copyright and Creative Freedom, pp. 58-59.
[1139] Years 1917-1991.
[1140] Rajan, Copyright and Creative Freedom, p. 11.

Furthermore, besides the different legal norms and concepts, harmonization should also cover different social interests. Namely, harmonization should be achieved "not only among the diverse legal systems of different jurisdictions, but among the diversity of social interests"[1141] as well. Within this context, social interests can be diverse and cover the areas of private and public, domestic and international interests. When any of these interests prevail while others are muted, which is quite common when implementing 'dominant' legal systems in 'peripheries', the 'true' essence of harmonization is missing. Such dominant–obedient and centre–periphery schemes lead to situations in which one interest oppresses another: in the case of Soviet copyright law, this was public versus private interest; in the contemporary, commercialized international system it is private versus public interest; while in both cases the domestic needs and local specificities are neglected. In order to avoid such a one-sided approach, the original essence of harmonization, which is the co-existence of different and sometimes even opposing systems and interests, should be implemented in the copyright legislations.

4.2 Balance-based Approach

The 'original' essence of harmonization is quite similar to the meaning of 'balance'. What differentiates them is that the concept of harmonization is much closer to the meaning of compatible co-existence, while balance mostly refers to coherence, or medium, between the diverse concepts, systems, or interests. However, the idea of adjusting different notions with each other remains the same. Finding "that legendary 'delicate balance' between the interests of right holders in maximizing protection and the interest of users (i.e., the public at large), in having access to products of creativity and knowledge"[1142] has been considered one of the primary goals of European copyright law. If we generalize this idea, reaching balance

[1141] Rajan, Copyright and Creative Freedom, p. 234.
[1142] Hugenholtz, in: Harmonization of European IP Law, p. 60.

between the variety of interests, including private and public incentives as well as international and domestic needs, should be considered one of the main goals of copyright law, in general. Accordingly, if we take such kind of balance as the evaluation criteria, then copyright legislation has to be examined on the basis of the level of balance reached between this variety of interests, among which the public and private incentives, on one hand, as well as domestic and international needs, on the other, should prevail.

4.2.1 Balance between Public and Private Interests

Copyright emerged as a tool for state censorship of the printing industry[1143] on one hand, and as a tool for protecting the private interests of publishers on the other, as early as the beginning of the 17th century.[1144] Later, by the end of that century,[1145] protection of authors' moral rights, as an achievement of the human rights movement after the French revolution,[1146] has been attributed to the concept of copyright (which also covers authors' rights). Since then, finding an appropriate balance between public and private interests has been the main feature of copyright law. A balance has to be found between the private interests of authors and publishers on one hand, and the public interests of the state and society at large, on the other. Finding this "legendary delicate balance"[1147] is also considered one of the main goals of EU copyright law, although it is disputable whether EU law has made significant progress in this regard, since it was not able to harmonize moral rights,[1148] and its commercial character, which prevailed since the very beginning,[1149] remains unchanged. However, finding a balance between private and public interests is important for

[1143] Rajan, Copyright and Creative Freedom, p. 1.
[1144] Berger, in: United in Diversity, p. 91.
[1145] Year 1791.
[1146] Berger, in: United in Diversity, p. 91.
[1147] Hugenholtz, in: Harmonization of European IP Law, p. 60.
[1148] Bechtold in: Dreier/Hugenholtz Concise Copyright, p. 355.
[1149] Stamatoudi & Torremans, p. 8.

copyright laws in the post-Soviet non-member states, since these laws were previously radically publicly-oriented in the Soviet ruling, then suddenly became radically privately-oriented immediately after the breakup of the Soviet Union. Therefore, appropriately balancing private and public interests should be the main goal for future harmonization of copyright laws in the post-Soviet non-member states.

An illustrative example of such a balance-based approach is the first copyright act in the world, the Statute of Anne (1709).[1150] This Statute required printers and booksellers not to make prices "too high and unreasonable",[1151] and the Lord Archbishop of Canterbury was entitled to limit these prices.[1152] Moreover, it was mandatory to provide a copy of each printed book to the libraries of the universities, as well as to the Royal Library.[1153] On the other hand, the right to print a book was given to authors, who had to register the title of the newly published book, after which the necessary measures would be taken against infringements of this registered copyright.[1154] As we see, the Statute of Anne is a very well-balanced copyright act even from the present day perspective, since it protects the private interests of authors on one hand, and establishes monopoly control over publishing[1155] in order to protect the public interests, on the other. In this regard, the Statute of Anne, adopted three centuries ago, should be used as an example of balancing and adjusting public and private interests to each other within copyright law.

[1150] Stokes, p. 23.
[1151] Part IV, Statute of Anne.
[1152] Berger, in: United in Diversity, p. 91.
[1153] Part V, Statute of Anne.
[1154] Berger, in: United in Diversity, p. 91.
[1155] Rajan, Copyright and Creative Freedom, p. 30.

4.2.2 Balance between Domestic and International Interests

Another important aspect, which must also has be balanced and which is most problematic in the copyright legislations of the post-Soviet non-member states, is the area of domestic and international interests. The common standards and fundamentals of Soviet copyright law were obligatory in the national legislations of these countries[1156] in the past century, before the breakup of the USSR.[1157] Since then, however, the new and radically different Western system of copyright law became obligatory for these newly independent post-Soviet countries, due to the "aggressively Western approach to reform"[1158] during the 1990s. As a result, the copyright legislators of post-Soviet countries became accustomed to rewriting norms and provisions – at first from the Soviet guidelines, then later from Western samples – and grew out of the habit of defining their own national copyright policies, since both of these foreign guideline principles disregarded domestic needs and insisted on implementing their common principles in the local legislations. Accordingly, the legislations of these post-Soviet countries are less likely to be adequate for their domestic specificities, and therefore remain as 'the law on the paper'. In order to avoid this, the future process of harmonizing copyright laws in these countries should be based on domestic needs, local specificities, and indigenous characters, which differ from country to country.

An illustrative example of founding legal reform on domestic needs and of harmonizing foreign laws with the local characteristics is the codification of Georgian law in the years 1703–1709 by the commission of scholars led by king Vakhtang VI.[1159] King Vakhtang's commission translated the foreign sources of civil law available by that time[1160] in order to elaborate new and more comprehensive legislation.[1161] While harmonizing these foreign legal

[1156] Levitsky, Introduction to Soviet Copyright Law, p. 35.
[1157] In 1991.
[1158] Rajan, Copyright and Creative Freedom, p. 64.
[1159] Feldbrugge, p. 310.
[1160] Metreveli, p. 32-40.
[1161] Feldbrugge, p. 310.

sources and Georgian laws with each other, the principle of applicability for Georgia and relevance to the reality in Georgia were considered the basic criteria for implementing the norms of foreign legal systems and the codification of Georgian legislation.[1162] Another typical characteristic of this codification was the examination of currently available legal sources, harmonizing them to each other (even obviously different legal systems such as Greek and Hebrew laws) and providing their synthesis. Since the principle of considering domestic needs has to be restored in order to reach an appropriate balance between local and international interests, in this regard the codification of Georgian law, conducted three centuries ago, should still be used as an example of balancing and adjusting international and domestic interests to each other while reforming civil law.

4.3 Synthesizing Method

In order to provide a synthesis of the opposed concepts, we have to apply a method of synthesis based on critical evaluations of two different (in our case – even antagonistic) concepts. This three-level scheme might have certain similarities with the dialectical method developed by Hegel, according to which three sides of the logical are defined: "(a) the side of abstraction or of the understanding, (b) the dialectical or negatively rational side, [and] (y) the speculative or positively rational one",[1163] famously simplified later as the scheme of 'thesis, antithesis, synthesis'.[1164] However, in our case the two elements – European copyright law and Soviet copyright law plus other alternatives – are opposing concepts, even though the latter is derived from the former. Accordingly, we take European copyright law as the first component, and Soviet copyright law plus the other alternative approaches towards copyright as the second component, based on which we will develop the third component, which synthesizes the previous components and at the same time serves as the proposal for

[1162] Javakhishvili, History of Georgian Law, Book I, p. 87-88.
[1163] Hegel, p. 24.
[1164] Stone, in: British Journal for the History of Philosophy, p. 1118.

the process of future harmonization of European copyright law in the legislations of post-Soviet non-member states.

4.3.1 The First Component: European Copyright Law

While applying the synthesis method, European copyright law is taken as the first component. Within the context of this method, 'European copyright law' refers to the unity of the following sub-components: the concepts of copyright and authors' rights developed in Europe in XVII century[1165] as well as EU copyright law – including the copyright legislation of the EU and the practice of the European Court of Justice (ECJ) in the field of copyright, started two decades before the adoption of EU copyright legislation.[1166] We have examined each of these sub-components in detail so far. Namely, we have defined the foundations of copyright, with its original balance-based approach expressed in the first ever copyright act, the Statute of Anne.[1167] We have also considered the doctrine of moral rights developed since the end of the 17th century in Western Europe, protecting authors' creativity and, accordingly, personality.[1168] We have also reviewed the progress made by EU copyright legislation in terms of harmonizing certain aspects of European copyright law since the adoption of the first copyright Directive[1169] up to the present day. Additionally, we have also considered the progress made by the ECJ in terms of interpreting this EU legislation and creating harmonized EU-wide standards in the area of copyright.

Together with consideration of the progress made by European copyright law, we also had to develop a critical approach and take into consideration other aspects of European copyright law. In this regard, we have considered the censorial[1170] and commercial[1171] characters of the

[1165] Berger, in: United in Diversity, p. 91.
[1166] Case 78/70 (08.06.1971).
[1167] Parts IV and V, Statute of Anne.
[1168] Berger, in: United in Diversity, pp. 92-93.
[1169] Directive 91/250/EEC.
[1170] Rajan, Copyright and Creative Freedom, p. 1.

concept of copyright since its early development. Furthermore, we have also developed a critical approach towards the trend of 'propertization' of copyright,[1172] the ambiguity of just rewards theory,[1173] and the general feature of acting as an obstacle against the public access to works of art, literature, and science.[1174] In terms of EU copyright legislation, we have examined its radically commercial, market-based foundations,[1175] as well as several critical remarks from the perspective of legal tactics and methodology, including its failure to harmonize moral rights.[1176] A similar critical approach, based on its tactics and methodology, has been developed towards the practice of the ECJ in the area of copyright. Based on this critical assessment of the first component, there is a need to define and thoroughly evaluate an 'alternative' to this component.

4.3.2 The Second Component: Soviet Copyright Law and Other Alternatives

A critical approach towards the first component – European copyright law leads to the elaboration of the second component, which should present an alternative. While defining the second component, we consider Soviet copyright law as an alternative and 'antipode' of European copyright law at first. The divergence and antagonism between these two forms of copyright law is obvious: the first is based on commercial rights and develops a market-based approach, whereas the second insists on maximizing public interests (referring to both: the interests of the state and of society) and focusing on the moral rights of authors rather than economic rights, on which EU copyright law has mostly focused. Furthermore, Soviet copyright law emerged as an alternative to 'capitalist' copyright law and considered itself as

[1171] Berger, in: United in Diversity, p. 92.
[1172] Siegrist, in: United in Diversity, p. 12.
[1173] Stokes, p. 13.
[1174] Stokes, p. 12.
[1175] Recital 4, Directive 91/250/EEC.
[1176] Bechtold in: Dreier/Hugenholtz Concise Copyright, p. 355.

such since its inception. Derived from the Marxist critique of property[1177] and law,[1178] defined later according to Lenin's approach as a temporary necessity before the final "withering away of the state",[1179] Soviet copyright law developed along the original and, at the same time, contradictory paths before its end in the early 1990s.

This contradiction, better defined as self-contradiction, is the main object of criticism of Soviet copyright law. We have examined how this original and, in the beginning, idealistic system was ultimately corrupted into an ideology.[1180] Deviation from the Marxist ideal by Soviet copyright law resulted in it being a tool of strict censorship in the hands of the state, where this state should be considered as the owner-in-chief of economic rights and even misappropriated rights of authorship.[1181] Due to this internal corruption, Soviet copyright law also retreated from the international arena, the clear indication of which was the reform of Soviet copyright law preceding accession to the Universal Copyright Convention in 1973.[1182] These compromises and retreats resulted in Soviet copyright law losing its distinctive character, increasingly shaping itself after Western copyright law to which it was initially considered an antipode. As we can see, Soviet copyright law gradually lost its original character, based on which it could be differentiated from and considered as an alternative to Western copyright law. As the Soviet Union was approaching its end, Soviet copyright law was becoming increasingly similar in ideological terms to its Western former antipode. Although it still retained certain distinctive characteristics, the similarity to Western copyright law was so significant that Soviet copyright law could no longer be considered an alternative to its Western counterpart.

[1177] Marx / Engels, Manifest der Kommunistischen Partei, p. 24.
[1178] Marx / Engels, Manifest der Kommunistischen Partei, p. 27.
[1179] Lenin, p. 121.
[1180] Rajan, Copyright and Creative Freedom, p. 89.
[1181] Baqradze, p. 106.
[1182] Newcity, p. 44.

As we see, Soviet copyright law cannot be considered a proper alternative to European copyright law, due to its self-contradictory character and backward way of development, which made it increasingly similar to its counterpart. However, this does not mean that we should not seek any alternative concepts other than European copyright law. It is significant that these alternative approaches have been developed within the European copyright law itself. We should first mention the originally European concept of moral rights, which is nowadays "treated with tremendous suspicion and hesitation in international copyright law"[1183] as well as in EU copyright law. Accordingly, the focus on moral rights can be considered as an alternative approach to contemporary EU copyright law. Another alternative is the concept of so-called 'copyleft', which has developed in the area of free computer software.[1184] These alternatives should also be taken into consideration while discussing alternative approaches to European copyright law. After fully analysing the first (EU copyright law) and second (alternatives to EU copyright law) approaches, they are synthesized to form the third component.

4.4 New Developments: 'Copyleft' and Moral Rights

Soviet copyright law, which initially emerged as an alternative to the Western doctrine of copyright, finally became increasingly similar to its counterpart while losing its original characteristics. Accordingly, the ideological foundations of Soviet copyright law can be considered as an alternative to the Western concept of copyright; however, in practice, Soviet copyright developed counter to its ideological foundations, diverged, and gradually lost its distinctive character. However, several other new and alternative thoughts have emerged within the Western doctrine of copyright itself, most recently that of so-called

[1183] Rajan, Copyright and Creative Freedom, p. 239.
[1184] Gascón & Garcia-Navas, p. 68.

'copyleft', which developed in the area of software,[1185] as a result of technological developments in the digital era, also referenced in EU copyright law as the "information society"[1186]. Another concept, which has been indigenous for the Western European concept of authors' rights,[1187] but has recently been disregarded by EU copyright law because of the market-based orientation of the latter,[1188] is that of moral rights. Namely, the focus on moral rights nowadays appears as an alternative to 'mainstream' EU copyright law with its obviously commercial character. Accordingly, these new developments must also be examined to develop a proper alternative to European copyright law.

4.4.1 Copyleft

The idea that the private use of literary, artistic, and scientific works should be free and unfettered[1189] comes from the essence of literature, arts, and science itself, which by their nature do not endure obstacles and censorship. Accordingly, even in the first ever copyright act (the Statute of Anne, 1709) public access to books in libraries was guaranteed.[1190] Since then, copyright law, despite its censorial character, has sought to impose the fewest restrictions possible on private use. Generally, "the insight that private use ought to be unfettered is so obvious that it rarely features in copyright laws, even though it has always been free in copyright history".[1191] From the perspective of human rights, restrictions on the use of copyrighted works are equivalent to restricting the constitutional right to free expression – "in particular, the right to have access to works of the intellect, art, and entertainment for personal enjoyment, and to make use of the existing cultural and

[1185] Jaeger & Metzger, p. 5.
[1186] Recital 2, Directive 2001/29/EC.
[1187] Rajan, Moral Rights, p. 53.
[1188] Rajan, Copyright and Creative Freedom, p. 239.
[1189] Karapapa, p. 16.
[1190] Part V, Statute of Anne.
[1191] Karapapa, p. 16.

intellectual heritage for the purpose of creating new work"[1192]. Moreover, because of the incompatibility of censorship with the essence of culture, copyright regulation has also been referred to as "copyright harassment".[1193]

Technological development, including digital technologies in recent decades, also challenged the traditional concept of copyright and made it seem rather obsolete.[1194] Accordingly, an antagonism between the censorial character of copyright on one hand, and the development of science not enduring censorship on the other, has become inevitable in recent years. The increasing role and significance of the Internet also created a situation where "the measures to restrict the Internet for the purpose of enforcing copyright may engage the right to freedom of expression".[1195] These technological challenges caused systemic reforms in copyright laws worldwide, including in post-Soviet countries and Russia.[1196] In fact, the creation of EU copyright law was the response of the European Community to this challenge of technology.[1197] Although modern international copyright law, as well as regional and national copyright laws, are trying hard to overcome the challenges of technology, it is obvious that the nature of copyright law, which was originally applied to physical artefacts, is becoming outdated and old-fashioned when it refers to the new technologies of the digital era.[1198] The application of the originally censorial nature of copyright[1199] to the achievements of modern technologies, especially the Internet, threatens freedom of expression[1200] and, additionally, seems awkward and incompatible. Moreover, from current perspectives, considering the development of digital technologies, copyright seems "often an unnecessary obstacle in the sharing and accessing of information, and of literary and artistic works", since

[1192] Rajan, Copyright and Creative Freedom, p. 32.
[1193] Klein, p. 177.
[1194] Gascón & Garcia-Navas, p. 73.
[1195] Horten, p. 8.
[1196] Eidemiller, p. 135
[1197] Part 1.1, EC Green Paper on Copyright and the Challenge of Technology.
[1198] Gascón & Garcia-Navas, p. 73.
[1199] Rajan, Copyright and Creative Freedom, p. 1.
[1200] Horten, p. 8.

it "applies the brakes on the development of the knowledge society and creates a chasm of a digital divide between producers and consumers".[1201]

The concept of so-called 'copyleft' derived from these two foundations, namely the idea of free private use of literary, scientific, and artistic works on one hand, and the development of digital technologies in recent decades on the other. In terms of software, 'copyleft' should be defined as a clause about making software freely available,[1202] which grants the creator of the software freedom to publish and distribute changes made to the software.[1203] As a result of developing technologies that made computers increasingly accessible in the 1980s, the concept of 'copyleft' emerged as an alternative proposal, which is "different and more flexible than copyright"[1204]. Nowadays the concept of 'copyleft' has spread beyond European borders and has also been implemented in South American countries, i.e. in Argentina.[1205] Although there is no universal definition of 'copyleft', it can be explained "as a method to convert a free software program and to situate that all modified and extended versions of the program are also free"[1206]. In this regard the features of 'copyleft' are similar to the characteristics of copyright but with a significant difference in restrictions, whereas considering the original censorial character of copyright,[1207] the notion of 'copyleft' seems much less restrictive.[1208]

Although 'copyleft' originally emerged within the area of software licensing,[1209] it also opens new possibilities in other areas such as industrial, medical, scientific, audio-visual, economic, and social fields, where software is also widely used.[1210] Generally, the basic idea of 'copyleft',

[1201] Gascón & Garcia-Navas, p. 73.
[1202] Jaeger & Metzger, p. 5.
[1203] Meyer, p. 3.
[1204] Gascón & Garcia-Navas, p. 67.
[1205] Busaniche, p. 11.
[1206] Gascón & Garcia-Navas, p. 68.
[1207] Rajan, Copyright and Creative Freedom, p. 1.
[1208] Gascón & Garcia-Navas, p. 68.
[1209] Jaeger & Metzger, p. 5.
[1210] Gascón & Garcia-Navas, p. 69.

which is freedom to publish and distribute changes made to software,[1211] opens new possibilities to participate in cultural life in a more free, democratic, and responsive way, as stagnant copyright conventions and laws have been unable to adapt to new technologies.[1212] The development of these technologies in recent decades has become increasingly incompatible with the restrictive nature of copyright[1213] and the prevailing opinion of understanding knowledge as a commodity,[1214] which leads to the propertization of culture[1215] and creates a "major obstacle to both the expansion of copyleft and for the development of the knowledge society".[1216] On the other hand, even the development of EU copyright law, which was initially a response to technological challenges,[1217] confirms that copyright law is responding to the impulses of the increasing development of digital technology, which suggests that this development will be able to overcome these artificial obstacles and change the way of thinking.[1218]

4.4.2 Focus on Moral Rights

The concept of moral rights has been an indispensable part of the continental European doctrine of authors' rights,[1219] which itself derived from the concept of moral rights (*droits moraux*) that emerged even earlier, in 1777 in France.[1220] As we see, the concept of moral rights is even older than the continental European concept of authors' rights. Since then, the concept of authors' rights, based on the moral rights doctrine, has spread from France throughout Europe, although in France moral rights are separated from economic rights

[1211] Meyer, p. 3.
[1212] Gascón & Garcia-Navas, p. 68.
[1213] Rajan, Copyright and Creative Freedom, p. 1.
[1214] Gascón & Garcia-Navas, p. 68.
[1215] Siegrist, in: United in Diversity, p. 12.
[1216] Gascón & Garcia-Navas, p. 69.
[1217] Part 1.1, EC Green Paper on Copyright and the Challenge of Technology.
[1218] Gascón & Garcia-Navas, p. 69.
[1219] Berger, in: United in Diversity, p. 91.
[1220] Rajan, Moral Rights, p. 53.

according to a dualistic approach, while in most European countries economic and moral rights are united according to a dualistic approach.[1221] In both cases, moral rights remain a significant (even fundamental) part of the national copyright legislations of European countries.

On the other hand, the importance of moral rights has declined rather significantly at the international level in recent decades. This is a symptom of the trend since the era of the Berne Convention (when the international copyright regime was purely cultural and oriented on moral rights), which has seen copyright law develop in the opposite direction – toward commercialization, with the result that the component of moral rights has lost its significance.[1222] The same applies to EU copyright law, which disregarded moral rights and refused to harmonize them,[1223] while fully concentrating on commercial rights since the very beginning of its development.[1224] In the contemporary regime of international copyright law, based on the TRIPs agreement and WIPO policy, it is obvious that moral rights "are treated with tremendous suspicion and hesitation in international copyright law".[1225] The same applies to European copyright law: Europe is the birthplace of the moral rights doctrine and moral rights remain a significant part of the national copyright laws of member states; nevertheless, EU copyright legislation has failed to harmonize moral rights[1226] and continues to be preoccupied with rights to commercial exploitation.

Considering the diminished role of moral rights in EU copyright law, an approach focused on moral rights represents an alternative proposal, although the origin of moral rights is undoubtedly European. A focus on moral rights challenges the market-based nature of EU copyright law, as well as the entire international copyright system, which is currently highly

[1221] Hansen, p. 25.
[1222] Rajan, Copyright and Creative Freedom, p. 24.
[1223] Bechtold in: Dreier/Hugenholtz Concise Copyright, p. 355.
[1224] Recital 4, Directive 91/250/EEC.
[1225] Rajan, Copyright and Creative Freedom, p. 239.
[1226] Bechtold in: Dreier/Hugenholtz Concise Copyright, p. 355.

commercialized.[1227] Moreover, it also challenges the common trend of "propertization of culture",[1228] which has strongly influenced modern copyright law at the international level. In this regard, an initiative to restore the role of moral rights, and to act as a reminder that the European doctrine of authors' rights is derived from moral rights, would be a significant novelty. In this regard, together with the recently developed concept of 'copyleft',[1229] an initiative to focus on moral rights rather than commercial rights should also be considered as an alternative proposal.

The concept of moral rights has special significance for the copyright laws of post-Soviet non-member states. In these states, there was an attempt to develop Soviet copyright law, which considered itself as an alternative to the 'capitalist' copyright regime, while the Soviet doctrine of copyright had focused on authors' moral rights[1230] and disregarded economic rights since the very beginning. This attempt was unsuccessful, since Soviet copyright law gradually deviated from its initial ideals and the Soviet state also appropriated moral rights including that of authorship;[1231] nevertheless, this regime endured for most of the 20th century and left a significant mark in the copyright culture of these post-Soviet countries.[1232] As a result of this influence, modern commercial aspects of copyright law are barely implementable in these countries even now, and mostly remain as 'the law in the books'[1233] rather than representing the way in which the law is applied in reality. Therefore, strengthening moral rights would have significant impact on the future process of harmonizing the national copyright laws of these post-Soviet countries with those of the EU. Moreover, legislators in these countries should be able to take an initiative towards raising

[1227] Rajan, Copyright and Creative Freedom, p. 239.
[1228] Siegrist, in: United in Diversity, p. 12.
[1229] Gascón & Garcia-Navas, p. 67.
[1230] Rajan, Copyright and Creative Freedom, p. 148.
[1231] Baqradze, p. 106.
[1232] Rajan, Copyright and Creative Freedom, p. 56.
[1233] Dietz, in: Harmonization of European IP Law, p. 113.

the importance of moral rights within their national copyright laws, thereby making local laws more responsive to domestic needs and local characteristics.

4.4.3 Summary

While applying the synthesis method, we have referred to European copyright law as the first component, and to alternatives as the second component – the first being Soviet copyright law. However, Soviet copyright law was unfit to serve as a 'proper' alternative, as it deviated from its initial ideals and gradually approximated to its former antipode, maximizing its oppressive and censorial power. Accordingly, we have examined two other recent developments, namely 'copyleft' and the initiative to strengthen the importance of moral rights in copyright law. These two alternative approaches to copyright can also be used as the 'theoretical' part of our recommendations and proposals for the future harmonization of copyright laws in post-Soviet non-member states with those of the EU. The following sections develop these alternative approaches in more practical terms, providing general recommendations for the development of copyright legislations in post-Soviet non-member states, and for further implementation of EU copyright law (as well as European copyright law, in general) in the national legislations of these countries

5. Recommendations for the Development of Copyright Legislations in the Post-Soviet Non-EU States

Recommendations and proposals for the further development of copyright laws in the post-Soviet non-member states, and for future reforms in this regard will be based on the assessment made so far, of European copyright law and the development of copyright legislation in the post-Soviet non-member states. These recommendations will contain a 'theoretical' part – referring to the main directions and incentives for future reform, as well as a 'practical' part – referring to ways of implementing these proposals in the legal texts of copyright laws in post-Soviet non-member states. The theoretical part will examine the importance of the balance-based approach (including public vs. private, and international vs. domestic needs) and alternative views (including the focus on moral rights, and consideration of the recent concept of 'copyleft') previously discussed in detail.

5.1 Background to Future Reform of Copyright Law

Three levels can be identified in the development of copyright laws in post-Soviet non-member states following the breakup of the USSR. The first level started immediately after the breakup of the Soviet Union, when the newly independent states faced the challenge of elaborating national copyright legislation and incorporating the standards of international copyright law as soon as possible[1234] (this first level of reform was basically conducted in the 1990s). The second level was the amendment of these rather rapidly adopted national copyright legislations due to domestic needs, but more importantly due to the necessity of incorporating both international and EU standards of copyright law (basically after the

[1234] Rajan, Copyright and Creative Freedom, p. 47.

1990s, e.g., in 2005 in Georgia).[1235] Accordingly, the third level, characterized as the stage of deeper and more comprehensive amendments, is approaching. Our proposals and recommendations are aimed at this third level of reform. The backgrounds to these recommendations have two basic directions: a focus on balance-based approach, and consideration of alternative views.

5.1.1 Balance-based Approach

The ability to balance diverse and sometimes opposing interests is considered the main essence of copyright law. The same applies to copyright laws in post-Soviet non-member states and also to EU copyright law – a primary goal of which is to find "that legendary 'delicate balance' between the interests of right holders in maximizing protection and the interest of users (i.e., the public at large), in having access to products of creativity and knowledge".[1236] Namely, a balance has to be found between the public interests, on one hand, and private needs, on the other. This kind of balance is necessary for the copyright laws in post-Soviet countries, since they tend to favour private interests, following the international trend of commercializing copyright law. Furthermore, it is also necessary to balance the requirements of international copyright regimes with the domestic needs of certain states, which differ from country to country. This is especially important for the post-Soviet non-member states, since their copyright laws largely favour the international requirements over domestic needs.[1237] The following sections provide recommendations and proposals for finding that balance between these diverse interests.

[1235] Explanatory Note of changes and amendments to the Georgian Law on Copyright and Neighboring Rights (3 June 2005).
[1236] Hugenholtz, in: Harmonization of European IP Law, p. 60.
[1237] Rajan, Copyright and Creative Freedom, p. 49.

5.1.1.1 Balance between Public and Private Interests

Balancing the interests of society and the state on one hand, and private needs on the other, has been an original characteristic of copyright since the adoption of the Statute of Anne in 1710.[1238] However, modern copyright law is becoming increasingly commercialized,[1239] which shifts the balance in favour of private commercial interests. On the other hand, post-Soviet non-member states have experienced a copyright regime in which the public interests of society and, especially, the state have predominated, whereas private interests were largely ignored[1240] according to the communist ideology.[1241] In this regard, what the copyright laws of the post-Soviet member states are originally lacking is the balance between public and private interests: they largely favoured public interests before the breakup of the USSR, and started to favour private interests immediately after the breakup. Therefore, finding the balance between these two extremes would be a significant innovation for the copyright laws of these states. In practical terms, in order to achieve this balance, the exceptions and limitations to copyright (including economic rights) should be developed. In this regard, the German Copyright Act can be used as an example (since the copyright acts of these countries are significantly based on the German model),[1242] which sets numerous limitations on copyright.[1243]

5.1.1.2 Balance between International and Domestic Needs

Another significant feature of copyright laws in the post-Soviet countries has been the trend of ignoring their domestic needs and specificities since such laws were first developed.

[1238] Parts IV and V, Statute of Anne.
[1239] Rajan, Copyright and Creative Freedom, p. 25.
[1240] Levitsky, Introduction to Soviet Copyright Law, p. 15.
[1241] Marx / Engels, Manifest der Kommunistischen Partei, p. 24.
[1242] Matanovac Vučković, in: IIC, p. 31.
[1243] Teil 1, Abschnitt 6, Urheberrechtsgesetz.

During the Soviet era these countries had to implement common all-union standards and fundamentals of Soviet copyright law into their national legislations.[1244] Being trained in rewriting such guidelines, the post-Soviet countries subsequently borrowed the provisions of the international copyright regime with the same success following the breakup of the Soviet Union.[1245] In both cases the domestic needs of these countries were and continue to be ignored.[1246] On the other hand, after almost a century of rewriting externally imposed guidelines, it is time for the post-Soviet countries to develop their own standards and policies in the area of copyright. In practical terms, such approaches should address issues such as the spread of copyrighted works via the Internet (the issue is regulated in legal terms but unresolved in practical terms) to enable practical implementation of these provisions, providing for 'law in action' rather than keeping them as 'law in the books'[1247].

5.1.2 Consideration of Alternatives

Copyright laws in the post-Soviet countries originally lacked another significant feature, defined as consideration of alternatives. Before the breakup of the USSR, the Soviet copyright doctrine had been considered ultimately righteous, which should be obeyed tacitly and its guidelines scrupulously translated.[1248] However, shortly after the breakup of the USSR, copyright laws in the post-Soviet countries made another idol for themselves, which was the radically commercial approach towards copyright law and, generally, the "god of commerce".[1249] In the post-Soviet euphoria of 'victory over communism', it was almost sacrilegious to question the righteousness of this market-based approach. However, after two and a half decades, when this euphoria has abated, there is a time to critically evaluate the

[1244] Levitsky, Introduction to Soviet Copyright Law, p. 35.
[1245] Dietz, in: Harmonization of European IP Law, pp. 101-103.
[1246] Rajan, Copyright and Creative Freedom, p. 49.
[1247] Dietz, in: Harmonization of European IP Law, p. 113.
[1248] Levitsky, Introduction to Soviet Copyright Law, p. 35.
[1249] Rajan, Copyright and Creative Freedom, p. 25.

trend of propertization of copyright law[1250] and consider that there might be alternatives to this mainstream approach, namely 'copyleft' and the initiative to strengthen the importance of moral rights.

5.1.2.1 'Copyleft'

The concept of so-called 'copyleft' is relatively new, since it emerged in the 1980s[1251] based on the development of digital technologies, referring to software,[1252] as an alternative form of copyright regulation, which it considered rather clumsy and obsolete.[1253] Although the concept of 'copyleft' initially emerged within the area of software[1254] and has been defined in relation to making software freely available,[1255] it also offers possible applications in other areas.[1256] In general, the idea of 'copyleft' challenges the restrictive idea of copyright as well as the general trend of the propertization of culture.[1257] Rather, it suggests that the development of technology on one hand, and the originally free nature of art, literature, and science on the other, are incompatible with the original censorial character of copyright.[1258] Such a view is especially important for the copyright laws of post-Soviet non-member states, which are experiencing difficulty adjusting to restrictions in the areas of software, Internet, and digital technologies required by both international and EU standards of copyright. This difficulty is also caused by the inconsistency between domestic needs and the requirements of international copyright regimes. In order to avoid the transformation of copyright laws as

[1250] Siegrist, in: United in Diversity, p. 12.
[1251] Gascón & Garcia-Navas, p. 67.
[1252] Meyer, p. 3.
[1253] Gascón & Garcia-Navas, p. 73.
[1254] Meyer, p. 3.
[1255] Jaeger & Metzger, p. 5.
[1256] Gascón & Garcia-Navas, p. 69.
[1257] Siegrist, in: United in Diversity, p. 12.
[1258] Rajan, Copyright and Creative Freedom, p. 1.

'laws in the books',[1259] these post-Soviet non-member states need to consider the alternative concept of 'copyleft' while defining policies for the further development of their national copyright laws.

5.1.2.2 Focus on Moral Rights

Although the doctrine of moral rights is indigenous to the Western European doctrine of authors' rights,[1260] it is also obvious that the later development of international copyright law under the TRIPs agreement and WIPO regime has deviated from the culture-oriented regime of the Berne Convention[1261] towards the commercialization and propertization of copyright,[1262] where moral rights "are treated with tremendous suspicion and hesitation in international copyright law".[1263] In this regard, an initiative to strengthen the role of moral rights within copyright law is nowadays regarded as an alternative approach. On the other hand, Soviet copyright legislation disregarded private rights[1264] and declared itself to be based on moral rights,[1265] although this declaration did not prevent the Soviet state from appropriating even the rights of authorship in certain cases.[1266] However, the post-Soviet countries have a significant tradition of focusing on moral rights, which does not have to be disregarded as were the other Soviet backgrounds since the 1990s. Rather, the importance of moral rights should be restored and raised in the future process of reforming copyright law in post-Soviet countries.

[1259] Dietz, in: Harmonization of European IP Law, p. 113.
[1260] Berger, in: United in Diversity, p. 91.
[1261] Rajan, Copyright and Creative Freedom, p. 24.
[1262] Siegrist, in: United in Diversity, p. 12.
[1263] Rajan, Copyright and Creative Freedom, p. 239.
[1264] Levitsky, Introduction to Soviet Copyright Law, p. 15.
[1265] Rajan, Copyright and Creative Freedom, p. 148.
[1266] Baqradze, p. 106.

5.2 Recommendations for Copyright Legislation in Post-Soviet Non-EU States

The theoretical views, approaches, proposals, and recommendations discussed so far are valuable for the copyright laws of post-Soviet non-member states, as long as they can be implemented within copyright legislations in 'practical' terms. In this regard, we will have to make theoretical observations 'translated' into practice, in order to make them applicable for the legal texts. Namely, we will elaborate proposals for the existing national copyright laws of post-Soviet non-member states. We will first focus on the types of copyright regulation in these states, namely the types of acts that regulate copyright, and their structures. We will additionally review the contents of specific chapters and parts of these copyright acts; and further, examine certain norms and provisions within these parts. This will be achieved through comparative analysis of the various copyright acts.

5.2.1 Copyright Acts and their Structures

The observed countries employ three diverse approaches for regulating copyright and related rights, which should be differentiated from each other. The first and most prevalent is the regulation of copyright via special legal acts dedicated solely to copyright and related rights. The second approach, which originally comes from the Soviet copyright system (since after the 1960s copyright was regulated by the civil codes of the Soviet republics) involves regulating copyright via the civil code, an example of which is the Russian Civil Code.[1267] The third approach combines the first and second types, thereby regulating copyright simultaneously via both the civil code special acts concerning copyright and related rights. This 'hybrid' type of copyright regulation is applied in Armenia[1268] and Ukraine,[1269] where

[1267] Part IV, chapter 70, Civil Code of the Russian Federation.
[1268] Division 10, Chapter 63, Civil Code of the Republic of Armenia.
[1269] Book Four, Chapter 36, the Civil Code of Ukraine.

general issues of copyright and related rights are regulated by the civil codes, and the special acts on copyright and related rights regulate the issues more specifically.

Most post-Soviet countries have vacillated between the possibilities of regulating copyright by the civil code (as in the case of the Soviet Union) or by special acts (similarly to the German model used as a sample for most of the post-socialist countries).[1270] Initially, most of them included parts dedicated to copyright within their civil codes,[1271] while subsequently these parts have been removed and special acts adopted concerning copyright. However, Russian copyright law has developed differently: at first, the special copyright act was adopted in 1993,[1272] after which copyright regulations were incorporated into the civil code.[1273] Both forms of regulation have their own justifications. However, in our opinion, the 'hybrid' method of regulating copyright by combining both special law and civil code leads to legal uncertainty, and it would be recommended to choose one or other method.

Most copyright laws in these post-Soviet countries are more-or-less based on the "five-pillar system of copyright" including: "1) substantive copyright law (objects, owners, content in terms of moral and pecuniary rights, duration and limitations of copyright protection); 2) related or neighbouring rights; 3) copyright contract law; 4) comprehensive regulation of collecting societies, and, finally, 5) a comprehensive set of rules on enforcement of copyright".[1274] However, Georgian and Moldovan laws comprise many more structural units: Georgian law contains 12 chapters and Moldovan law 10. In our opinion, such multiplicity of chapters leads to structural ambiguity. This applies especially to Georgian copyright law, which contains 12 chapters, some of which could easily be combined to relieve this multiplicity. For example, chapter VIII of the Georgian law regulates the terms of protection of related rights and of the rights of database makers, and contains only one article having a

[1270] Matanovac Vučković, in: IIC, p. 31.
[1271] Book Four, Part one, Civil Code of Georgia.
[1272] Rajan, Copyright and Creative Freedom, p. 195.
[1273] Part IV, chapter 70, Civil Code of the Russian Federation.
[1274] Dietz, in: Harmonization of European IP Law, p. 104.

similar title.[1275] In our opinion, the appropriate article could be incorporated in the previous chapter regulating the rights of database makers, rather than creating a single chapter for this article.[1276] It would generally be recommended to avoid a multiplicity of structural units, and to instead provide a clearer structure according to the "five-pillar system of copyright",[1277] as provided in Armenian, Azerbaijani, and Moldovan laws.

5.2.2 Application of the Balance-based Approach in Copyright Laws

The aim of finding the "delicate balance"[1278] between the diversity of interests, especially between public and private needs, has been a feature of copyright law since the very beginning of its development.[1279] Although this balance is not always achieved in present-day international copyright law due to its market-based commercial character,[1280] the national laws of EU member states remain balanced in this regard. In contrast, the copyright laws of the post-Soviet countries seem originally imbalanced regarding private and public interests, since before the breakup of the USSR they disregarded private and recognized only public interests (which was a common trend in Soviet copyright law);[1281] and after the breakup, in order to 'remediate' this hostility towards private interests, they emphasized the protection of private needs, this time on the account of the public interests. In this regard, the balance-based approach has special importance for the copyright laws of post-Soviet countries in terms of public and private rights.

An illustrative example of balancing public and private interests in copyright legislation is the German Copyright Act, which guarantees the protection of copyright and, at the same

[1275] Chapter VIII, Article 57, Law of Georgia on Copyright and Neighboring Rights.
[1276] Chapter VII, Law of Georgia on Copyright and Neighboring Rights.
[1277] Dietz, in: Harmonization of European IP Law, p. 104.
[1278] Hugenholtz, in: Harmonization of European IP Law, p. 60.
[1279] Parts IV and V, Statute of Anne.
[1280] Rajan, Copyright and Creative Freedom, p. 25.
[1281] Levitsky, Introduction to Soviet Copyright Law, p. 15.

time, sets the limitations to these rights. In German copyright law, limitations to copyright apply in 37 cases.[1282] The Georgian and Moldovan copyright laws are structurally similar to the German law in terms of collecting the limitations within a single part/chapter, while in Armenian[1283], Azerbaijani,[1284] and Ukrainian[1285] laws such exceptions and limitations are located within the sections that deal with the basic regulation of copyright. However, most of these limitations set by the German Copyright Act are absent from the copyright laws of the post-Soviet countries. Georgian copyright law imposes the largest number of limitations in this regard compared to other copyright laws, as follows: reproduction of a work for personal use; reprographic copying of a work by libraries, archives, and educational institutions; use of a work without consent of the author and without paying remuneration; use of a work permanently displayed in public places; public performance of a musical work at ceremonies; reproduction of a work for court proceedings; ephemeral recording of a work by a broadcasting organization; limitations to the rights of an owner of a computer program and database; free use of a computer program (decompilation); and free use of databases.[1286]

Accordingly, we would recommend implementing the limitations to copyright set by the German Copyright Act (numerated above) in those of the post-Soviet non-member states: temporary acts of reproduction; disabled persons; public speeches; newspaper articles and broadcast commentaries; reporting on current events; quotations; communication to the public; communication of works at terminals in public libraries, museums, and archives; reproduction for private and other personal uses; order for dispatch of copies; obligation to pay remuneration; amount of remuneration; trader's or importer's obligation to pay remuneration; obligation incumbent on the operator of photocopiers to pay remuneration; obligation to make a reference; obligation to report; obligation to provide information;

[1282] Teil 1, Abschnitt 6, Urheberrechtsgesetz.
[1283] Chapter 2, Law of the Republic of Armenia on Copyright and Related Rights.
[1284] Chapter II, Law of the Republic of Azerbaijan on Copyright and Related Rights.
[1285] Paragraph II, Law of Ukraine on Copyright and Related Rights.
[1286] Chapter III, Georgian Law on Copyright and Neighboring Rights.

inspection; collecting societies; handling of reports; reproduction and communication to the public in commercial enterprises; incidental works; works in exhibitions; on public sale and in institutions accessible to the public; works in public places; portraits; orphan works; diligent search and documentation obligations; termination of use and obligation to pay remuneration; use of orphan works by public broadcasting organizations; prohibition of alteration; acknowledgement of source and statutory remuneration rights.[1287]

5.2.3 Definition of Copyrighted Work

The definition of protected works, also referred to as an object or a subject matter of copyright, is one of the basic definitions in copyright law. In this regard we compare the various definitions provided in the post-Soviet countries. The definitions provided in Armenian, Azerbaijani, and Georgian copyright laws are comparatively similar: Armenian law states that "subject matters of copyright shall be the unique outcome of a creative activity",[1288] Azerbaijani law declares that copyrighted works should be "results of creative activity",[1289] and Georgian law also emphasizes that a copyrighted work should be "the result of the intellectual and creative activity".[1290] As we see, the element of 'creative activity' is common to all three countries, while Georgian law adds the component 'intellectual' to activity in the definition of the work. In Moldovan,[1291] Ukrainian,[1292] and Russian[1293] copyright laws, it is stated that such works should belong to the scientific, literary, or artistic

[1287] Teil 1, Abschnitt 6, Urheberrechtsgesetz.
[1288] Art. 3.1, Law of the Republic of Armenia on Copyright and Related Rights.
[1289] Art. 5.1, Law of the Republic of Azerbaijan on Copyright and Related Rights.
[1290] Art. 5.1, Georgian Law on Copyright and Neighboring Rights.
[1291] Art. 5.1, Law of the Republic of Moldova on Copyright and Related Rights.
[1292] Art. 8.1, Law of Ukraine on Copyright and Related Rights.
[1293] Art. 1257, Civil Code of the Russian Federation.

area, according to the Berne Convention,[1294] but they do not provide detailed definitions of copyrighted work.

The German Copyright Act, on the other hand, after repeating the same international standard of the Berne Convention, states that: "only the author's *personal* intellectual creations constitute works within the meaning of this Act".[1295] In this regard German copyright law adds the component 'personal' to the concept of the copyrighted work defined as 'intellectual creation', or the 'result of creative activity'. This 'personal' component is missing from the definitions of work given in the post-Soviet legislations. However, the element of 'personality' is quite important in defining copyrighted work, since it emphasizes that copyright protection should be attributed to creations by *human beings*,[1296] which is an important component, especially within the context of modern technological developments. Accordingly, we would recommend incorporating the component of 'personality' into the definitions of copyrighted work in post-Soviet countries, according to the definition provided by the German Copyright Act.

[1294] Art. 2.1, Berne Convention.
[1295] Art. 2.2, Urheberrechtsgesetz.
[1296] Wandtke, Urheberrecht, p. 64.

6. Recommendations for Further Implementation of EU Copyright Legislation in the Laws of the Non-Member States

Although European copyright law does not equate to EU copyright legislation, the latter is still the basic component part of the former (so that they are sometimes used synonymously). Furthermore, EU copyright legislation is of primary importance for the upcoming wave of reform of copyright laws in post-Soviet non-member states, especially for the signatories of Association Agreements with the EU (namely Georgia, Moldova, and Ukraine). The directions of this reform are dependent on recent developments in EU copyright legislation, especially the adoption of the Orphan Works Directive[1297] and CRM Directive[1298] in recent years. Since the addition of these new Directives to EU copyright legislation, a new level of deeper and more comprehensive reforms is approaching in the countries willing to harmonize their copyright laws with those of the EU. We have made some general observations and developed certain theoretical recommendations so far. The proposals provided below are more 'practical' and, at the same time, more specific, since they refer to the reasonableness of implementing certain provisions of the EU copyright Directives in the copyright laws of post-Soviet non-member states.

6.1 Approximation of the Copyright Laws of Post-Soviet Non-Member states with EU Copyright Directives

Since 1991, nine EU Directives have been adopted in the area of copyright, beginning with the Computer Programs Directive.[1299] We will review these Directives in chronological order

[1297] Directive 2012/28/EU.
[1298] Directive 2014/26/EU.
[1299] Directive 91/250/EEC.

of their *first* adoption (as some were repealed following their adoption). The first seven Directives have already been implemented, to certain extents, in the copyright legislations of the post-Soviet non-member states. However, the process of their implementation is not complete, since several norms and provisions of these first seven EU copyright Directives still need to be implemented, as we will see below. The last two Directives are quite new in terms of their implementation, and have not yet been implemented by the post-Soviet non-member states. Proposals for their implementation will at the same time serve as the recommendations for the upcoming cycle of copyright reform in the post-Soviet countries, since this implementation is intended to be the basic part of this round of reforms.

6.1.1 Computer Programs Directive

The Computer Programs Directive is significant not only because it was the "first copyright Directive"[1300] but, more importantly, because the problem of further implementation of this Directive into the legislations of the post-Soviet non-EU states is highly controversial from the present-day perspective. It has been commonly acknowledged that the adoption of this Directive in 1991 was a response to the "challenge of technology",[1301] as well as the need to provide protection for computer programs; that same need is now evident in the post-Soviet non-member states. Furthermore, there is a risk that the provisions seeking to protect computer programs remain only as 'law in books',[1302] since the actual situation in these post-Soviet countries concerning such protection differs significantly from that in the EU.

As previously discussed, the Computer Programs Directive has already been implemented to a reasonable extent in the copyright laws of the post-Soviet non-member states, and the most significant provisions concerning restricted acts, exceptions to these acts, and decompilation

[1300] Schippan, p. 59.
[1301] Part 1.1, EC Green Paper on Copyright and the Challenge of Technology.
[1302] Dietz, in: Harmonization of European IP Law, p. 113.

are already implemented.[1303] The only important provision, for approximating EU law, which remains unimplemented is that regulating the special measures of protection.[1304] The rest of the Articles in this Directive either concern issues already regulated by post-Soviet countries, or refer to aspects that would not have importance copyright laws within these legislations.[1305] We should also mention that even the implementation of the provision of Article 4 concerning the restricted acts[1306] has been criticized in the Georgian legal literature,[1307] as it dealt with issues already regulated in other parts of the law. However, we still consider that current version of the criticized norm[1308] should remain in Georgian law, as it implements an important aspect of the Computer Programs Directive.

While discussing the issue of implementing measures to protect computer programs in the post-Soviet legislations, we have to take into consideration the actual situations in these countries, which differ significantly from the reality in EU member states. The Directive "requires Member States to provide appropriate remedies"[1309] against a person committing the infringing acts. In practice, the post-Soviet countries have not yet taken such appropriate remedies. This applies not only to the legal remedies, as a legal provision alone cannot guarantee protection of computer programs, but the situation in general. It is also obvious that simply adopting legislative regulation in this issue without enforcing it in practice would result in the provision remaining as 'law in book'[1310], having no real effect.

Considering this reality, implementing special measures of protection[1311] in the copyright laws of post-Soviet countries would be an important step towards creating the legal basis for protecting computer programs. Accordingly, there would be a necessity to implement

[1303] Arts. 4, 5, and 6, Directive 2009/24/EC.
[1304] Art. 7, Directive 2009/24/EC.
[1305] Arts. 8, 9, 10, and 11, Directive 2009/24/EC.
[1306] Art. 4, Directive 2009/24/EC.
[1307] Dzamukashvili, p. 132.
[1308] Art. 19, Georgian Law on Copyright and Neighboring Rights.
[1309] Bently in: Dreier/Hugenholtz Concise Copyright, p. 233.
[1310] Dietz, in: Harmonization of European IP Law, p. 113.
[1311] Art. 7, Directive 2009/24/EC.

paragraphs (a), (b), and (c) of Article 7 (1) into the respective copyright laws of Armenia, Azerbaijan, Georgia, Moldova, Ukraine, and Russia. This would highlight the importance of protecting computer programs and introduce a useful component to the norms of post-Soviet copyright laws. However, this initiative also has an important drawback: It is difficult to disagree with one of the most common arguments against it – that the general situation in the post-Soviet countries is not ready for the implementation of such 'drastic measures'. We also contend that the harmonization of European legislation should be based on the reality in these post-Soviet countries and on their own domestic interests, not only on the abstract desire for implementing European law.

However, it is also true that the implementation of this norm into post-Soviet copyright laws should also comply with their domestic interests, to the extent that the protection of computer programs would encourage further economic relations with the European Union. It should also foster the process of European integration, which is one of the main challenges for these post-Soviet countries. In order to find the 'delicate balance'[1312], there could also be another option – that before the imposition of the abovementioned norm, a preparatory period should be declared, which would introduce effective measures for improving the general market conditions in these post-Soviet countries in terms of protecting computer programs, thereby facilitating more realistic and adequate implementation of these special measures.

6.1.2 Database Directive

Directive 96/9EC (Database Directive) is widely implemented into the legislations of the post-Soviet countries. From the first chapter of this Directive, which contains the relevant definitions, the definition of "database" is already implemented into the copyright laws of

[1312] Hugenholtz, in: Harmonization of European IP Law, p. 60.

post-Soviet states (basically in the explanation of terms). The remaining norms in the first chapter would not add anything new or useful to the existing legislations. In the first article of the Directive, only the second part (definition) is relevant in this regard, and is therefore implemented. While defining limitations on scope, the Directive declares "without prejudice"[1313] to the earlier Directives, "a legislative technique that, by leaving the existing acquis intact, inevitably leads to inconsistencies".[1314] Accordingly, we can deduce that further implementation of these two articles should not be recommended.

The second chapter of the Directive "harmonizes copyright protection for databases".[1315] Articles 5 and 6 of this chapter have already been implemented by the post-Soviet countries, while articles 3 and 4 have not. However, the reflection of the object of protection[1316] and database authorship[1317] should be useful for the copyright laws of these countries, since without them copyright protection for databases would not be fully defined or the "two-tier protection regime"[1318] fully realized. Moreover, these two articles address closely related issues. Therefore, it would be recommended to insert new articles in the appropriate chapters of the copyright laws of post-Soviet countries,[1319] in which articles 3 and 4 of the Database Directive will be unified. The new article would comprise five parts – the first two reflecting the two parts of Article 3 of the Directive, and the last three implementing the three parts of Article 4 of the Directive. By adding this new norm, the extent of copyright protection for databases will be fully implemented and the "two-tier protection regime" more clearly guaranteed in its entirety.

[1313] Art. 2, Directive 96/9EC.
[1314] Eechoud, p. 301.
[1315] Hugenholtz in: Dreier/Hugenholtz Concise Copyright, p. 318.
[1316] Art. 3, Directive 96/9EC.
[1317] Art. 4, Directive 96/9EC.
[1318] Hugenholtz in: Dreier/Hugenholtz Concise Copyright, p. 307.
[1319] I. e. Chapter 7, Georgian Law on Copyright and Neighboring Rights.

The third chapter of the Directive guarantees the right of *sui generis* for databases, also known as "database right".[1320] The provisions concerning objects of protection,[1321] position of lawful user,[1322] and exceptions to the *sui generis* right[1323] are already implemented by the post-Soviet countries, while the rest of Chapter 3 (term and beneficiaries of protection) is not yet implemented. The definition of the term of protection for databases[1324] seems overly specific from the legal perspective of post-Soviet non-member states, as in their legislations there is no need for such an advanced level of approximation in the protection terms. Since the regulation concerning the beneficiaries of protection under the *sui generis* right[1325] deals with the issues specifically related to the European Union and its member states,[1326] the implementation of this norm would be less useful for the Soviet non-member states as it is too EU-specific. According to the circumstances mentioned above, at this stage we would not recommend the implementation of Articles 10 and 11 of the Directive by the non-member states. The last chapter of the Directive comprises the common provisions. All of the norms in this chapter (Articles 12 to 17) deal with the specific issues related to the transitional provisions and implementation of this Directive. These would not add anything new to the legislations of the non-member states; accordingly, their adoption would not be recommended.

6.1.3 Rental and Lending Rights Directive

The Rental and Lending Rights Directive (92/100/EEC, since replaced) was less widely implemented by the post-Soviet non-member states, compared to the Computer Programs

[1320] Tritton, p. 527.
[1321] Art. 7, Directive 96/9EC.
[1322] Art. 8, Directive 96/9EC.
[1323] Art. 9, Directive 96/9EC.
[1324] Art. 10, Directive 96/9EC.
[1325] Art. 11, Directive 96/9EC.
[1326] Lewinski in: Walter/Lewisnki, p. 778-785.

and Database Directives. As the previous Rental and Lending Rights Directive has also been repealed, we will subsequently discuss Directive 2006/115/EC covering the same issue. Generally, the first and second parts of this Directive are significantly different: the first chapter "confers rental and lending rights upon authors of works (in the sense used in the Berne Convention), as well as upon performers and producers of phonograms and films", while the second chapter "goes well beyond rental and lending rights to confer a whole range of rights upon performers, phonogram producers and broadcasters".[1327]

Article 1 of the first chapter defines the object of harmonization and, accordingly, the implementation of this norm would bring nothing new to the legislations of the non-member states. Article 2 deals with the definitions of "rental", "lending", and "film", together with explaining the status of principal director. The definition of "rental" is already legislated by the post-Soviet countries,[1328] the content of which is quite similar to that proposed by the Directive. However, Azerbaijani, Georgian, Ukrainian, and Russian laws do not include the definition of "lending", while Armenian[1329] and Moldovan[1330] laws do. Therefore, it would be recommended to insert the definition of "lending" provided by the Directive into the copyright laws of Azerbaijan, Georgia, Ukraine, and the Russian Civil Code. The definition of "film" is also omitted from Azerbaijani, Georgian, Moldovan, Ukrainian, and Russian laws, whereas it is provided in Armenian law.[1331] In this case, the implementation of this definition depends on the characteristics of certain laws, as some (i.e., Georgian law) do not include definitions of intellectual works such as "film", "song", "poem", etc., but instead leave the right to define the character of the work in accordance with the circumstances of the case.

[1327] Tritton, p. 499.
[1328] I. e. Art. 4.f, Georgian Law on Copyright and Neighboring Rights.
[1329] Art. 13.1.d, Law of the Republic of Armenia on Copyright and Related Rights.
[1330] Art. 3, Law of the Republic of Moldova on Copyright and Related Rights.
[1331] Art. 48.1, Law of the Republic of Armenia on Copyright and Related Rights.

Therefore, from Article 2, the definition of "lending" would generally be recommended for adoption.[1332]

Article 3 is partly implemented by the post-Soviet countries (i.e., Georgian law). The remaining parts of Article 3 simply refer to the other norms, and as such would not add anything new to the laws of the non-member states. The same should be said about Article 4 of the Directive, which refers to the Computer Programs Directive. Similarly, the implementation of Article 6, the content of which does not comply with the general character of the laws of non-member states at this stage, would not be recommended. However, we recommend implementing the norms of Article 5, as it would guarantee that authors and performers benefit from their rental rights, especially when they have "generally weak bargaining positions in relation to producers",[1333] which is often the case not only in EU but also in non-member states. Therefore we recommend inserting the third and fourth parts of Article 5 into the relevant parts of the copyright laws of post-Soviet countries dealing with the activity of the organization administering economic rights on a collective basis.

The second chapter of the Directive "covers the harmonization of certain neighbouring rights".[1334] Specifically, Article 7 provides fixation rights for performers and broadcasting organizations, and Article 8 adds certain further exclusive rights. In our opinion, approximation with these provisions would make post-Soviet law more responsive to the challenges of contemporary technological developments. Therefore, it would be recommended to implement the provisions dealing with the rights of performers[1335] and the norms providing these rights to broadcasting organizations[1336] into the respective legal norms of post-Soviet non-member states. Furthermore, the first part of Article 9, dealing with the exclusive rights of performers, phonogram producers, film producers, and broadcasting

[1332] Art. 2.2.b, Directive 2006/115/EC.
[1333] Krikke in: Dreier/Hugenholtz Concise Copyright, p. 249.
[1334] Lewinski in: Walter/Lewinski, p. 310.
[1335] Arts. 7.1 and 8.1, Directive 2006/115/EC.
[1336] Arts. 7.2.3 and 8.2.3, Directive 2006/115/EC.

organizations, would be reasonable and innovating for the post-Soviet copyright legislations. Therefore, it would be recommended to incorporate the four parts of this norm into the respective parts of the copyright laws of post-Soviet non-member states.

Article 10 sets limitations to the rights discussed above. The implementation of this norm would be necessary in order to defend the 'delicate balance'[1337] between rights holders and users. Taking into account the requirements of legal technique, we recommend to add new parts to the copyright acts of the post-Soviet countries dealing with the limitations of rights, where the provisions of Article 10 will be reflected. The last chapter of the Directive comprises some common and final provisions (Articles 11–16) that only regulate specific details concerning the application of this Act, and therefore their implementation would not be recommended. Generally, such provisions refer only to EU member states and, accordingly, are not relevant for non-member states.

6.1.4 Resale Right Directive

The Resale Right Directive 2001/84/EC aims "to give contemporary artists who have already sold their creations the right to claim a portion of the proceeds of any subsequent sales for the term of the copyright".[1338] The post-Soviet countries have already implemented the main provisions of this Directive into the norms of their respective copyright laws dealing with the rights of authors of works of fine art. Article 1 defines the subject matter of the resale right. The first and third parts of this Article have already been implemented. In order to introduce the whole extent of this norm and make the approximation more complete, we would recommend to implement the second and fourth parts of this article. For reasons of legal technique, we suggest unifying these two parts into one provision, as they deal with the same issue.

[1337] Hugenholtz, in: Harmonization of European IP Law, p. 60.
[1338] Tritton, p. 541.

Generally, the copyright laws of post-Soviet countries do not include definitions of intellectual works, such as "original work of art", but instead decide on a case-by-case basis whether a work belongs to this field. Therefore the implementation of Article 2 would not be in compliance with the general character of the copyright laws of these countries and, accordingly, is not recommended. The second part of this article has been implemented already. Article 3 sets certain thresholds that minimum sales price should not exceed. The legislators of post-Soviet countries have established such threshold for royalties in their national currencies, but not for the minimum sale price. We would recommend setting the threshold similarly to Article 3 of the Directive, according to the currency rate and other financial circumstances, and to insert the sentence defining this threshold into the respective parts of the copyright laws of these countries.

The rates of resale rights set by Article 4 are already reflected in the legislations of the post-Soviet countries, in their national currencies. The short notice of Article 5, that sale prices are net of tax, should also be inserted into the respective parts of these laws. The provisions of Article 6 dealing with royalty receivers, and the norm of Article 9 providing the right to obtain information, have already been implemented. Article 7 establishes rules for receiving royalties for third-country nationals. These rules are quite specific and closely related to the special rules for EU member states. The same can be said about Article 8 dealing with the term of protection of the resale right. As the contemporary reality in the post-Soviet countries does not show any specific need for implementing such European-specific norms, at this stage we cannot see any necessity to adopt these two articles. The final provisions of the Directive (Articles 10–14) are also not recommended for implementation.

6.1.5 Satellite and Cable Directive

The Satellite and Cable Directive, which requires to provide "an exclusive right for the author to authorize the communication to the public by satellite of copyright works",[1339] is partially implemented by the post-Soviet countries. However, the significant majority of the Directive's norms have not yet been implemented. The first article of the Directive defines certain terms, from which the definition of "cable retransmission"[1340] is adopted by the post-Soviet countries. We would recommend also including the definition of "satellite"[1341] in this glossary of terms. The term "collecting society" is also omitted from the glossary, but other parts of the laws regulate issues concerning the collecting society more widely; therefore, the definition of "collecting society" provided by the Directive would introduce nothing new to the post-Soviet legislations. The second part of Article 1 of the Directive regulates the specific aspects of communication to the subjects by satellite, the implementation of which we would not recommend at this stage, as there is no need for such detailed regulation in contemporary legislation and it would overload the law with unnecessary regulations.

The text of Article 2 includes a sentence that is too general to be implemented, defining an obligation for the Member States to provide an exclusive right, according to other provisions of the second chapter.[1342] The acquisition of broadcasting rights regulated by Article 3 is already covered by the respective copyright laws of post-Soviet countries dedicated to the administration of economic rights on a collective basis, and there is presently no need for implementing further details. Article 4 refers solely to the Rental and Lending Rights Directive (92/100/EEC) without defining any specific rule available for implementation. Similarly, Article 6 refers to the norms of the same Directive. Article 5 requires only to "leave intact" the protection of copyright, and the transitional provisions of Article 7 are too

[1339] Art. 2, Directive 93/83/EC.
[1340] Art. 1.3, Directive 93/83/EC.
[1341] Art. 1.1, Directive 93/83/EC.
[1342] Art. 2, Directive 93/83/EC.

indicative to be implemented. The third chapter of the Directive deals with cable retransmission. Article 8 of this chapter regulates issues of cable retransmission, with the rule available only for EU member states, and therefore not relevant for implementation. The exercise of cable retransmission rights defined in Article 9, and the exception rule in Article 10 are already implemented in the post-Soviet countries.[1343] Articles 10 and 11 deal with the system of mediation between EU member states, and would not be relevant for implementation at this stage. The final chapter comprises the general provisions (Articles 13–15), which are usually not relevant for implementation.

6.1.6 Term Directive

The Term Directive 93/98/EEC (later repealed by Directive 2006/116/EC and again by new Directive 2011/77/EU) was implemented even in the initial versions of the copyright laws in the post-Soviet countries. Although this Directive was replaced and repealed twice, those rules implemented in the copyright laws of these countries were not changed. In this part, we refer to second version of the Term Directive 2006/116/EC. Article 1 defines the duration of authors' rights and is entirely implemented into the copyright laws in post-Soviet countries. Article 2 deals with the term of protection for cinematographic and audio-visual works. We would recommend implementing this rule in the provisions dealing with the copyright on audio-visual work. However, in the laws which do not include similar norms regulating cinematographic works,[1344] the part of Article 2 dealing with cinematographic works cannot be implemented. Article 3 regulates the duration of related rights and is fully implemented in the post-Soviet countries, together with the requirement for protection of previously unpublished works.[1345]

[1343] I. e. Arts. 18.7, 52.2.3, Georgian Law on Copyright and Neighboring Rights.
[1344] I. e. Georgian Law on Copyright and Neighboring Rights.
[1345] Art. 4, Directive 2006/116/EC.

Article 5, dealing with critical and scientific publications, and Article 6, providing protection of photographs, are not implemented by the post-Soviet countries. The adoption of these two norms would make the implementation of the entire Directive more complete. Furthermore, the norms of the Directive provide regulations that are new for the legislations of the post-Soviet countries. Therefore, we recommend adding the relevant provisions of these legislations where Articles 5 and 6 of the Directive will be implemented. Article 7 "prescribes reciprocity towards authors from non-EU countries for works that do not have a Member State as their country of origin".[1346] The content of this article is specifically related to EU member states, and therefore would not be relevant for implementation at this stage. The provisions of Articles 8 and 9, dealing with the calculation of terms and regulation of moral rights, are already reflected in the copyright laws of the post-Soviet countries. The final provisions of Articles 10–14 regulate specific issues concerning the application of the Directive, and are not relevant for implementation.

6.1.7 Information Society Directive

A substantial number of norms from the Information Society Directive 2001/29/EC have already been implemented by the post-Soviet countries. The approximation of these laws is necessary to make the legislation more responsive to recent developments on one hand, and to harmonize them with the general standards of the European legislation concerning issues of the information society, on the other. The first article concerns the general scope of application, and is not relevant for implementation. The second chapter "harmonizes exploitation rights more generally"[1347] than the previously adopted "first-generation" Directives. Particularly, it harmonizes the rights of reproduction,[1348] communication, making

[1346] Visser in: Dreier/Hugenholtz Concise Copyright, p. 300.
[1347] Bechtold in: Dreier/Hugenholtz Concise Copyright, p. 357.
[1348] Art. 2, Directive 2001/29/EC.

works available to the public,[1349] and of distribution.[1350] While approximating the laws of the post-Soviet countries with this chapter, only the first part of Article 3 has been implemented. In our opinion, the implementation of the abovementioned three articles by post-Soviet countries would be important to make the approximation complete. Therefore, we would suggest implementing these provisions into the respective copyright laws of post-Soviet countries.

Article 5 is an important part of the second chapter, in setting the exceptions and limitations to the abovementioned rights. In the absence of this article, the law will become imbalanced; we therefore recommend its adoption. The provisional title for these articles should be "Limitations on Exploitation Rights in the Information Society". The third chapter provides for protection of technological measures and rights-management information, and is an important part of the Directive, the omission of which would make the approximation incomplete. The legislators of the post-Soviet countries have implemented only those parts providing definitions of "technological measures", "circumvention of technological measures",[1351] and "rights-management information".[1352] The rest of Articles 6 and 7 remain unimplemented. While acknowledging the importance of these two articles, we propose to add the respective parts to the copyright laws of the post-Soviet countries where the norms of protection provided by the Directive should be reflected. The last chapter of the Directive (Articles 8–15) includes common provisions concerning the application of this Directive, and therefore the implementation of these articles would not be relevant.

[1349] Art. 3, Directive 2001/29/EC.
[1350] Art. 4, Directive 2001/29/EC.
[1351] Art. 6.3, Directive 2001/29/EC.
[1352] Art. 7.2, Directive 2001/29/EC.

6.1.8 Orphan Works Directive

Unlike the seven Directives examined above, the Orphan Works Directive[1353] has not yet been implemented by the non-member states, since it forms part of the 'new wave' of Directives, being adopted in 2012. This Directive includes original content which, at the same time, is quite EU-specific since it provides for mutual recognition of the status of an orphan work granted in one member state.[1354] The first article of the Directive, for example, is obviously EU-specific, applying especially to the EU member states. However, certain provisions of the Directive should also be applicable in the non-member states. The Directive provides the definition of "orphan work", a concept that was previously unknown in the legislations of the post-Soviet countries. The Directive provides the following definition: "a work or a phonogram shall be considered an orphan work if none of the rightholders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out and recorded".[1355] This definition would represent a significant innovation for the post-Soviet countries. The remaining provisions of Article 2 are too specific and therefore less relevant for the non-member states, especially the provision referring "without prejudice to national provisions"[1356] – the legislative technique that has been criticized for leading to inconsistencies.[1357]

Another important provision defined by the Directive is the requirement for a diligent search. Namely, in order to determine whether the work is orphaned or not, the organization "shall ensure that a diligent search is carried out in good faith in respect of each work or other protected subject-matter, by consulting the appropriate sources for the category of works and other protected subject-matter in question. The diligent search shall

[1353] Directive 2012/28/EU.
[1354] Dusollier, in: Geiger, Constructing European IP, p. 29.
[1355] Art. 2.1, Directive 2012/28/EU.
[1356] Art. 2.5, Directive 2012/28/EU.
[1357] Eechoud, p. 301.

be carried out prior to the use of the work or phonogram."[1358] This provision is directly related to the concept of orphan works, is not EU-specific, and is therefore recommended for implementation. However, the rest of the provisions concerning this issue [1359] are too EU-specific, referring namely to the EU member states, and would not be relevant for implementation in non-member states. The Directive also defines a rule according to which "a rightholder in a work or phonogram considered to be an orphan work has, at any time, the possibility of putting an end to the orphan work status in so far as his rights are concerned".[1360] The insertion of this norm is also necessary in order to fully implement the concept of orphan works.

Other articles of the Directive also refer directly to the EU member states. Mutual recognition of orphan work status specifies that an orphan work in one member state shall also be considered an orphan work in other member states.[1361] The provision concerning the permitted use of orphan works refers to the norms of other EU Directives,[1362] which are already implemented in the post-Soviet countries. The rule of continued application of other legal provisions also uses the "without prejudice"[1363] technique, which has been criticized in the earlier discussion.[1364] The rule concerning the application in time sets a specific date (29 October 2014)[1365] for the application of the Directive, which is obviously not relevant for the post-Soviet countries, since this date has already passed and the Directive is not yet implemented. The same applies to the rules of transposition and review clause,[1366] setting

[1358] Art. 3.1, Directive 2012/28/EU.
[1359] Art. 5, Directive 2012/28/EU.
[1360] Art. 3, Directive 2012/28/EU.
[1361] Art. 4, Directive 2012/28/EU.
[1362] Art. 6, Directive 2012/28/EU.
[1363] Art. 7, Directive 2012/28/EU.
[1364] Eechoud, p. 301.
[1365] Art. 8, Directive 2012/28/EU.
[1366] Arts. 9 and 10, Directive 2012/28/EU.

dates that have already passed. The final provisions of the Directives[1367] are usually not relevant for implementation.

6.1.9 CRM Directive

The Directive on collective management of copyright, related rights, and multi-territorial licensing of rights in musical works for online use in the internal market, commonly referred to as the CRM Directive,[1368] is the most recent EU Directive in the area of copyright (adopted in 2014), and has therefore not yet been implemented at all in the post-Soviet non-member states. This Directive represents a significant novelty within EU copyright legislation, since it regulates the activities of the Collective Management Organizations (CMOs) quite strictly and incisively,[1369] in order to protect the public interests. The Directive has been criticized (even before its adoption) for these incisive measures used to restrict the activities of the CMOs, referred to as "detrimental to the small and medium-sized CMOs".[1370] However, these bold measures were necessary to achieve the 'delicate balance'[1371] between the public and private interests, which favoured private commercial interests prior to the adoption of this Directive. Accordingly, the CRM Directive is also appropriate to the needs of the copyright laws in the post-Soviet countries, the future reformation of which should be based on a similar balance-based approach while protecting public interests and regulating the activities of the CMOs.

The CRM Directive is large compared to the previous EU Directives in the area of copyright, since it regulates CMO activities in detail. The introductory section consist of definitions of

[1367] Arts. 11 and 12, Directive 2012/28/EU.
[1368] Directive 2014/26/EU.
[1369] Arezzo, in: IIC, p. 538.
[1370] Matanovac Vučković, in: IIC, p. 29.
[1371] Hugenholtz, in: Harmonization of European IP Law, p. 60.

the subject matter and the scope of the Directive,[1372] and is therefore not relevant for implementation. However, the definitions provided in the next article[1373] are highly relevant to approximation, since they refer to the institute of CMOs (already implemented by the post-Soviet countries)[1374] and define the terms which are basically regulating the activities of the CMOs. The Directive defines CMOs as: "any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria: (i) it is owned or controlled by its members; (ii) it is organised on a not-for-profit basis".[1375] This is the 'core' definition in terms of implementing the whole Directive, and therefore its implementation by post-Soviet countries is highly recommended, preferably in the definitions of terms. Besides CMOs, the Directive also defines basic terms such as 'independent management entity', 'rightholder', 'member', 'statute', 'general assembly of members', 'director', 'rights revenue', 'management fees', 'representation agreement', 'user', 'repertoire', 'multi-territorial licence', and 'online rights in musical works'. These are also significant in terms of approximation, but their implementation depends on the needs and specificities of the specific copyright acts of the post-Soviet non-member states.

The following provisions refer to the CMOs, namely their organization, membership, and representation of rightholders, as well as management of rights revenue, management of rights on behalf of other collective management organizations, relations with users, transparency, and reporting. The Directive defines the general principle, according to which the CMOs should act "in the best interests of the rightholders whose rights they represent and that they do not impose on them any obligations which are not objectively necessary for

[1372] Arts. 1 and 2, Directive 2014/26/EU.
[1373] Art. 3, Directive 2014/26/EU.
[1374] I. e. Chapter X, Georgian Law on Copyright and Neighboring Rights.
[1375] Art. 3.a, Directive 2014/26/EU.

the protection of their rights and interests or for the effective management of their rights",[1376] which is relevant for implementation. The rights of rightholders[1377] (including those who are not the members of the CMO)[1378] are defined by the Directive and are also relevant for implementation. The Directive also provides the rules concerning the supervisory function[1379] and obligations of the persons who manage the business of the collective management organization,[1380] which should also be incorporated in order to completely implement the Directive. However, the provisions concerning the general assembly of members of the collective management organization[1381] and membership rules of collective management organizations[1382] are too specific and detailed, the implementation of which might overload the copyright legislations.

The Directive sets certain rules concerning the management of rights revenue, namely collection and use of rights revenue, deductions, and distributions of amounts due to rightholders.[1383] These provisions are also too specific to be directly implemented in the copyright laws. The same applies to the management of rights on behalf of other collective management organizations, namely the rights managed under representation agreements as well as deductions and payments in representation agreements.[1384] However, the general provisions on transparency and reporting, namely the disclosure of information to the public[1385] and an obligation to provide an annual transparency report,[1386] impose important obligations and are therefore relevant for implementation. The remaining provisions concerning transparency and reporting, namely concerning the information provided to

[1376] Art. 4, Directive 2014/26/EU.
[1377] Art. 5, Directive 2014/26/EU.
[1378] Art. 7, Directive 2014/26/EU.
[1379] Art. 9, Directive 2014/26/EU.
[1380] Art. 10, Directive 2014/26/EU.
[1381] Art. 8, Directive 2014/26/EU.
[1382] Art. 6, Directive 2014/26/EU.
[1383] Arts. 11, 12, and 13, Directive 2014/26/EU.
[1384] Arts. 14 and 15, Directive 2014/26/EU.
[1385] Art. 21, Directive 2014/26/EU.
[1386] Art. 22, Directive 2014/26/EU.

rightholders on the management of their rights; information provided to other collective management organizations on the management of rights under representation agreements; and information provided to rightholders, other collective management organizations, and users on request,[1387] are too specific and their direct implementation would overload the copyright acts.

The third part of the Directive deals with the multi-territorial licensing by the CMOs of online rights in musical works. Namely, it regulates multi-territorial licensing in the internal market, the capacity to process multi-territorial licenses, transparency of multi-territorial repertoire information, accuracy of multi-territorial repertoire information, accurate and timely reporting and invoicing, accurate and timely payment to rightholders, agreements between collective management organizations for multi-territorial licensing, obligations to represent another collective management organization for multi-territorial licensing, access to multi-territorial licensing, and derogation for online music rights required for radio and television programs.[1388] The general contents of these provisions are useful for the complete implementation of the Directive. However, their direct insertion into national copyright laws would overload the texts of the copyright acts. Therefore, it would be recommended to implement the general contents of these provisions in the national copyright legislations but not necessarily all of the details.

The fourth part of the Directive defines the measures that should be taken to enforce the granted rights. Namely, it regulates complaints procedures, dispute resolution, alternative procedures for dispute resolution, compliance, and the exchange of information between competent authorities.[1389] These provisions are also necessary for the complete implementation of the Directive, but they do not need to be fully inserted in the copyright acts. Rather, their content should be implemented in the national copyright legislations

[1387] Arts. 18, 19, and 20, Directive 2014/26/EU.
[1388] Arts. 23-32, Directive 2014/26/EU.
[1389] Arts. 33-37, Directive 2014/26/EU.

concerning the procedures for enforcing the rights (in the case of Russia, it is also possible to implement them among the procedural norms and not necessarily in the part of the Civil Code dedicated to copyright).[1390] However, the norm concerning cooperation for the development of multi-territorial licensing[1391] refers directly to EU member states and is therefore irrelevant for implementation by the post-Soviet non-member states, as are the final provisions of the Directive.[1392]

6.1.10 Association Agreements

Among the post-Soviet countries, three (Georgia, Moldova and Ukraine) are involved in Association Agreements (AAs) with the European Union. Accordingly, the further implementation of EU copyright legislation in these three countries will take place within the framework of the Association Agreements. The other three countries (Armenia, Azerbaijan, and Russia) should also take further steps towards harmonizing their copyright legislations with that of the EU, but within the framework of the Partnership and Cooperation Agreements (PCAs) signed with the European Community during the 1990s. AAs are generally considered to represent a higher level of European integration than are PCAs. Accordingly, they set certain standards for legal harmonization, which are also higher than those of PCAs. This difference between the standards is also visible in terms of regulating copyright: in the PCA with Georgia the word 'copyright' occurs only once in a joint declaration,[1393] and it is generally mentioned that the approximation of laws shall extend to the area of intellectual property,[1394] whereas the AA between the EU and Georgia

[1390] Part IV, chapter 70, Civil Code of the Russian Federation.
[1391] Art. 38, Directive 2014/26/EU.
[1392] Arts. 39-45, Directive 2014/26/EU.
[1393] Art. 42, Partnership and Cooperation Agreement between the EC and Georgia.
[1394] Art. 43.2, Partnership and Cooperation Agreement between the EC and Georgia.

contains eleven articles dedicated to copyright[1395] (even more than in the EU Association Agreement with Ukraine).[1396]

These copyright-related provisions in the AAs, however, are more oriented towards defining general standards than specific provisions. Accordingly, they are useful for identifying the priority areas for harmonization (which differ from country to country). In the cases of Georgia and Moldova, these priority areas are more similar to each other and contain the following: protection granted, authors, performers, producers of phonograms, broadcasting organizations, broadcasting and communication to the public, term of protection, protection of technological measures, protection of rights management information, exceptions and limitations, artists' resale rights in works of art, and cooperation on collective management of rights.[1397]

In the case of Ukraine, the priority areas for copyright harmonization are: protection granted, duration of authors' rights, duration of protection of cinematographic or audio-visual works, duration of related rights, protection of previously unpublished works, critical and scientific publications, protection of photographs, cooperation on collective management of rights, fixation right, broadcasting and communication to the public, distribution right, limitations, reproduction right, right of communication to the public of works and right of making available to the public other subject-matter, exceptions and limitations, protection of technological measures, protection of rights management information, right holders and subject matter of rental and lending rights, unwaivable right to equitable remuneration, protection of computer programs, authorship of computer programs, restricted acts relating to computer programs (and exceptions thereof), decompilation, protection of databases, objects of protection, database authorship, restricted acts relating to databases, resale right,

[1395] Arts. 153-164, Association Agreement between the EU and Georgia.
[1396] Arts. 161- 192, Association Agreement between the EU and Ukraine.
[1397] Arts. 280-291, Association Agreement between the EU and Moldova; Arts. 153-164, Association Agreement between the EU and Georgia.

broadcasting of programs by satellite, and cable retransmission.[1398] The AAs do not require the direct implementation of its norms within the national copyright legislations. Rather, the process of copyright harmonization among AA signatories should be conducted according to these priority areas and standards set in the Agreements.

[1398] Arts. 161–192, Association Agreement between the EU and Ukraine.

6.2 The Extent of Further Approximation

This section summarizes the findings regarding further approximation of copyright legislation among post-Soviet non-member states (Armenia, Azerbaijan, Georgia, Moldova, Ukraine, and Russia) with that of the European Union. Those articles and provisions that are omitted from the following table are already implemented into the legislations of the post-Soviet non-member states.

Directive	Implementation recommended (Articles)	Implementation not recommended (Articles)
Computer Programs Directive 91/250/EEC	Art. 7 (1)	Arts. 1, 2, 3, 8–11
Database Directive 96/9EC	Arts. 1(2), 3, 4	Arts. 1(1)(3), 2, 10, 11, 12–17
Rental and Lending Rights Directive 2006/115/EC	Arts. 2(2)(b), 5, 7, 8, 9(1), 10	Arts. 1, 2(1)(c)(2), 3, 4, 6, 9(2)(3)(4), 11–16
Resale Right Directive 2001/84/EC	Arts. 1(2)(4), 3, 5,	Arts. 2, 7, 8, 10–14
Satellite and Cable Directive 93/83/EC	Art. 1(1)	Arts. 1(2)(4)(5), 2, 4, 5, 6, 7, 8, 13–15
Term Directive 2006/116/EC	Arts. 2, 5, 6	Arts. 7, 10–14
Information Society Directive 2001/29/EC	Arts. 2, 3, 4, 5, 6, 7	Arts. 1, 8–15
Orphan Works Directive 2012/28/EU	Arts. 2(1), 3(1), 5.	Arts. 1, 2(2)(3)(4)(5), 3(2)(3)(4)(5)(6), 6–12.
CRM Directive 2014/26/EU	Arts. 3, 4, 5, 7, 9, 10, 16, 17, 23–37.	Arts. 1, 2, 6, 8, 11–15, 18–20, 38–45.

The following two sections address two main themes: recommendations for further approximation; and areas of legislation where implementation should *not* be recommended.

6.2.1 Recommendations for Further Approximation

The table represented below shows those norms and provisions of the European Union Directives the implementation of which we have recommended for the legislations of the post-Soviet non-member states.

Directive	Articles
Computer Programs Directive 91/250/EEC	Art. 7 (1)
Database Directive 96/9EC	Arts. 1(2), 3, 4
Rental and Lending Rights Directive 2006/115/EC	Arts. 2(2)(b), 5, 7, 8, 9(1), 10
Resale Right Directive 2001/84/EC	Arts. 1(2)(4), 3, 5,
Satellite and Cable Directive 93/83/EC	Arts. 1(1)
Term Directive 2006/116/EC	Arts. 2, 5, 6
Information Society Directive 2001/29/EC	Arts. 2, 3, 4, 5, 6, 7
Orphan Works Directive 2012/28/EU	Arts. 2(1), 3(1), 5.
CRM Directive 2014/26/EU	Arts. 3, 4, 5, 7, 9, 10, 16, 17, 23–37.

During these recommendations we have taken into account the similarities and differences between these legislations and the realities they are regulating; the specific characteristics of each of these regulations, together with structural and content-related requirements of legal technique, in general. The reasons for recommending further approximation in these specific areas are based on the balanced approach, and on basic directions in the further development of copyright laws in the post-Soviet non-member states discussed so far.

A primary reason for recommending the implementation of any specific norm should be its successful application in the European reality since its adoption. It has been mentioned that the harmonization of copyright-related issues in European legislation during the last couple of decades "has undeniably produced a certain acquis communautaire. Although far from complete, this acquis has had normative effect not only in the Member States that are obliged to transpose the Directives, but also at the regional and international levels".[1399] Accordingly, the implementation of this "best practice"[1400] developed by the EU should also be recommended for non-member states in order to further develop their copyright legislations.

The effect of European copyright legislation at the regional and international levels is acknowledged through the legislations of post-Soviet non-member states – both AA and PCA signatories. A primary reason for this positive effect is the successful application of the EU acts over time. An example is the Computer Programs Directive,[1401] which was adopted in 1991 when the European Union faced several challenges, and which has proven its suitability by successfully meeting these challenges. As the post-Soviet countries face some similar challenges, the implementation of norms that have already resolved similar problems would be recommended.

The next reason for recommending harmonization would be the general legal developments in certain post-Soviet non-member states in terms of their European integration after the restoration of independence during the 1990s. The overall aspiration of some of these countries (e.g., Georgia) towards European integration is reflected in legislation, as legal harmonization is one of the main components in the general process of integration.[1402] Accordingly, the goal of complying with European legal standards includes the implementation of European legal provisions in specific areas, such as copyright law, in order

[1399] Eechoud, p. 298.
[1400] Dietz, in: Harmonization of European IP Law, p. 105.
[1401] Directive 91/250/EEC, later repealed by Directive 91/250/EEC.
[1402] Art. 43, Partnership and Cooperation Agreement between EC and Georgia.

to reach a more advanced level of approximation. In this regard legal approximation can be 'justified' by the overall political process of European integration.

However, as we have seen, the general desire to implement European legislation is not sufficient for recommending the implementation of a specific norm. The local characteristics of national legislation, which is in accordance with the recent developments in the areas of copyright, has to prevail in this sense. In order to be implemented, the norms of a Directive must be responsive to these needs of national legislation. This implies the practical usefulness and importance of the legal norm, which should also be new to the national copyright legislation and add something new to it. Only if the norm complies with these "balance standards" would it be recommended for implementation. In this regard, post-Soviet countries share more-or-less similar characteristics of developing national copyright laws, and therefore the recommendations for them are also common.

6.2.2 Limitations to Further Approximation

The following table presents certain norms in areas of EU copyright Directives where implementation is not recommended. The reasons constraining approximation of these norms differ, as the norms also vary from each other in their character.

Directive	Articles
Computer Programs Directive 91/250/EEC	Arts. 1, 2, 3, 8–11
Database Directive 96/9EC	Arts. 1(1)(3), 2, 10, 11, 12–17
Rental and Lending Rights Directive 2006/115/EC	Arts. 1, 2(1)(c)(2), 3, 4, 6, 9(2)(3)(4), 11–16
Resale Right Directive 2001/84/EC	Arts. 2, 7, 8, 10–14
Satellite and Cable Directive 93/83/EC	Arts. 1(2)(4)(5), 2, 4, 5, 6, 7, 8, 13–15
Term Directive 2006/116/EC	Arts. 7, 10–14
Information Society Directive 2001/29/EC	Arts. 1, 8–15
Orphan Works Directive 2012/28/EU	Arts. 1, 2(2)(3)(4)(5), 3(2)(3)(4)(5)(6), 6–12.
CRM Directive 2014/26/EU	Arts. 1, 2, 6, 8, 11–15, 18–20, 38–45.

Generally, the two and half decades of European copyright law harmonization has made clear that the Directives contain certain norms that have to be criticized even from the perspective of EU insiders. The "later Directive are usually declared 'without prejudice' to earlier Directives, a legislative technique that, by leaving the existing acquis intact, inevitably leads to inconsistencies."[1403] Moreover, "sometimes, completely different areas of the law are cobbled together to be dealt with in the same Directive."[1404] Besides these technological deficiencies, such norms can easily be already outdated, as "in all, the time span between the first proposal of a Directive and its final implementation can easily exceed

[1403] Eechoud, p. 301.
[1404] Tritton, p. 487.

ten years".[1405] Such 'insider' criticisms have to be taken into account while implementing the Directive.

Even if the norms of a Directive are perfect from the EU perspective, in certain cases they can irrelevant to the legislations of post-Soviet non-member states, for example when the issue regulated by this norm is not relevant to the realities in these countries. They might also be irrelevant to the general character of these national copyright acts. One example of such content-related irrelevance is that of definitions, when the Directive provides a definition of an intellectual work that is not common for the copyright laws in the post-Soviet countries, while they do not provide such definitions but rather leave these to be determined by the circumstances of individual cases. Such irrelevant norms should not be the object of approximation. Furthermore, implementation of norms is not recommended in cases where the issues are already regulated by national law. It is not necessary for regulations provided by national law to comply with the norms of EU Directives while these post-Soviet countries are not member states of the European Union.

Although membership of the European Union has been declared as the 'long-term goal' by some post-Soviet countries (e.g., Georgia) by politicians from different parties in various contexts, the timescale for EU accession remains unclear and will not be known in the nearest future. Accordingly, there is no urgent need for harmonizing the "European-specific" norms of the European legislation. The Directives examined so far contain certain provisions on EU-specific issues. Obviously, European Directives should include norms that are specific and applicable only within the territory of the member states. Therefore, as mentioned, there is no current need for such a specific level of harmonization. Finally, all seven of the Directives contain final provisions, sometimes located in the last chapter. These provisions usually deal with specific technical issues related to the application of the Directive.

[1405] Eechoud, p. 298.

Accordingly, the implementation of these norms into the legislations of non-member states would be unreasonable, and are therefore not recommended for approximation.

7. Conclusions

The main elements of our research, namely European copyright law and the copyright legislations of post-Soviet non-member states, have been critically evaluated to define the frontiers for future harmonization of national legislations with European copyright law. The first critical assessment is aimed at the European copyright law in this regard. We initially analysed the propertization character[1406] of the general European concept of copyright (also including author's rights), as well as 'just rewards theory'[1407] and the imbalance between public and private interests (in favour of the latter). The market-based and radically commercialized foundations of EU copyright law are objects of criticism. Moreover, we summarized several other criticisms of EU copyright law in terms of legal tactics and methodology. Critical assessments of ECJ decisions were also summarized, since the developing ECJ practice also belongs to the notion of EU copyright law. All these critical evaluations are based on the applicability of European copyright law to the national legislations of post-Soviet non-member states.

Another element of our research, and accordingly another object of criticism, is the development of copyright laws in the post-Soviet non-member states. This began under Soviet administration, within the framework of common guidelines issued to the local legislations of the 'Soviet' republics.[1408] Accordingly, the critique first addresses the Soviet copyright law, namely its self-contradictory character that led it to deviate from the original Marxist/Communist 'ideals', gradually becoming distorted to resemble its opposing 'capitalist' system of copyright on one hand, while on the other hand expanding its censorial and restrictive character. The radical and rapid shift during the early 1990s, from the Soviet to

[1406] Siegrist, in: United in Diversity, p. 12.
[1407] Stokes, p. 13.
[1408] Levitsky, Introduction to Soviet Copyright Law, p. 34.

the Western international system of copyright[1409] under international pressure[1410] was also criticized. The final theme of criticism in this regard is the 'transplantation' of EU copyright legislation into the national laws of the post-Soviet member states.

Based on these evaluations, we propose alternatives to the criticized objects, which should also serve as a background to recommendations for the future harmonization of post-Soviet non-member legislations with European copyright law. In order to do so, the essence of 'harmonization' was first clarified. Although it is usually employed within the legal literature as a synonym for 'approximation', the original meaning is based on points of difference[1411] and should be 'restored' in the context of copyright law. Subsequently, while applying the synthesis method, we referred to the European copyright law as the first component, and examined alternatives to European copyright law as the second component. We took Soviet copyright law as the first alternative but found it lacking. Accordingly, we examined two other alternative approaches, namely the recently emerged concept of 'copyleft' and the initiative to strengthen the importance of moral rights in copyright law.

Considering the needs of the upcoming round of harmonization, we have elaborated recommendations for the future development of copyright laws in the post-Soviet countries within the framework of the synthesis approach. The post-Soviet non-member states adopted national copyright legislations during the 1990s, then subsequently amended them, and the third round of deeper and now more comprehensive copyright reform is approaching. Accordingly, we have developed certain recommendations for this upcoming level of reform, based on theoretical consideration of a 'balance-based' approach, aimed at achieving an appropriate balance between private and public as well as international and domestic interests; and consideration of alternatives, namely the modern concept of 'copyleft' and an initiative to strengthen the role of moral rights in copyright laws. In practical terms, certain

[1409] Rajan, Copyright and Creative Freedom, p. 47.
[1410] Haigh, p. 251.
[1411] Rajan, Copyright and Creative Freedom, p. 10.

recommendations have been proposed regarding general approaches to copyright regulation as well as the structures of copyright acts. In terms of applying the balance-based approach between public and private interests, we recommended setting certain limitations to copyright; and modifying the basic definition of copyrighted works provided in the copyright laws of the post-Soviet member states.

Since the implementation of EU copyright law is foreseen as a basic element of future copyright reform in the post-Soviet non-EU states (especially among signatories to Association Agreements with the EU), our recommendations and proposals are mostly directed to the process of harmonizing the copyright laws of these countries with EU copyright law. We examined certain provisions of nine EU Directives adopted in the area of copyright to date. The first seven Directives have already been implemented in the post-Soviet countries to certain extents (although further harmonization is still needed), while the two most recent Directives remain completely new to these countries. Accordingly, we proposed certain recommendations in areas where harmonization should be enhanced. We also defined certain limitations to this process of implementation, based on the principle of achieving a balance between international and domestic interests.

V Summary

The basic topic of this research is the interrelation between European copyright law and those of post-Soviet member states. The concept of 'European copyright law' consists of the different layers, and comprises diverse historical levels from the creation of the concepts of copyright and authors' rights in the 18th century[1412] up until the present day. 'Reconciliation' of these significantly different concepts has been considered as one of the main achievements of European copyright harmonization. Although these two concepts emerged in geographically and historically different contexts, they both share a similar place within the system of property rights (namely intellectual property); and have similar raisons d'être, including the general justification as property, as well as 'moral' and 'public' justifications. Accordingly, considering common practice in EU law, we use the English word "copyright" in its broad sense, provided that it also includes the concept of authors' rights

The creation of EU copyright law has been the result of various driving forces that remain significant in terms of defining the main directions of its development. It is generally acknowledged that economic impulses should be granted primary importance in terms of creating EU copyright law, which initially emerged in order to eliminate national differences that hindered the common market,[1413] and which is still strongly dependent on this market. In order to be applied as a body of harmonized law, acquis communautaire in the area of copyright had to create certain standards, expressed in the dominance of economic impulses; responding to the challenges of technology; finding a balance between copyright and authors' rights, public and private interests; as well as reaching certain compromises between

[1412] Berger, in: United in Diversity, p. 91.
[1413] Recital 4, Directive 91/250/EEC.

these different interests. Political factors are also relevant for examining the features of EU copyright law. Accordingly, to fully analyse its applicability in non-member states, we must evaluate its driving economic impulses, indispensable political factors, and the legal standard created by this law.

The recent development of EU copyright law, which has obviously extended beyond the borders of the EU to be applied in numerous non-member states, inevitably leads to the introduction of non-member states' perspective in the academic discussion of European copyright law; accordingly, we introduced this non-member perspective in two contexts: We first examined the relevance of the non-member states' perspectives for the EU copyright law, in general. After evaluating this relevance positively, we examined the reasonableness of implementing European copyright law in the legislations of non-member states. In order to define the relevance of such implementation, we conducted qualitative assessment of EU copyright law, based on its foundations, political impulses and the legal standards it has created.

Furthermore, we have examined EU copyright legislation, namely the nine EU Directives, to date, concerning copyright, in order to evaluate EU copyright law. While evaluating these Directives, the perspective of non-member states (namely the relevance of implementing these Directives) should predominate. Within the context of our research, the term 'EU copyright law' refers not only to these nine Directives, but also to the practice of the European Court of Justice in the area of copyright (the development of which started twenty years before the adoption of the first EU copyright Directive). Examination of this practice highlighted several characteristics, including the increasing number of cases decided by the court in the recent years, and the dominance of the Information Society Directive[1414] among the interpreted legal acts.

[1414] Directive 2001/29/EC.

Since all of these observations on European copyright law focused on its applicability to non-member states, the second part of the research is dedicated to these non-member states, namely to Georgia in comparison to other post-Soviet non-member states (Armenia, Azerbaijan, Moldova, Russia, and Ukraine). Georgia is an illustrative example of an Eastern European post-Soviet non-member state that has shifted its copyright legislation from the Soviet system to the EU standards. This process of developing Georgian copyright law, however, was examined not in isolation but in comparison with the five other national legislations that share certain similarities with Georgia. Three different ways of regulating copyright have been highlighted in this comparison: the first and most prevalent is regulation via special copyright act; the second approach relies on provisions within the Civil Code; the third 'hybrid' method involves regulating general issues via the civil code and defining more detailed provisions through special acts.

The Western European doctrine of copyright (including authors' rights) developed much later in Georgia and neighbouring countries. In order to explain this difference we compared the distinctive historical developments in these two regions. Historically, Georgian legislators employed an interesting approach to implementing different foreign legal systems into Georgian law, which is worth considering even nowadays. According to this tradition, the available different legal systems have to be elaborated, balanced with each other, and – most importantly – adjusted to local specificities, in order to be relevant and applicable to domestic needs. This method is also significant for the ongoing process of implementing European copyright law in Georgia and other post-Soviet non-member states.

Copyright law was absent in all of the observed countries (except Russia) prior to the Soviet era. Hence, Soviet copyright legislation represents a significant part of the development of copyright laws in these post-Soviet countries, where the attitude towards Soviet copyright law remains quite radical, in that it has been either praised or completely disregarded. In this regard, an objective analysis of Soviet copyright law, especially from the 'insider perspective'

is quite rare, and therefore important. Most criticisms of Soviet copyright law derive from the radical market-based commercial view. However, Soviet copyright law can also be criticized from the Marxist/Communist perspective, since it significantly and progressively deviated from these doctrines towards their counterpart – Western copyright law.

Another significant historical event in the development of post-Soviet copyright law was the shift from the Soviet to the radically different Western system of copyright law, which prevailed following the collapse of the Soviet Union. The necessity for this shift has been indigenous and practical to a certain extent, since Soviet-era legislation was longer unable to regulate the newly emerging forms of relations. However, international pressure also played a significant role in this shift.[1415] Accordingly, the rapid transition between extremely different legal systems began in the 1990s and developed in quite a disoriented and convoluted way in creating national copyright laws among the former Soviet states.

Comparing these developments gives an overview of the structural and content-related similarities and differences between these national copyright laws. Structurally, Georgian and Moldovan laws are mostly similar to each other and are reasonably similar to Azerbaijani law. With Moldovan legislation, Georgian law shares the common approach of regulating the limitations on economic rights and the collective administration of copyright and related rights, while under Azerbaijan law these are related by regulating the term of protection and the transfer of copyright. Armenian and Ukrainian laws, on the other hand, share structural similarities that differentiate them from the other legislations. What the copyright laws of these five countries have in common is the regulation of the basic rights of authors, protection of copyright and related rights, as well as sharing the continental European approach of dividing related (neighbouring) rights from author's rights. Furthermore, they all more or less follow the classical "five-pillar structure"[1416] of copyright.

[1415] Haigh, p. 251.
[1416] Dietz, in: Harmonization of European IP Law, p. 104.

The development of national copyright law and court practice in the area of copyright are interrelated. Georgian courts started to develop their practices in the field of copyright only after the adoption of Georgian law on copyright in 1999. However, in certain cases the courts also referred to Soviet copyright law, when the relations between the parties started prior to the breakup of the USSR. Subject matter of copyright protection is the most frequently examined issue in the Georgian Supreme Court, which has made a number of significant decisions since the year 2002. However, the court expresses a certain 'hesitant' approach in these decisions, declaring each of the cases individually and avoiding elaborating a common standard that should be generally applicable.

The process of European integration, including legal approximation and the implementation of EU copyright law in non-member states, can be divided into two different levels. The first and very basic level of the integration began during the 1990s, within the framework of the Partnership and Cooperation Agreements (PCAs) between the EU and the post-Soviet countries. The second and more advanced level of integration has continued since the EU signed Association Agreements with Georgia, Moldova, and Ukraine. The levels of legal approximation concerning copyright are also different, and the requirements of the AAs are much more advanced than the basic requirements of the PCAs. Generally, the further process of implementing EU copyright law into the legislations of these three countries should be based on these Association Agreements and is to be realized in the near future.

The third and final part of our research combines the two basic elements: European copyright law and the copyright legislations of the post-Soviet non-member states, in order to evaluate them in a critical manner. The first critical assessment concerned European copyright law (also referring to the concept of authors' rights), the propertization character of such,[1417] as well as 'just rewards theory',[1418] and the imbalance between public and private interests (in favour of the latter). Furthermore, the radically commercial foundations of EU

[1417] Siegrist, in: United in Diversity, p. 12.
[1418] Stokes, p. 13.

copyright law have also become an object of criticism, in addition to certain legal tactics and methods, together with certain decisions of the ECJ in the area of copyright. Another critical assessment is directed towards copyright law in the post-Soviet countries, the following feature of which have become objects of criticism: the self-contradictory and censorial character of Soviet copyright law; the hasty and radical shift from Soviet administration to the fundamentally different Western system of copyright;[1419] the disoriented and convoluted development of national copyright legislations; and, finally, the 'blind transplantation' of EU copyright legislation into the national laws of the post-Soviet member states.

Following these critical evaluations, alternative proposals to these criticized elements were elaborated. Since EU copyright law was considered as the first component in this critical scheme, the Soviet copyright law served as the second component, being an antipode of EU copyright law. However, the self-contradictory and censorial character of Soviet copyright law made it unsuited to serve as an alternative. Accordingly, two other new approaches, namely the recently emerged concept of 'copyleft' and the initiative to strengthen the importance of moral rights, have been considered as new interpretations opposed to the certain features of European copyright law. As a result of such contradictions, the third 'synthesizing' component has been elaborated as recommendations for the future process of harmonizing the copyright laws of the post-Soviet countries with European copyright law.

The recommendations and proposals are directed towards the general process of further reformation of post-Soviet copyright laws and the more tangible process of further harmonization of the European copyright law into these post-Soviet legislations. In the first case, the theoretical implications of a 'balance-based' approach and consideration of alternatives have been translated into the 'practical' recommendations concerning the types of copyright regulation and structures of copyright laws in the post-Soviet countries; and the implementation – of certain limitations to copyright and modification to the definition of

[1419] Rajan, Copyright and Creative Freedom, p. 47.

copyrighted work – within these copyright laws. The recommendations are more specific concerning the harmonization of EU copyright legislation, since we have examined all nine copyright Directives in detail and evaluated the provisions in terms of their implementation within post-Soviet countries. As a result, the conclusions address two main themes: We have defined the areas where, in our opinion, the approximation process should go further, and the areas where it should not. These recommendations aim to more clearly define the frontiers for future implementation of European copyright law within the legislations of the post-Soviet non-EU states.

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Coditel v Ciné-Vog Films	18.03.1980	Case 62/79
Musik-Vertrieb Membran GmbH v GEMA	20.01.1981	Joined cases 55/80 and 57/80.
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Butterfly Music Srl v. Carosello	29.06.1999	Case C-60/98
EGEDA v. HOASA	03.02.2000	Case C-293/98
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Laserdisken ApS v Kulturministeriet	12.09.2006	Case C-479/04
Uradex v. RTD & BRUTELE	01.06.2006	Case C-169/05
SGAE v. Rafael Hoteles	07.12.2006	Case C-306/05
Promusicae v. Telefónica	29.01.2008	Case C-275/06
Peek & Cloppenburg v. Cassina	17.04.2008	Case C-456/06
Sony v. Falcon	20.01.2009	Case C-240/07
Infopaq v. Danske Dagblades Forening	16.07.2009	Case C-5/08

Fundación Gala-Salvador Dalí v. ADAGP	15.04.2010	C-518/08
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Stichting de Thuiskopie v. Opus Supplies	16.06.2011	C-462/09
Scarlet Extended v. SABAM	13.10.2011	Joined Cases C-431/09 and C-432/09
Circul Globus Bucureşti v. UCMR – ADA	24.11.2011	Case C-283/10
Scarlet Extended v. SABAM	24.11.2011	Case C-70/10
UsedSoft v. Oracle	03.07.2012	Case C-128/11
Performance v. Ireland	15.02.2012	Case C-162/10
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Date	Number
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Germany

Court	Date	Number
Oberlandesgerichts München (Higher Regional Court of Munich)	14.07.2016	29 U 953/16
Bundesverfassungsgericht (Federal Constitutional Court)	07.07.1971	BVerfGE 31, 229