JUST A LITTLE BIT: COMPARING THE DE MINIMIS DOCTRINE IN U.S. AND GERMAN COPYRIGHT REGIMES

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I. INTRODUCTION

The European copyright tradition values expansive protection of author's rights, which is reflected in the European Union's (EU) most recent copyright directive to member states.[1] However, in implementing the directive, Germany—a country whose copyright regime generally mirrors the values of the EU—fought hard to include a controversial *de minimis* provision aimed at balancing the copyright interests of users and rights holders.[2] The provision would allow users to copy up to certain amounts of a protected work without incurring liability.[3] In United States copyright jurisprudence, there is no statutorily defined *de minimis* threshold; instead, this concept is used as a defense to infringement.[4] In practice, where it is found that a user has unlawfully infringed another's protected work but the amount copied is trivial, the court will not impart damages.[5] What's surprising, given the copyright tradition in Europe is that the new German *de minimis* amounts are so large that they dwarf even those found in American common law.[6] This provision will likely send reverberations throughout Europe and the rest of the world. The questions for U.S. copyright lawyers are: what can we learn from Germany's law, how does it conflict with American laws, and how could it potentially apply? The United States judiciary is currently caught in a circuit split regarding *de minimis* use[7] and has not seen major copyright innovation since the late 90s.[8] The timing could be fortuitous to revisit the *de minimis* doctrine in the U.S. copyright regime, but that requires understanding the underlying theoretical

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1 *See generally Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, COM (2021) 288 Final (Apr. 6, 2021) [hereinafter *Guidance on Article 17*].

2 *See generally* Urheberrechts-Diensteanbieter-Gesetz [UrhDaG] [Act on the Copyright Liability of Online Content Sharing Service Providers] June 14, 2021, Bundesgesetzblatt [BGBl. I] (Ger.).; *see also* Hayleigh Bosher, De minimis uses and the German implementation of Art 17 DSM Directive, The IPKat (May 24, 2021), https://ipkitten.blogspot.com/2021/05/guest-post-de-minimis-uses-and-german.html.

3 *See generally* Urheberrechts [UrhDaG] [Copyright Act] June 14, 2021, [BGBL. I] (Ger.).

4 *See* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 874 (9th Cir. 2016) (noting that Congress did not eliminate the *de minimis* defense through legislation).

5 *See id.* at 877.

6 See *id.* at 874 (holding that a sound sample less than a second long was considered *de minimis* use).

7 *See id.* at 866 (noting that in following its own holding the Ninth Circuit was deliberately creating a circuit split).

8 *See* Katharine Trendacosta, *Reevaluating the DMCA 22 Years Later: Let's Think of the Users*, ELEC. FRONTIER FOUND. (Feb. 12, 2020), https://www.eff.org/deeplinks/2020/02/reevaluating-dmca-22-years-later-lets-think-users.

differences between U.S. and EU/German copyright foundations[9] and tracking the divergent lawmaking practices between the two bodies.[10]

For the past thirty years, European copyright law has been defined by EU harmonization efforts.[11] Directives over the years have primarily sought to create an internal market between EU member states under the assumption that consistent copyright principles and laws would aid rights holders, service providers, and users.[12] The directives work in tandem with national laws, as well as the constantly morphing common law established by the Court of Justice of the European Union (CJEU), which takes on especially thorny questions presented by member state courts.[13] The CJEU's attempts to balance and interpret copyright interests, in accordance with the Charter of Fundamental Rights of the EU,[14] have often resulted in a heavier weight placed on users' rights rather than the proprietary interest in the Intellectual Property that rights holders maintain.[15]

A. A Brief Overview of American Copyright Law

On the other side of the Atlantic, copyright jurisprudence adopted a different character that embodies American sensibilities and economic interests. The Constitution's authors, understanding the importance of creation and invention, carved out a clause that allowed Congress to create copyright laws.[16] The Copyright Act of 1909 was intended to be the definitive text on copyright jurisprudence, but its efficacy was almost immediately put into question, as its provisions and definitions failed to account for, or anticipate, the rapid growth of technology that introduced new kinds of subject matter and methods for creation.[17] Therefore, when Congress and industry representatives convened to reconfigure the law, the resulting 1976 Copyright Act did away with vestigial parts of the law, extended the

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9 *See generally* Aaron D. White, *The Copyright Tree: Using German Moral Rights As the Roots for Enhanced Authorship Protection in the United States,* 9 LOY. L. & TECH. ANN. 30 (2010) (discussing the differences in ideological underpinnings between American and German moral rights in copyright laws).

10 *See generally* Jessica Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857 (1987) (tracking the legislative history of the 1976 Copyright Act).

11 *See* Eleonora Rosati, Preface, in The Routledge Handbook of EU Copyright Law xi-xii (Eleonora Rosati ed. 2021).

12 *See* Ana Ramalho, *The Competence and Rationale of EU Copyright Harmonization*, *in* THE ROUTLEDGE HANDBOOK OF EU COPYRIGHT LAW 4-5 (Eleonora Rosati ed. 2021).

13 *See* Rosati, *supra* note 11, at xi-xii.

14 *See* Tito Rendas, *Fundamental Rights in EU Copyright Law*, *in* THE ROUTLEDGE HANDBOOK OF EU COPYRIGHT LAW 19-20 (Eleonora Rosati ed. 2021).

15 *See id.* at 20.

16 *See* U.S. Const. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

17 *See* ROBERT A. GORMAN, COPYRIGHT LAW 1-2 (2d ed., 2006).

duration of exclusive rights, codified the common law on copyright, and gave federal law exclusive subject matter to resolve disputes.[18]

The decades-long project to update the law incorporated industry-specific compromises and represented a unique legislative history that seemingly prioritized specific interest groups over others.[19] For example, the fair use doctrine, which had been a common law defense to copyright infringement since the 19th century, was codified in the act as the result of a "hard fought compromise" between representatives of "authors, composers, publishers, music publishers, and educational institutions."[20] The conflicts leading to the compromise on fair use language were fraught and often included backtracking on previously agreed to provisions.[21] The detailed fair use exemptions that accompanied the general provision represented specific interest groups who found themselves at the bargaining table, but gave almost no consideration to technologies, users, or future creators, thereby limiting judicial creativity.[22] All of this is to say that the American copyright regime over the past 50 years has been governed by specific interest groups and generally kept out of the hands of courts to develop the common law.

This industry-specific character is especially notable in the copyright update Congress passed before the turn of the century: the Digital Millennium Copyright Act (DMCA).[23] The DMCA could be seen as the American corollary to Article 17 of the most recent EU Copyright Directive, as both define the relationship between online service providers and copyright holders.[24] The DMCA limits the liability of service providers and establishes safe harbors under certain circumstances.[25] In order to fall under one of the four safe harbors, providers must prove they lack constructive knowledge regarding the infringing material, they cannot interfere with reasonable measures to combat privacy, and they have a policy in place for combating infringement.[26] While fair use remains a viable defense against infringement, the DMCA notably exempts service providers, puts the onus on copyright rights holders to notify service providers of infringement, and requires

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18 *See id.* at 3-4.

19 *See* Litman, *supra* note 10, at 862 (arguing *inter alia* that the way the legislative history makes it nearly impossible for courts to glean a specific Congressional intent of the act's provisions).

20 *Id.* at 869.

21 *Id.* at 875-77.

22 *Id.* at 887.

23 *Digital Millennium Copyright Act (DMCA) Safe Harbor Provision for Online Service Providers: A Legal Overview*, CONGRESSIONAL RESEARCH SERVICE (Mar. 30, 2020), https://crsreports.congress.gov/product/pdf/IF/IF11478.

24 *Id.*

25 *Id.* (protecting service providers under the act if they are transmitting or routing the material through their servers, if the information is being cached in their system, if they store the information at the direction of their users, or if they link or refer to the online location of the information).

26 *Id.*

providers to take down flagged material.[27] Additionally, the DMCA's safe harbors protect service providers from having to seek mandatory licenses, unlike other content providers, which don't fall in the statutory language.[28]

As I will discuss later in the section on Article 17 of the EU Copyright Directive and the 2021 German Copyright Act, the American service provider liability regime is almost completely antithetical to the European model, which instead attempts to promote licensing and places liability on providers in order to protect both copyright holders and content creators.[29] Part of this Note will attempt to compare the elements of the two regimes and see if there is common ground for overlap, or even cross-national regime interchange.

B. A Brief Introduction to German Copyright Law

German copyright law, by comparison, is a far more frequently updated beast, with the most recent substantial amendments being passed in 2006.[30] While the 2006 law ultimately made it illegal to download works from file-sharing websites if the website did not have the appropriate rights, the legislature considered a *de minimis* rule that would allow for small-use copying in order to cut down on the large amount of criminal complaints that would follow.[31] This provision was ultimately left out of the final bill, but it's notable that, over a decade previously, Germany was already considering how *de minimis* could balance the rights of users alongside copyright holders and service providers.[32]

Given the different histories and principles of the two countries' copyright regimes, how realistic is it that America could learn from Germany? At least one academic has contemplated a similar question and has suggested that there is a way to model America's Visual Artists Rights Act (VARA) after Germany's enhanced protection for moral rights.[33] However, the biggest takeaway from the author's thought experiment is his methodological approach. He compared American and

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27 Jessica E. Gopiao, *The Music Industry's Discord with the DMCA*, 46 AIPLA Q. J. 267, 273 (2018).

28 *Id.* at 274-75.

29 *See infra* Section II.

30 *See* Katharina Scheja & Reto Mantz, *Copyright Law Reform Finally Enacted in Germany*, 3 CONVERGENCE 155, 155 (2007).

31 *See id.* at 156.

32 *See id.*

33 *See generally* White, *supra* note 9 (arguing *inter alia* that the United States should amend VARA by: 1) "explicitly protect an author's right to decide on the form of attribution," 2) grant authors the right to prevent the use of works if the use is prejudicial to the author's honor or reputation, but limit recovery to situations where honor or reputation are injured, and 3) delete the act's destruction provision. The expanded attribution rights would help American copyright law meet the requirements of the Berne Convention, the rights for protecting integrity would not unduly burden free speech–thereby complying with the First Amendment and the parallel requirements in Article 6*bis* of the Berne Convention–and finally, the deletion of the destruction right would help tie in the new additions by protecting authorial integrity and brand over the work itself).

German copyright law with regards to the protection of moral rights and sifted through the elements to find those that satisfied international treaty requirements, or those which could fit and function within existing American legal structures.[34] My comparison and analysis of American and German *de minimis* jurisprudence will follow a similar filtration model.

After my discussion of both the German Copyright Act of 2021 and American copyright jurisprudence, I will compare the two using this method. First, I will discuss the elements of the *de minimis* provision in the German Copyright Act of 2021, its reception, and the potential effect it could have on international copyright norms. Next, I will discuss whether the *de minimis* provision, or other provisions in the German Copyright Act, would fit and function within American common and statutory law. Finally, I will look to previous international copyright conflicts to determine whether those proceedings provide insightful precedent on how implementation of the *de minimis* could occur. Ultimately, I conclude that while the German Copyright Act's *de minimis* provision provides a novel approach to balancing copyright interest in a digital age, American law is likely too byzantine and set in its way to adopt such a user-friendly model.

II. THE GERMAN COPYRIGHT ACT OF 2021

A. The EU Copyright Directive and the Influence of European Law on the Development of Germany's Copyright Act

The EU has long sought to create a cohesive internal market; however, that goal has been undercut by different national copyright laws and regimes.[35] Therefore, the EU has previously passed a number of copyright directives to help "harmonize" laws between countries and further its goals.[36] Generally, these efforts do not seek to replace national laws so much as to reduce discrepancies between laws and regimes which could potentially hamper the development of the internal market.[37] Still, the harmonization mandate is binding, and national laws are forced to conform with the provisions by the date laid out in a given directive.[38] As a member state, Germany is bound to conform its law with each copyright directive's provisions, but it still retains some discretion in writing and implementing the national law. It is in this nuance that the scope and nature of the new German copyright law found a niche separate from that of the directive.

The most recent EU Copyright directive was adopted on April 17, 2019, and it contained a number of controversial provisions.[39] In particular, the directive

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34 *Id.* at 90.

35 1 ESTELLE DERCLAYE, BEN SMULDERS & HERMAN COHEN JEHORAM, INTERNATIONAL COPYRIGHT LAW AND PRACTICE EU § 4, at 1 (2021).

36 *Id.* at 2.

37 *Id.*

38 *Id.* at 4.

39 *Id.* at 3.

placed new copyright infringement monitoring obligations on platforms which host large amounts of content, such as YouTube and Google.[40] The EU specifically defined content service providers as those which store or give the public access to a large amount of copyrighted works organized by users and who use those works to make profits.[41] This provision reversed the previous roles of online infringement detection—which was initially on the copyright owner to enforce—and instead put the onus on the service provider to track and monitor and remove all infringing content on its site.[42] Additionally, any communication of a copyrighted work to the public would need an authorization.[43] Although the directive did not define the elements of an authorization, it did note that an authorization is generally notice from the copyright holder that use of the work is permitted.[44] The intent of this directive, at least to German artists, was clear—the directive would maximize copyright protection and give creators avenues to seek remuneration through laws.[45]

However, new monitoring duties were not the only controversial addition to the directive. Amendments to the copyright directive made in March 2019, shortly before the directive's passage in April of that year, reveal that many of the most hotly debated provisions were added towards the end of the lawmaking process.[46] The new provisions, including the aforementioned internet service provider obligations, were sprung upon member states at the last minute and provided for little public response. Public sentiment was notably negative towards the new service provider obligations, as the duty to monitor and block infringing content could potentially chill speech.[47] Most strikingly, the entirety of Article 17––which outlined these new service provider obligations—was created entirely from the later amendments.[48]

To effectuate the seismic change in online infringement liability, the new amendments helped define and set the parameters for how service providers could

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40 *See* DERCLAYE ET AL., *supra* note 35, at 3.

41 *See Guidance on Article 17*, *supra* note 1, at 3.

42 *See* DERCLAYE ET AL., , *supra* note 35, at 35.

43 *See Guidance on Article 17*, *supra* note 1, at 2.

44 *Id.*

45 *More than 1000 Artists Protest the "Horror" of Germany's New Copyright Law*, CELEBRITYACCESS (May 4, 2021), https://celebrityaccess.com/2021/05/04/more-than-1000-artists-protest-the-horror-of-germanys-new-copyright-law/; *see also* Matthias Beckonert, *German Musicians Criticize Planned Copyright Reform*, DEUTSCHE WELLE (May 20, 2021), https://www.dw.com/en/german-musicians-criticize-planned-copyright-reform/a-57594386.

46 *See generally Amendments by the European Parliament to the Commission Proposal on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC*, at 116-29, COM (2016) 0593 final (April 17, 2019) [hereinafter *Amendments to the Copyright Proposal*] (noting new additional provisions in bold ink, including many provisions of Articles 15 and 17).

47 *See EU copyright bill: Protests across Europe highlight rifts over reform plans*, DEUSTCHE WELLE (Mar. 23, 2019), https://www.dw.com/en/eu-copyright-bill-protests-across-europe-highlight-rifts-over-reform-plans/a-48037133.

48 *See Amendments to Copyright Proposal*, *supra* note 46, at 120-129.

fulfill their new obligations.[49] The greatest obligations were required of the largest content service providers, as the amended provision demanded that providers with monthly unique visitors of over 5 million individuals must demonstrate their best efforts to prevent further uploads of works which they have notice to block.[50]

These new obligations forced service providers to radically and fundamentally change how they approached business interactions with copyright holders, as well as their own users, in ways which would potentially limit the expressive conduct for all involved. Public concern that service providers would implement content filters to automatically block infringing content was so great that Germany quickly put out a press release that its national implementation of the law would ban the use of upload filters.[51] With the new provisions in place, member states would need to rely on EU guidance to implement the new provisions; fortunately, the EU would oblige with a helpful set of definitions and suggestions for member states.[52]

While the EU ultimately left it to its members' state discretion to create new mandatory licensing models, define key statutory terms, and determine appropriate standards for liability,[53] the EU did mandate that states include exceptions for uses of works which are primarily used for quotation, criticism, review, or caricature, parody, and pastiche.[54] These new exceptions, which were voluntary under previous directives, were now mandatory.[55] The EU noted other potential legitimate uses, such as for content created with cleared samples or authorized uses, works that appear in the public domain, and incidental use.[56] Every exception, which was unenumerated but written in existing national laws, would need to be in compliance with the EU Charter of Fundamental Rights and any Court of Justice of the European Union (CJEU) copyright case law.[57] While the list was not exhaustive, the EU notably did not include a discussion of whether some works might be legitimate based on the amount of a work used.

In its official response to the directive's passage, Germany noted its concern that "upload filters" would be necessary in order to catch any infringing

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49 *Id.* (the newly amended provisions of Article 17 also laid out the manner in which online content service providers could avoid liability as well as the elements used to determine if the service provider met its obligation to seek an authorization, noting that: 1) the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and 2) the availability of suitable and effective means and their cost for service providers, would both be considered.)

50 *Id.* at 124.

51 *Compromise on Copyright: No Upload Filters!*, CDU (Mar. 15, 2019), https://archiv.cdu.de/artikel/kompromiss-zum-urheberrecht-keine-uploadfilter.

52 *See generally Guidance on Article 17*, *supra* note 1.

53 *See id.* at 3, 13.

54 *See id.* at 19.

55 *Id.*

56 *See id.* at 20.

57 *See Guidance on Article 17*, *supra* note 1, at 20.

work being posted by users.[58] While Germany did not address whether factors such as length, duration, or amount of copied protected content would be considered elements for protected uses, the statement noted that protection would be lax in areas where a rightsholder's economic interests are less relevant.[59] It is fair to say that none of the official communications from either the EU nor Germany, up until the adoption of the directive, noted that *de minimis* use might be a consideration for national laws to consider. However, at some point in the legislative process, it became an essential part of Germany's list of exceptions. The next section will discuss how faithfully Germany adopted the provisions of the EU Copyright Directive, the ways in which it deviated from the prescribed legislation, and where in the process of crafting the law *de minimis* considerations might have found their way in.

B. The First Two Drafts of the German Copyright Act: *De Minimis* to the Max

Soon after the directive was finalized, the German government prepared a forum through which interested parties could voice their comments on the implementation of any draft articles.[60] This was indicative of a collaborative lawmaking model, as numerous stakeholders ended up writing in with comments and concerns as the many drafts of the law were published.[61] This section will address the lead up and the reveal of the early drafts, and detail notable feedback that may have contributed to the shape of future drafts.

One of the first choices made by the German government was to split its new copyright law in two: the first being a law which would implement the vast majority of the EU directive, and the second, which would specifically address the

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58 *Interinstitutional File: Draft Directive of the European Parliament and of the Council on Copyright and Related Rights in Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC (first reading)*, at 3, COD (2016) 0280 (Apr. 15, 2019) [hereinafter File *Draft Directive*].

59 *Id.* at 5.

60 Öffentliche Konsultation zur Umsetzung der EU-Richtlinien im Urheberrecht (DSM-RL (EU) 2019/790 und Online-SatCab-RL (EU) 2019/789) [Public Consultation for the Implementation of the EU Directives in Copyright Law (DSM-RL (EU) 2019/790 and Online-SatCab-RL (EU) 2019/789)], Jun. 28, 2019, (Ger.), https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/Konsultation_UrhR-Richtlinien.pdf;jsessionid=6002EED0DE08864242BC47F54E8A49F7.2_cid324?__blob=publicationFile&v=2.

61 *See Second Law to Adapt Copyright Law to the Requirements of the Digital Single Market,* FEDERAL MINISTRY OF JUSTICE (last visited, Ap. 14, 2022), https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/Gesetz_II_Anpassung-Urheberrecht-dig-Binnenmarkt.html;jsessionid=9B48BD96B55201BEF9E1AB469B4E09FF.1_cid324?nn=6712350#Anker (the link provides dozens of responses from diverse interests groups including academics, artists coalitions, and companies).

content service provider obligations of Article 17.[62] The bill dealing with content service providers, Gesetz über die urheberrechtliche Verantwortlichkeit von Diensteanbietern für das Teilen von Online-Inhalten (UrhDaG), was considered by some observers to be a model implementation for the EU directive's provisions, even if it failed to fulfill the lofty promises of the directive.[63] A press release on March 15, 2020, from General Secretary of the Christian Democratic Union of Germany (CDU), Paul Ziemiak, guaranteed five characteristics of the new law; it would: 1) avoid upload filters in the national implementation, 2) promote fair remuneration for content over blocking, 3) allow more effective and easy enforcement of IP for creators and rights holders, 4) give content service providers' users greater freedom of expression, and 5) hold internet platforms liable for infringement.[64]

The draft proposal largely followed the EU's guidance on defining service providers and in apportioning liability;[65] however, it also marked the first written instance of the *de minimis* provision.[66] The provision acknowledged that users could legally reproduce or duplicate a copyrighted work if the use of a protected work was fewer than 20 seconds of a film, 20 seconds of an audio track, 1,000 characters of a written text, or 250 kilobytes of an image.[67] Despite the EU's intention that service providers hold primary responsibility for monitoring content,

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62 Diskussionsentwurf des Bundesministeriums der Justiz und für Verbraucherschutz Entwurf eines Ersten Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarkts [Discussion Draft of the Federal Ministry of Justice and Consumer Protection, Draft First Law to Adapt Copyright Law to the Requirements of the Digital Single Market], Jan. 15, 2020, at 1 (Ger.) [hereinafter *Discussion of First Draft*]; *see also Article 17 Implementation: German Proposal Strengthens the Rights of Users and Creators*, COMMUNIA ASS'N (Jun. 24, 2020), https://www.communia-association.org/2020/06/24/article-17-implementation-german-proposal-strengthens-right-user-creators/.

63 *See Article 17 Implementation: German Proposal Strengthens the Rights of Users and Creators*, *supra* note 62. COMMUNIA ASS'N (Jun. 24, 2020).

64 *See Compromise on Copyright: No Upload Filters!*, *supra* note 52 (However, by the time the government unveiled the second draft on June 24, 2020, the use of content filters was accepted with some limitations).

65 Diskussionsentwurf [Stand: 24. Juni 2020] des Bundesministeriums der Justiz und für Verbraucherschutz Entwurf eines Zweiten Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalin Binnenmarktes [Draft Discussion [as of June 24, 2020] of the Federal Ministry of Justice and Consumer Protection Draft Second Law Adapting Copyright Law to the Requirements of the Digital Single Market], Jun. 24, 2020, at 21 (Ger.) [hereinafter *Discussion of Second Draft*] (Among the notable changes, Germany adopted different language for defining the size of service providers—referring to amount of sales rather than number of users as a threshold for large or small providers. Additionally, the obligations for service providers were stricter than those proposed by the EU, requiring that providers securing authorization to the rights before "best efforts" were met.)

66 *Id.* at 23 (Ger.).; *see also Article 17 Implementation: German Proposal Strengthens the Rights of Users and Creators*, *supra* note 62.

67 *See Discussion of Second Draft*, *supra* note 65, at 23.

the German provision instead asked that users "pre-flag" content which would fall into the protected categories of parody, pastiche, review, criticism, or *de minimis*.[68] This likely was an attempt to balance freedom of expression without reverting to upload filters.[69]

The government's rationale for including a *de minimis* provision seemed out of character with the general EU sentiment. The draft's comments noted that because it is a common business practice to give away free samples of content to advertise a product, any minor, non-commercial uses of protected material would likely help, not hamper the rights holder.[70] Despite the proffered reasoning, the new exemption still seemingly contradicted the fundamental character of European moral rights tradition.[71] When creators cannot ensure that their works are being used according to their wishes, their right of attribution is tarnished.[72] Under the German copyright law draft, low resolution images could be shared amongst individuals not seeking commercial gain, or those using the piece in parodic or pastiche forms, but in a way that might serve to advance an idea disliked by the creator. Additionally, short snippets of sound recordings could be used at the beginning of vlogs and/or Tik Toks, which promote an ideology or message with which the author does not agree. The author can do nothing to prevent the use of these works outside of notifying the content provider beforehand, but in general, must receive remuneration rather than be able to block the content.[73] While freedom of expression was an essential consideration of these early drafts,[74] it is hard to square with longstanding moral rights of copyright holders in Germany.

The second draft of the new German Copyright Act, presented on June 24, 2020—in a notable difference from the first draft—opens its discussion of the new edits with a reference to the 2019 CJEU *Pelham* case.[75] Due to the judgment of the *Pelham* case, section 24 of Germany's previous Copyright Act was now incompatible with the current law and would have to be amended.[76] This is notable because section 24 of the previous Copyright Act had regulated "free use"—or instances where creators of new and independent works could use segments of copyrighted works without requesting permission.[77] Due to its noted presence in

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68 *Id.* at 23; *see also Article 17 Implementation: German Proposal Strengthens the Rights of Users and Creators*, *supra* note 62.

69 *See Discussion of Second Draft*, *supra* note 65, at 23.

70 *Id.* at 88.

71 White, *supra* note 9, at 86-89 (noting that the right of attribution, or the ability to either attach your name to a work or not associate with a work is a fundamental right in moral rights regimes).

72 *See Authors, Attribution, and Integrity: Examining Moral Rights in the United States*, U.S Copyright Office (Apr. 23, 2019), https://www.copyright.gov/policy/moralrights/#:~:text=Chief%20among%20these%20rights%20are,(the%20right%20of%20integrity).

73 *Discussion of Second Draft*, *supra* note 65, at 88.

74 *Compromise on Copyright: No Upload Filters!*, *supra* note 51.

75 *Discussion of Second Draft*, *supra* note 65, at 1.

76 *Id.*

77 *Id.* at 2.

the draft legislation, the *Pelham* case—and the changes it introduced to European copyright sampling jurisprudence—is worth a deeper dive.

The *Pelham* case, announced by the CJEU in the summer of 2019, addressed inconsistencies in European law regarding sampling and other permitted uses of copyrighted material.[78] This decision was announced after the EU copyright directive was passed and shortly before Germany presented its first draft of the Copyright Act. The case originated from a German Federal Constitutional Court decision from May 31, 2016, in which the court found that the "use of samples for artistic purposes may justify an interference with copyrights and related rights."[79] In that initial decision, the federal court ultimately overruled a lower court decision that claimed sampling was not a protected use under section 24 of the old German Copyright Act, noting that the early decision had failed to establish a "proportionate balance between the artistic interest in creativity and the property interests of the phonogram producer."[80] Previous court decisions had narrowly construed the free use of sampling,[81] but the constitutional court was willing to consider whether the interpretation could be broadened.[82] This case opened the door for a reconsideration of legal uses for copyrighted works, but it was potentially at odds with previous European Union copyright directives—necessitating the German courts to refer the case to the CJEU for further analysis.[83]

The CJEU ultimately decided that sampling is a protected free use so long as the sampled work is unrecognizable from the original work.[84] However, the court notably did not provide a standard for determining what is unrecognizable.[85]

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78 Case C-476/17, Pelham v. Hütter, 2019 E.C.R. 1002.

79 The Federal Constitutional Court, *The use of samples for artistic purposes may justify an interference with copyrights and related rights*, BUNDESVERFASSUNGSGERICHT (May 31, 2016), https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-029.html.

80 *Id.*

81 Bernd Jütte & João Pedro Quintais, T*he Pelham Chronicles: sampling, copyright and fundamental rights,* 16 J. INTELL. PROP. L. & PRAC. 213 (2021), https://academic.oup.com/jiplp/article/16/3/213/6143562 (citing Judgment of 13.December 2012, I ZR 182/1 (Metall auf Metall II), paras 27–28, BGH, Judgment of 20 November 2008, I ZR 112/06 (Metall auf Metall), para 37, *see also* Leistner, GRUR (2016) 772).

82 *See id.* (noting that the German courts essentially requested clarification on whether "sampling requires authorization form the rightsholder").

83 *See id.* (The German courts requested that the CJEU consider six primary issues: 1) "whether unauthorized sampling is a prima facie infringement of the phonogram producers' right, " 2) "whether an extract of a phonogram is a 'copy' of that phonogram for the purposes of [the 2001 Copyright] Directive," 3) "whether national rules like the German 'free use' provision [§ 24] are acceptable under EU law," 4) "whether sampling is covered by the quotation [license]," 5) "what latitude exists for the national implementation of [licenses] in this respect," and 6) "how fundamental rights in the EU Charter…of Fundamental Rights…must be taken into account in this context).

84 *Id.*

85 *See id.* (Academic commentators noted that this decision was intended to prevent EU member states from introducing "creativity-conducive exceptions" to sampling in their

Additionally, any recognizable sample would now require the user obtain an authorization, essentially redefining free use and rendering the original German Copyright Act § 24 obsolete.[86] While the Court of Justice wanted to afford musicians who sample music the opportunity to "take part in the public exchange of cultural, political, and social information and ideas," it did not greatly expand protection for sampling, and certainly not to the amount which would be reflected in Germany's *de minimis* provision.[87]

While acknowledging that the *Pelham* case required the legislature to scrap its old free use definitions, the second draft of the new Copyright Act now maintained that free use of copyrighted works is permitted so long as they are sufficiently different from the original copyrighted work or could be exempted by another permitted use.[88] Perhaps seizing upon the slim opening created by the *Pelham* decision and the mandatory permitted uses defined in the EU Copyright Directive, Germany deconstructed its previous free use policy and replaced it with an even greater set of teeth.[89] Now permitted uses included transformative works (i.e., those envisioned by the *Pelham* decision), caricature, pastiche, and commentary, as well as *de minimis* use. [90]

Reactions to this draft were notably mixed, and some of the strongest criticism came from music publishers who were concerned with how the *de minimis* provision furthered the EU's cause of promoting licensing deals and protecting intellectual property.[91] The German Music Publishers Association authored a stinging critique of the new "*de minimis* barrier," noting that the provision does away with licensing agreements that normally govern and bemoaning that the German government was making a unilateral decision to enact the policy out of step

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legislation, and instead put the onus on creating copyright law firmly on legislatures, not the judiciary).

86 *See id.* (noting that the Court of Justice generally did not consider a de minimis threshold to exist and that any part of the phonogram should be protected, but still created a small carve out that would protect some creativity).

87 *See id.* (citing CJEU, C-476/17 Pelham and Others, para 30 with reference to recitals 4, 9 and 10 InfoSoc Directive).

88 *See Discussion of Second Draft*, *supra* note 65, at 44.

89 *Id.*

90 *See id.* at 88.

91 *See* Stellungnahme des Deutschen Musikverleger-Verbandes e.V. (DMV) zum Diskussionsentwurf eines Zweiten Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarkts [Statement by the German Music Publishers Association (DMV) on the draft discussion of a Second law to adapt copyright law to the requirements of the digital single market], July 30, 2020 (Ger.) [hereinafter *DMV Statement*]; *see also* Einschätzung zum „Diskussions-Entwurf" für ein „Zweites Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes vom 24. Juni 2020" zur Umsetzung eines Teils der DSM- Richtlinie (EU 2019/790) [Assessment of the "Draft Discussion" for a "Second Act to Adapt the Copyright to the Requirements of the Digital Single Market of June 24th, 2020" to Implementation of part of the DSM Directive (EU 2019/790)], July 31, 2020 (Ger.) [hereinafter *Assessment of the Second Draft*].

with the rest of EU Copyright Law.[92] The Association was also quick to note that many service providers offering creation platforms—such as Tik Tok and Instagram—primarily consist of user created content lasting less than 20 seconds, in essence exempting those providers from licensing agreements altogether.[93] The Association opined that this practice was antithetical to the EU's goals: to compel service providers to seek licenses and to hold them accountable for unlicensed and unauthorized usage.[94]

The Federal Association of the Music Industry offered similar concerns in their response and referenced the legislative history regarding the drafting of the EU Copyright Directive.[95] They noted that a "trivial barrier" had been discussed and firmly rejected by the EU during the drafting of the directive.[96] They belabored that any existing licensing deals for short snippets of protected work would be quashed, and copyright holders would find themselves with less protection, not more.[97] The German Composers Association provided a succinct statement, noting their disagreement with the *de minimis* provision, while asking for greater protection so that musicians no longer be the "playthings" of greater economic interests.[98] The German Music Council admitted that the permitted uses for caricature, parody, and pastiche were logical, but again reaffirmed the other organization's disdain for the *de minimis* provision—noting it had no place in EU law.[99]

To other observers, however, the addition of the *de minimis* provision was seen as a positive improvement for users and a potential protection against the vast prohibition of content that would occur if content filters were used.[100] Academic institutions, such as the Max Planck Institute, commended the inclusion of the *de minimis* provision, noting that it sought to apply the principles of protecting content based on proportionality, which they claimed was intended in the EU Copyright Directive.[101]

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92 *DMV Statement* at 8 (indicating that the Association also balked at the justifications given by the draft, noting that the 30 seconds used in iTunes previews are meant to entice the purchaser and reflect existing licensing schemes).

93 *Id.*

94 *Id.*

95 *Assessment of the Second Draft*, *supra* note 91, at 8.

96 *Id.*

97 *Id.*

98 Opinion on the BMJV's draft discussion of June 24, 2020 "Draft of a second law to adapt copyright law to requirements of the digital single market", July 8, 2020 at 2-3 [hereinafter *BMJV Opinion*].

99 *Id.* at 2, 4.

100 *Article 17 Implementation: German Proposal Strengthens the Rights of Users and Creators*, *supra* note 63.

101 Reto M. Hilty et al., *Law on the Copyright Liability of Service Providers for the Share online content (Copyright Service Provider Act - UrhDaG): Opinion on the draft bill dated September 2, 2020*, MAX PLANCK INST. FOR INNOVATION AND COMPETITION, 2-3 (Nov. 6, 2020).

Germany was not the only entity facing backlash during this period, as the EU received a letter of concern from a group of European music, film, publishing, and news organizations about the EU's proposed guidance on the application of Article 17.[102] As member states approached the implementation year of 2021, the EU provided suggestions and definitions to help with the process.[103] However, these new definitions and suggestions aggravated concerned respondents who felt that the EU's new guidance that member states adopt a proportionality principle (that the best efforts service providers need to take to fulfill their license-gathering obligations may be in proportion to the amount of content used), as well as its call for member states to implement additional exceptions (perhaps similar to those envisioned by Germany), were straying too far from the original meaning of the directive.[104] As lawmaking bodies across Europe approached the deadline, it seemed evident that very few rightsholders considered their interests to be adequately represented.

These responses reveal the subtle magnitude the *de minimis* provision could have in the modern European copyright world. On the one hand, the provision is a blow to the initial goals of the EU Copyright Directive: to protect creators and foster licensing agreements with service providers. On the other hand, it is one of the only mechanisms for protecting uploaders and users who want to engage with the protected content without being subject to an automatic filter. Surely the final balance would have to lie somewhere in the middle.

C. The Third Draft: Toning Down User's Rights

The final draft presented by the German government provided a radically altered *de minimis* provision.[105] In the new draft, only caricature, pastiche, and parody would be considered legally permitted uses, while *de minimis* uses were considered uses "presumably authorized by law."[106] The threshold amounts were also lowered, allowing only up to 15 seconds of an audio track or cinematic work, 160 characters of a text, or 125 kilobytes of a photographic work would be authorized.[107] Moreover, the use still could not serve a commercial purpose nor generate significant income.[108] This represents a stark contrast from initial drafts, which gave minor uses a full-fledged exception.[109] Now the use would only be

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102 *See generally Rightsholders letter on Consultation on Article 17 Guidance,* (Sept. 9, 2020), https://www.ifpi.org/wp-content/uploads/2020/09/Rightholders-letter-on-Consultation-on-Article-17-Guidance-10-09-20.pdf.

103 *Id.*

104 *Id.*

105 *See* Urheberrechts-Diensteanbieter-Gesetz – UrhDaG [Regierungsentwurf] [[Act on the Copyright Liability of Online Sharing Content Service Providers [Government Draft]], Feb 26, 2021 at 6 (Ger.) [hereinafter *Discussion of Third Draft*].

106 *Id.*

107 *Id.*

108 *Id.*

109 *Assessment of the Second Draft*, *supra* note 91, at 8.

protected under narrow circumstances and subject to a complaint procedure which could have the content removed if so requested by the author.[110]

Despite these radical changes, there were still some procedural safeguards included in the new draft.[111] For instance, because uses were presumed legal, they could not be subjected to any automatic upload filters the content service provider employed.[112] Additionally, the work would remain on the service provider's platform until the copyright author put their request for takedown in a formal complaint.[113] However, the service provider was still required to pay the original author for the use of the work.[114] This way, licensing arrangements would not be undermined, and content would not be blocked.

Some commentators bemoaned the new changes, suggesting that the German government had caved to pressure from publishing interest groups.[115] Likely included in response to concerns about the proliferation of protected work through short-form content, another new provision denied protection for any creation that used more than 50% of a protected work, thereby limiting user rights even further.[116] However, other observers suggested that this switch was necessary to avoid potential conflict with EU law while still retaining the intended effect of the provision.[117] Because minor uses were protected from automatic upload filters under the new law, the content would still be published if it met the legal requirements.[118] It intended to strike a balance so that remuneration was still available to the original authors if their works were egregiously exploited, but also allowed for further creativity.[119] Some German copyright lawyers echoed this analysis and noted that the "presumed legality" language seemed to be one of the best answers to over-blocking.[120] They also concluded that the new draft provided even more protection and equity than what was originally proposed by the EU Copyright Directive, as service providers are still required to pay authors appropriate remuneration for any communication of a copyrighted work.[121] The draft seemingly accomplished the major goals of the German government: coherently incorporating the EU copyright directive without pushing against

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110 *See Discussion of Third Draft*, *supra* note 105, at 6.

111 *See id.* at 7.

112 *See id.*

113 *See id.*

114 *See id.*

115 Paul Keller, *German Government draft on Article 17: Two steps forward, one step back*, COMMUNIA ASS'N (Feb. 26, 2021), communia-association.org/2021/02/26/german-government-draft-on-article-17-two-steps-forward-one-step-back/.

116 *Id.*

117 Bosher, *supra* note 2.

118 *Id.*

119 *Id.*

120 Nils Rauer, *A country by country analysis of EU Copyright reform implementation*, PINSENT MASONS (Mar. 4, 2021), https://www.pinsentmasons.com/out-law/analysis/country-by-country-copyright-directive.

121 *Id.*

existing EU law, giving more rights and protections to authors, promoting the interests and creativity of users, and placing more burdens on service providers.

D. Concluding Thoughts: A Perfect Compromise Where No One is Truly Happy

The final draft of the Copyright Act was passed on May 20, 2021, and was entered into force about two weeks later.[122] As the only member state that had adopted a *de minimis* provision as of June 2021, there was some concern as to how the measure would be implemented cross-border.[123] Others speculated that because service providers are still required to filter out infringing content uploaded by users or else face direct liability, the *de minimis* exception would provide little wiggle room and likely require most service providers to adopt broad content filters.[124] Other industry-specific interest groups bemoaned what they considered to be an abandonment of the purpose and principles of the EU copyright directive and that the German Act provided too much leniency for users and service providers.[125]

However, in the months since the passage of the Act, it seems as if Germany may have hit the proverbial sweet spot.[126] Observers have noted that upload filters are not being used to the extent they predicted and imputed some of this success to the *de minimis* provision and its ability to establish an adequate balance between user, copyright holder, and service provider rights.[127] Germany seems to have been the only country to provide exceptions of "presumably authorized uses," so the efficacy of the implementation may lead to other countries adopting similar provisions.[128] Additionally, legal challenges to the applicability of Article 17 have been failing in EU courts, so it appears the directive, and the

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122 Nils Peters & Engeline Eustrup, *The End of an Odyssey: The German Act to Adapt Copyright Law to the Requirements of the Digital Single Market*, JDSUPRA (Jun. 1, 2021), https://www.jdsupra.com/legalnews/the-end-of-an-odyssey-the-german-act-to-1507250/#:~:text=Peters%2C%20Engeline%20Eustrup%5D-,The%20German%20Act%20to%20adapt%20copyright%20law%20to%20the%20requirements,(%E2%80%9CDSM%20Directive%E2%80%9D) (One final interesting aside: Commentators noted that the final *de minimis* provision would not apply to live video footage of sporting and music events, but that rights holders were considering challenging the provision before the German Constitutional Court).

123 *Id.*

124 Gabriele Engels, *Germany: DSM Copyright Reform Law Enters into Force on 7 June 2021*, LEXOLOGY (Jun. 4, 2021), https://www.lexology.com/library/detail.aspx?g=6260b5db-77e4-478f-b78c-ac9c69c29e39.

125 *See* Beckonert, *supra* note 45.

126 *See* Engels, *supra* note 124.

127 *Id.*

128 *See* Luca Bertuzzi, *Advocat General Dismisses Poland's Challenge to Copyright Directive*, EURACTIV (Jul. 15, 2021), https://www.euractiv.com/section/copyright/news/advocat-general-dismisses-polands-challenge-to-copyright-directive/; *see also* Case-C401/19 Republic of Poland v. European Parliament and Council of the European Union.

subsequent national law offshoots, is here to stay.[129] Given the relative efficacy and success of the provision, our attention now turns to analyzing American copyright law to determine whether a *de minimis* provision could fit in with common law and statutory regimes.

III. AMERICAN *DE MINIMIS* COPYRIGHT JURISPRUDENCE

Judge Pierre N. Leval articulated the paradoxical nature of the *de minimis* doctrine in his opinion for the case *On Davis v. The Gap, Inc*.[130] The jurist astutely noted that while *de minimis* suits are uncommon because trivial instances of copying are rarely litigated, trivial copying itself is rampant in American culture:

> Trivial copying is a significant part of modern life. Most honest citizens in the modern world frequently engage, without hesitation, in trivial copying that, but for the de minimis doctrine, would technically constitute a violation of law.[131]

The prevalence of content creation platforms and a general cultural trend towards short-form content has created an environment where short snippets of copyrighted materials can become major advertising tools.[132] And while going viral may be beneficial for new artists,[133] the nature of potential copyright offenses is underexplored, given the relatively recent creation of these platforms.[134] As a result, re-examining *de minimis* may be even more relevant. The rest of the section

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129 S*ee also* Case-C401/19 Republic of Poland v. European Parliament and Council of the European Union (Last year the Advocate General of the CJEU rejected Poland's claim that upload filters were inconsistent with fundamental EU rights, noting that online service providers are only required to block content that is "manifestly illegal.").

130 On Davis v. The Gap, Inc., 246 F.3d 152 (2d Cir. 2001), as amended (May 15, 2001).

131 *Id.*

132 Lisa Montenegro, *The Rise of Short-Form Video: TikTok is Changing the Game*, FORBES, (Aug. 27, 2021), https://www.forbes.com/sites/forbesagencycouncil/2021/08/27/the-rise-of-short-form-video-tiktok-is-changing-the-game/?sh=4a1158f65083 (noting that a short video by Nathan Apodaca in which he drank Ocean Breeze cranberry juice listening to Fleetwood Mac's "Dreams" resulted in both positive sales numbers for the juice company and millions of streams for the Fleetwood Mac song).

133 *See* Kris Boger, *The Rise of Short-Form Video & the Gen Z Social Revolution*, IAB.UK (Oct. 20, 2020), https://www.iabuk.com/opinions/rise-short-form-video-gen-z-social-revolution (noting the importance of sound in Tik Tok videos and how the use of certain songs like Doja Cat's "Say So" have resulted in hundreds of millions of streams on multiple streaming platforms).

134 *See* Lydia Bayley, *TikTok: A Copyright Time Bomb?*, IP BYTES (Mar. 29, 2021), http://blogs.luc.edu/ipbytes/2021/03/29/tiktok-a-copyright-time-bomb/ (noting that an estimated 50 percent of music used on Tik Tok is unlicensed and therefore the platform might not be able to survive an infringement suit through a fair use defense).

will lay out the statutory and common law history of the *de minimis* doctrine as practiced in the United States over the past 20 years.

Section 106 of the Copyright Act delineates the rights afforded to copyright holders, including the right to reproduce, prepare derivative works, distribute copies, and to perform and display works publicly.[135] These rights are expansive and well defined in common law but are subject to limitations established in sections 107-122 of the Copyright Act.[136] One exception of particular importance is fair use.[137] To determine whether the use of a copyrighted work is considered fair use, the court considers the following factors: 1) "the purpose and character of the use," 2) the "nature of the copyrighted work," 3) "the amount and substantiality of the portion used in relation to the copyrighted work," and 4) "the effect of the use upon the potential market for or value of the copyrighted work."[138]

The third factor is of particular importance to a *de minimis* discussion. In fact, this factor is one of the three identified incorporations of *de minimis* use in American copyright jurisprudence.[139] The modern case which made this claim, *Ringgold v. Black Entertainment Television, Inc.*, established the importance of the *de minimis* doctrine in both determining infringement through substantial similarity analysis and in providing for a fair use defense.[140] In *Ringgold*, the Second Circuit discussed the limitations of a *de minimis* defense in determining whether a "story quilt" was unlawfully used as a set decoration in a television program.[141] The court found that the HBO sitcom "ROC" had used the plaintiff's quilt as a background set piece in nine separate sequences totaling 26.75 seconds.[142] The court emphasized that the work was given heightened importance both through the "focus, lighting, camera angles, and prominence" and the length of time it was displayed.[143] This is where *de minimis* comes into play—the court opened the door to a *de minimis* argument and accepted that a user of copied works *could* make the argument that the usage of a copied work was so trivial and minimal as to tip the

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135 17 U.S.C. § 106 (1)-(6).

136 *Id.*

137 17 U.S.C. § 107; *see also* Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (holding that when determining if use of copyrighted material was justified, courts should look to the "nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work").

138 17 U.S.C. § 107 (1)-(4).

139 *See* Ringgold v. Black Ent. Television, Inc., 126 F.3d 70, 74-76 (2d Cir. 1997) (noting that *de minimis* can mean 1) a "technical violation of a right so trivial that the law will not impose legal consequences," 2) the copying is so trivial it would "fall below the quantitative threshold of substantial similarity," and 3) a factor in a fair use balancing test).

140 *See id.* (noting substantial similarity is the test used by courts to determine whether infringement occurred. Courts must determine whether there was copying in fact and whether the works are substantially similar to the reasonable purchaser).

141 *See id.*

142 *See id.* at 73 (The court noted that establishing infringement though a substantial similarity assessment requires both a factual determination of copying, as well as a determination of the qualitative and quantitative sufficiency to prove actionable copying).

143 *See id.* at 75.

scales of a fair use defense in the defendant's favor.[144] However, in *Ringgold*, the use of the work was too substantial to be considered minimal.[145]

In 2005, the Sixth Circuit dealt a blow to the applicability of the *de minimis* doctrine in the case *Bridgeport Music, Inc. v. Dimension Films*.[146] In *Bridgeport*, the court considered whether the *de minimis* doctrine applied to the use of a song which contained an unauthorized sample.[147] Previously, courts held that the *de minimis* doctrine applied to musical composition;[148] but in *Bridgeport*, the question was now directed to sound recordings. Ultimately, the court determined that there should be a difference and established the bright line rule that "only the sound recording owner has the exclusive right to 'sample' his own recording," disallowing sampling or trivial uses of sound recordings for any unlicensed purpose.[149]

The Ninth Circuit responded to the Sixth Circuit's new rule in *VMG Salsoul, LLC v. Ciccone* (the Madonna Case).[150] In the Madonna Case, the court decided not to follow the Sixth Circuit's opinion in a factually similar scenario.[151] The case concerned the unlicensed use of a horn sample in the Madonna song "Vogue."[152] The sample in question lasted less than a quarter of a second which prompted the court to reassert the rule it had established in *Newton v. Diamond* that "use is *de minimis* only if the average audience would not recognize the appropriation."[153] Given the brevity of the sampled recording, the court concluded that the average audience would not recognize the appropriation.[154] But the court did more than just reassert its previous rule; it actively sought to distinguish from *Bridgeport* and create a circuit split.[155] Whether future courts will employ a test

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144 *See* Ringgold, 126 F.3d at 75-76.

145 *See id.* (However, the court also noted that the quantitative continuum of fair use is not precise).

146 *See* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005).

147 *Id.*

148 *See* Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004) (holding that the use of a brief and relatively simple segment of a composition that was not licensed was *de minimis* because the segment was neither "quantitatively nor qualitatively significant when viewed in relation to the composition as a whole").

149 Bridgeport, 410 F.3d at 799, 801 (The court further noted: "The music industry, as well as the courts, are best served if something approximating a bright-line test can be established. Not necessarily a "one size fits all" test, but one that, at least, adds clarity to what constitutes actionable infringement with regard to the digital sampling of copyrighted sound recordings.").

150 VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 871 (9th Cir. 2016).

151 *Id.* at 887.

152 *Id.* at 874.

153 *Id.* at 874, 878 (quoting Newton v. Diamond, 388 F.3d at 1193) (note the similarity between this rule and the CJEU rule in the Pelham case).

154 *Id.* at 879.

155 Ciccone, 824 F.3d at 886 (noting the unusual nature of their choice because of the deleterious effects inconsistent copyright rules place on the industries they govern, but felt it essential in order to maintain congressional intent in applying the *de minimis* doctrine to sound recordings); *see also* Christopher J. Norton, *Little Bits Can't Be Wrong: The De Minimis Doctrine in the Context of Sampling Copyright-Protected Sound Recordings in*

similar to the Ninth Circuit, it's evident that in one of America's most important copyright circuits, *de minimis* use will be a factor considered by courts.

IV. COMPARING THE TWO JURISDICTIONS

As discussed previously, the application of the *de minimis* doctrine in American jurisprudence is in a state of flux, contending with a circuit split and a lack of clarity in its statutes. Therefore, the fact that Germany has moved from the similar position of establishing a *de minimis* use exception in case law to codifying and expanding that exception within the course of a few years presents real eye-opening insight. The information previously discussed on the creation and implementation of the German *de minimis* provision demonstrates a markedly different political environment and common law history,[156] but there are some reasons to believe that an international transfer of copyright ideas could occur.

American academics have generally noted the potential applicability of both German copyright law ideals with specific regard to *de minimis* use.[157] In her piece comparing global copyright regimes, Loren Mulraine noted the similarity in the fact patterns between the Madonna case and *Pelham*.[158] As discussed previously, the CJEU's[159] policy reasons for protecting small sampling included preserving the existence of musical genres which rely on the practice of sampling, especially in light of the fact that the original work's value was not diminished. Mulraine noted that this reasoning could be economically viable in the United States given that composers and producers also should be able to use small samples in ways that did not significantly negatively affect the commercial market of the original work.[160]

As discussed in my introduction, this paper's methodological approach will now analyze the two parallel trends of *de minimis* jurisprudence in America and Germany and attempt to see whether a cross-national adoption is possible.[161] The first part will analyze how each country has addressed factually analogous copyright cases and discuss whether Article 17 makes this exchange impossible.

New Music, 7 BERKELEY J. ENT. & SPORTS L. 14, 30 (2018) (proposing a two-part test rooted in "average audience recognition." The first step would be to conduct a normal substantial similarity analysis of the sample, and if the sampled music is still considered infringing, it should then undergo the balancing test for transformative fair use. Norton proffers that, with regard to the doctrine's application in transformative fair use analysis, *de minimis* usage should be given importance even when the quantitative threshold is crossed).

156 *See supra,* Section II. The German Copyright Act of 2021.

157 Loren E. Mulraine, *A Global Perspective on Digital Sampling*, 52 AKRON L. REV. 697, 737-38 (2018); White, *supra* note 9.

158 *Id.* at 732-33.

159 *Id.* (quoting Madaline Chambers, *German Court Allows Music Sampling for Hip-Hop Producer*, NEWS (2016), http://www.reuters.com/article/us-germany-music-sampling/german-court-allows-music-sampling-for-hip-hop-producer-idUSKCN0YM1JQ [https://perma.cc/MXW6-DK3Q]).

160 *Id.* at 733.

161 *See supra,* Section I. Introduction.

Additionally, this section will address how direct copyright conflicts between European and American law have been resolved under international treaties and whether similar conflict resolution might be necessary. Following that, I will attempt to place the German *de minimis* provision in what I consider to be the relevant U.S. statute, the DMCA, to see if such a provision could fit at all. Finally, I will conclude with my final thoughts on this experiment.

A. Comparative Copyright Cases

One way to consider the transferability of the *de minimis* provision is to look at how German and American courts have approached similar copyright issues. As noted previously, some American jurisdictions have produced common law precedents similar to that of the EU.[162] The resemblance in the holdings from the Madonna Case and *Pelham* prove that the common law of both countries are willing to provide a working *de minimis* standard that could protect sampling specific artforms.[163] This is a positive sign because previous decisions indicated the two countries were on divergent paths with regard to who their laws primarily protect.[164]

In 2007, the Ninth Circuit applied the fair use balancing test in a way that was beneficial to internet service providers and in a way that stood in direct contrast with how European courts had approached a similar issue.[165] The case centered around whether Google's use of image thumbnails in linking to a website's content could be defended by a fair use argument.[166] The Ninth Circuit ultimately held that the use of thumbnails as part of a search engine tool made them highly transformative and that any market harm to the original creator was speculative.[167] While American commentators hailed the case as a protection of online freedom,[168] German courts tackling the same issue came to markedly different conclusions.[169] In a 2003 case, the Hamburg Civil Court in Germany issued a preliminary injunction against Google for its use of photographic thumbnails without a license

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162 *See supra, S*ections II-III; *see also* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 879 (9th Cir. 2016); see also Case C-476/17, Pelham v. Hütter*,* ECLI:EU:C:2019:624, (July 29, 2019).

163 *See supra*, Sections II-III; see also Ciccone, 824 F.3d at 879; see also Case C-476/17, Pelham v. Hütter. ECLI:EU:C:2019:624, (July 29, 2019).

164 *See* Emily Kirsch & Alexander Klett, *US and European Courts Split Over Fair Use*, REED SMITH (Feb. 2009), https://www.reedsmith.com/-/media/files/perspectives/2009/06/us-and-european-courts-split-over-fair-use/files/us-and-european-courts-split-over-fair-use/fileattachment/usandeuropeancourtssplitoverfairusegooglethumnails.pdf.

165 *See id.* at 33.

166 *See id.* at 32-33; *see also* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

167 *See* Kirsch & Klett, *supra* note 164, at 33.

168 Perfect 10 v. Google, EFF (July 1, 2011, 4:04pm), https://www.eff.org/cases/perfect-10-v-google.

169 *See* Kirsch & Klett, *supra* note 164, at 33.

and noted that any American opinions on the matter were unpersuasive.[170] Matters of law regarding copyright infringement were to be analyzed purely under German law.[171] The German Court noted that unlike the American tradition of fair use, Germany did not have an analogous balancing test and that any exceptions were to be explicitly found in statutes.[172]

This split is further exemplified in the matter of parody. As noted previously, the new German Copyright Act had to revamp its statutory section on free use in order to meet the mandated legally permitted uses in Article 17 of parody, pastiche, and caricature.[173] However, previous cases deciding the extent of free use are fascinating to compare to their American counterparts.[174] In the German case, *Gaby wartet im Park*, the Bavarian Higher Regional Court determined that a parody song had left statutory protection when it used a recognizable segment of the melody as the basis for the song.[175] The court protected parody but only to the extent that the copied portion was so small as to make it unrecognizable from the original work.[176] Contrast that approach with the Supreme Court of the United States' precedent in a similar case, *Campbell v. Acuff-Rose Music, Inc*.[177] In *Campbell*, the Supreme Court held that fair use protected a hip-hop parody of the Roy Orbison song "Pretty Woman" because parody functions in part by using elements of the original work to transform the work and to make a specific point.[178] The two cases show a marked difference in how to protect copyright. Comparatively, German courts seem to take a far more regimented view, requiring that a work fall into statutorily defined categories or language before it can receive protection.[179]

Does this regimented analysis offered by German courts strike a better balance in protecting copyright because it allows creators and rightsholders to know specifically what can or cannot be protected? It's hard to say, but given that more recent German and European court holdings, notably in the *Pelham* case, have been willing to embrace a less rigid definition of what compromises recognizable copying (and have seemingly imported some American fair use analysis into their decision-making) strikes me as an indication that a cross-national copyright approach is not as far off as history, theoretical underpinnings, and actual legislation

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170 *See id.*

171 *See id.*

172 *See id.*

173 *See generally Discussion of Second Draft*, *supra* note 65.

174 *See generally* Holger Postel, The Fair Use Doctrine in the U.S. American Copyright Act and Similar Regulations in the German Law, 5 Chi.-Kent J. Intell. Prop. 142 (2006).

175 *See id.* at 146-47.

176 *See id.*

177 *Id.*; *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

178 *See* Campbell, 510 U.S. at 594. (Previously I argued that the definitions and meanings of some of the provision from the American Copyright Act of 1976 were never officially cemented, and in this case, the Supreme Court was allowed to interpret the law in a way that highlighted a specific legislative intent and elevated parody into the canonically accepted sphere of protected uses). *See also* Postel, *supra* note 174, at 147-48.

179 *See* Postel, *supra* note 174, at 147-48.

would suggest.[180] Perhaps a diffusion of the German *de minimis* thresholds could supplement the classic fair use analysis and, for certain transformative works, could provide a presumption of legal use that would then be weighed along with the other factors.

B. International Copyright Disputes

Stepping outside of common law court battles, another way to determine whether the new German *de minimis* barriers could be adopted in a cross-national approach is to consider their place in international treaties and agreements. The United States and Germany are both parties to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Berne Convention, which help set international standards for copyright protection.[181] How do Germany's *de minimis* barriers, or some of the other recent EU Copyright Directive changes, fit within the international context?

First, consider a recent example of international legislation that occurred after France adopted portions of Article 17 related to mandatory licensing. The EU Copyright Directive permitted member state publishers and news agencies to demand a fee from online platforms which exhibit their work.[182] In failing to comply with negotiation standards, the French antitrust watchdog fined Google 500 million euros and threatened more until the company worked out an agreement.[183] These negotiations were mandated by a court order after Google had initially rejected paying for the news, arguing that news companies benefited from the users Google generated.[184] As one of the first countries to adopt Article 17, it is likely that the decision in France will ripple throughout Europe.[185] The Google conflict reveals that European rights holders have renewed power in courts over international service providers, even ones as large and powerful as Google. This indicates that Article 17's goal in promoting licensing and imputing liability on service providers is having almost immediate fiscal effects and portends further successful implementation of the Copyright Directive and disruption of previous dynamics.

However, suppose United States rightsholders, incensed that such large quantities of their work could be legally used in international creative content, urged

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180 *Jütte & Quintais, supra* note 81, at 224-25.

181 *Overview: The TRIPS Agreement*, WORLD TRADE ORGANIZATION https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited, Feb. 26, 2022).

182 Mathieu Rosemain & Ingrid Melander, *France Fines Google 500 Mln Euroes Over Copyright Row*, REUTERS (Jul. 13, 2021), https://www.reuters.com/technology/france-fines-google-500-mln-over-copyright-row-2021-07-13/.

183 *Id.*

184 Michel Euler, *France Fines Google $592M In a Dispute Over Paying News Publishers for Content*, NPR (Jul. 13, 2021, 10:11 AM), https://www.npr.org/2021/07/13/1015596060/france-fines-google-592m-in-a-dispute-over-paying-news-publishers-for-content.

185 *Id.*

the United States to enforce its copyrights with TRIPS and Berne Convention members; what might occur? A similar scenario was presented to the World Trade Organizations (WTO) arbitration board when the EU moved against the United States for adopting the controversial "homestyle" exemption of 17 U.S.C. 110(5).[186] The exception allowed a user to display a work in public so long as it is displayed on a single device that is commonly used in private homes and as long as a direct charge is not administered.[187] Congress found that the exemption applied to a large number of establishments, and the EU countered that this diffuse use prejudiced the legitimate rights of copyright holders and was not contained within any of the known exemptions under the Berne Convention and TRIPS.[188] The WTO ultimately sided with the EU and requested the US bring the law under obligation with the TRIPS agreement.[189] However, the US instead sought to find a way to compensate European performing rights organizations rather than change its legislation.[190]

Following a similar analytical structure, the US would have to bring a claim before the WTO that the German *de minimis* provision violates the legitimate rights established in TRIPS and the Berne Convention. However, the German law only makes content which meets the *de minimis* threshold a presumed legally permitted use.[191] Rights holders would still be compensated under any licensing deal the law necessitates, and they would have recourse to remove the material if they so desire.[192] The U.S. exemption had no means of remuneration,[193] whereas Germany offers many,[194] which is likely why arbitration before the WTO is not an applicable recourse. Given that the EU Copyright Directive has been upheld in many legal theaters, and Germany has smartly adopted measures to avoid international arbitration, the *de minimis* provision likely has staying power in the international copyright arena.

C. Where German *De Minimis* Thresholds Could Fit in American Copyright Law

The most analogous U.S. statute to Article 17 and the German Copyright Act is the DMCA, so I will briefly touch on how a similar *de minimis* provision could function in its statutory structure. As discussed in the introduction, the

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186 *See Panel Report*, *United States–Section 110(5) of the US Copyright Act*, WT/DS160/R (adopted Jun. 15, 2000).

187 *See id.* at 3-4.

188 *See id.* at 6-7.

189 *See id.* at 69.

190 *US Tripped Up Over Public Performance Exemptions*, SWANTURTON (Aug. 2, 2001), https://swanturton.com/us-tripped-up-over-public-performance-exemptions/.

191 *See Discussion of Third Draft*, *supra* note 105, at 6.

192 *See id.*

193 *See* 17 U.S.C. § 110(5).

194 *See Discussion of Third Draft*, *supra* note 105, at 6.

DMCA provides safe harbors for service providers who meet specific eligibility.[195] The most essential provision, Section 512(c), sets up a system which limits the liability of service providers for infringing material on their websites so long as 1) they don't have constructive or actual knowledge, 2) the provider has not received a direct financial benefit from the infringing activity, and 3) upon receiving proper notification of infringement the provider must quickly take down or block access to the material.[196] These DMCA takedown notices are common on platforms such as YouTube, where users often post infringing content. While larger platforms have created systems to manage complaints, on smaller sites, the notices can be devastatingly time intensive.[197] Still, for many small service providers, the safe harbors provided by the DMCA offer essential protection.[198] In this way, the DMCA does favor users, if only to the extent that it generally allows for a more diverse and decentralized public forum on the internet.[199]

However, the DMCA is mostly a service provider-centric piece of legislation, giving providers an avenue to escape liability and putting monitoring requirements on the rights holders themselves.[200] The take down notification requirement is involved, and failure to comply with the notice requirements gives service providers the defense that they were not sufficiently informed.[201] Additionally, the user can even respond and send a follow-up notice explaining why the content is not infringing, further limiting the rights holder's recourse.[202] To summarize, the DMCA allows for the proliferation of content and the protection of liability for service providers by creating a system of safe harbors and putting requirements on rights holders to find and police their copyright.

This is a far cry from the system created by the EU Copyright Directive and enacted in the German Copyright Act. Creating service provider liability is one of the most striking components of the new law, shifting the burden from rights holders and users to the providers themselves.[203] However, in response to this new burden, the fear was that content filters would be a necessary way for service providers to avoid crushing liability.[204] This is where the power of the *de minimis* provision comes into play. It provides legally permitted uses that would not be

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195 *See The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary*, U.S. COPYRIGHT OFFICE, 9, (Dec. 1998), https://www.copyright.gov/legislation/dmca.pdf (measures include adopting a reasonable policy on repeat infringers or not interfering with standard means of detecting copyright).

196 *Id.* at 11.

197 *See* Katharine Trendacosta, *Reevaluating the DMCA 22 Years Later: Let's Think of the Users*, ELECTRONIC FRONTIER FOUNDATION (Feb. 12, 2020), https://www.eff.org/deeplinks/2020/02/reevaluating-dmca-22-years-later-lets-think-users.

198 *Id.*

199 *Id.*

200 *See The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary*, *supra* note 195, at 11.

201 *See id.* at 12.

202 *See id.*

203 *See Discussion of Third Draft*, *supra* note 105, at 6.

204 *Compromise on Copyright: No Upload Filters!*, *supra* note 51.

subject to an automatic content filter, it requires that service providers still remunerate authors for the content being posted, and it allows rights holders to request removal at any time.[205] Users, rights holders, and service providers all now have legislative consistency and a specific ceiling to conform to. Whether the amount is too high is up for debate, but the intent to balance interests is notable.

It is hard to imagine where a *de minimis* provision could exist in the DMCA because our statutory scheme does not balance rights in the same way.[206] Because service providers do not have inherent duties to monitor or filter, there is no need to protect nominal uses that might be struck down before they are posted. However, if *de minimis* were to fit into America's existing scheme, it likely would be as an exemption from notice requirements altogether. Any content that fit under the threshold would likely not be subjected to take-down requirements. However, given the drastic effect this would have, the thresholds would likely be along the lines established by the Ninth Circuit—small enough not to recognize the original piece.[207] Until there is greater service provider liability which increases monitoring requirements, there likely will be no need for *de minimis* protection.[208]

This Note has hopefully presented that American copyright *de minimis* jurisprudence is underdeveloped and confusingly deployed, and it agrees with those in the copyright field who suggest there may be a need for greater clarity of what *de minimis* is and what its limits should be.[209] Germany's law provides a fascinating case study in using *de minimis* as a floor for legally permitted uses of copying. While nothing in American case law, international agreements, or statutes would seem to mandate nor really find an effective place for this provision, it is still a novel solution that might be considered.

V. CONCLUSION

Germany has created an innovative approach to balancing copyright interests in our decentralized, online world. Taking the impetus from the EU Copyright Directive, which sought to impart more liability on service providers, Germany went further by adopting a *de minimis* provision and incorporated the interests of internet and copyright users into its legislation. While the measures may not have gone far enough for some groups, or maybe veered too far from the EU's prioritization of copyright rightsholders, their method is currently striking a

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205 *See Discussion of Third Draft*, *supra* note 105, at 5-6.

206 *See* Donald P. Harris, *Time to Reboot? Rethinking the Digital Millennium Copyright Act,* THE TEMPLE 10-Q, https://www2.law.temple.edu/10q/time-to-reboot-rethinking-the-digital-millennium-copyright-act/ (last visited Feb. 26, 2022).

207 Ciccone, 824 F.3d at 88.

208 *See* Harris, *supra* note 206.

209 *See generally* Andrew Inesi, *A Theory of De Minimis and a Proposal for its Application in Copyright*, 21 BERK. TECH. L. J. 945 (2006) (arguing that because new technologies will create nearly infinite new infringements of varying degrees of harm that *de minimis* analysis could be deployed when a harm is truly trivial and fair use would be an exorbitant step to take).

balance between liability, creativity, and remuneration. While this paper did not undertake a fiscal or quantitative analysis of the German act compared to the DMCA, it was worth analyzing the two jurisdictions side by side to see how one arrived at this point and whether the other could conceivably get there.

As it stands, U.S. law would need to radically reconsider its safe harbors for service providers to be truly comparable to German law, but it is not unrealistic that a similar *de minimis* exemption could find its way into the DMCA to give users more freedom. The German provision likely does not contravene or prejudice rights in a way that violates international treaties, and the effects of the law still need time to play out. However, as time goes on, and if more success is reached, potentially more cross-national proliferation could occur. Right now, the shift is unlikely given the U.S. circuit split on sampling, the common law underpinnings which make American copyright jurisprudence so distinct from European jurisprudence and given the way interest groups have molded the copyright regime to fit their specific industries. But it does not mean that the content of the German law should be ignored when future internet users determine what the appropriate balance of rights should be.