



**Stanford – Vienna
Transatlantic Technology Law Forum**

A joint initiative of
Stanford Law School and the University of Vienna School of Law



European Union Law Working Papers

No. 47

**Are fundamental rights the answer to the
deficiencies of EU copyright law, discussed
in a European context?**

Maria Christina Michailidou

2020

European Union Law Working Papers

Editors: Siegfried Fina and Roland Vogl

About the European Union Law Working Papers

The European Union Law Working Paper Series presents research on the law and policy of the European Union. The objective of the European Union Law Working Paper Series is to share “works in progress”. The authors of the papers are solely responsible for the content of their contributions and may use the citation standards of their home country. The working papers can be found at <http://tlf.stanford.edu>.

The European Union Law Working Paper Series is a joint initiative of Stanford Law School and the University of Vienna School of Law’s LLM Program in European and International Business Law.

If you should have any questions regarding the European Union Law Working Paper Series, please contact Professor Dr. Siegfried Fina, Jean Monnet Professor of European Union Law, or Dr. Roland Vogl, Executive Director of the Stanford Program in Law, Science and Technology, at:

Stanford-Vienna Transatlantic Technology Law Forum
<http://tlf.stanford.edu>

Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

University of Vienna School of Law
Department of Business Law
Schottenbastei 10-16
1010 Vienna, Austria

About the Author

Maria Christina Michailidou graduated with distinction from the European and International Business Law LL.M. Program of the University of Vienna in June 2020. She holds a Diploma in Greek Law from the Aristotle University of Thessaloniki. After completing the LL.M Program and the drafting of her thesis, her academic interests focus on intellectual property.

General Note about the Content

The opinions expressed in this student paper are those of the author and not necessarily those of the Transatlantic Technology Law Forum, or any of TTLF's partner institutions, or the other sponsors of this research project.

Suggested Citation

This European Union Law Working Paper should be cited as:
Maria Christina Michailidou, Are fundamental rights the answer to the deficiencies of EU copyright law, discussed in a European context?, Stanford-Vienna European Union Law Working Paper No. 47, <http://tlf.stanford.edu>.

Copyright

© 2020 Maria Christina Michailidou

Abstract

The present thesis aims at examining the role of fundamental rights regime in the EU copyright law system. Given that the past years the applicable comprehensive legal text on EU copyright law was the InfoSoc Directive, the analysis starts with the particularities of the regime based on the respective Directive. The main flaw of the regulation under the InfoSoc Directive was the optional list of exceptions and limitations and the application of the three-step-test, which led to a fragmented and strict internal system. Resultantly, the system could not function as a sufficient tool for the balance of the competing interests between the right holders and the users. Consequently, a new tendency has been developed by the ECtHR and the ECJ: both courts resorted even more often to the fundamental rights regime in order to either interpret the problematic internal system of exceptions and limitations or to balance the conflicting rights of the copyright owners and the users. The advent of the fundamental rights regime as an external limit to the copyright protection scope has raised questions on the exact role of the regime in the EU copyright system. A few months before the ECJ's answer to the relevant preliminary questions on whether is no externally limiting role of fundamental rights regime in the EU copyright system, the new Copyright Directive in the Digital Single Market was adopted. The Directive changed the preceding landscape and attempted to give solutions to its flaws as well as structure a solid internal balancing system and reinforce users' rights. However, the DSM Directive despite of its welcome new provisions maintains connections to the preceding system of the InfoSoc Directive. The conclusion is blurred. Will the new system be able to correspond to the challenges that the digital single market places or should the role of fundamental rights regime be reconsidered? What is left to be observed is the interpretation of the new provisions by the ECJ and their implementation by the Member States.

TABLE OF CONTENTS

I. Introduction.....	3
II. The importance of human rights in the intellectual property field	6
III. EU Copyright Regulation.....	10
3.1 The bases of its regulation and the historical overview of the process of its harmonisation.....	10
3.2. The current landscape of EU copyright regulation and its problems considering the entry into force of the Digital Single Market Directive.....	17
IV. European regulatory framework of fundamental rights – the two distinct regimes.....	26
4.1 The regulatory framework of fundamental rights under the ECHR	26
4.2 The ECtHR’s relevant case law.....	29
4.3 The regulation of fundamental rights under the ECFR and its interface with the ECHR regime.....	37
4.4 The ECJ’s relevant case law.....	40
V. Copyright’s internal system in deadlock.....	48
5.1 The problems of limitations and exceptions laid down in the InfoSoc Directive.....	48
5.2 The new system of limitations and exceptions introduced by the Digital Single Market Directive.....	60
VI. The ECJ’s case law on the interpretation of limitations and exceptions and the three-step-test laid down in the InfoSoc Directive	63
VII. Suggested solutions to the deficiencies of the copyright <i>acquis</i>	73

VIII. Crucial digression: the three coordinated references and the ECJ’s answer along with the entry into force of the Digital Single Market Directive.....87

IX. Conclusion.....95

X. Bibliography.....102

I. Introduction

Over the last years, there is an increasing interest in the interplay between intellectual property law and human rights law. The vivid scientific discussion began at the international level and then extended to the European level. At the international level, two distinct approaches have been expressed on the issue. According to the first approach, these two areas of law are in fundamental conflict which has to be solved by taking into account the supremacy of human rights in the hierarchy of norms. According to the second approach, intellectual property law and human rights law aim at solving the same issue, striking a fair balance between the monopoly of the right holders and the safeguards which ensure the public has the adequate access to protected works.

In the era of the information society, when intangible goods and innovation play a crucial role in both developed and developing economies, intellectual property increasingly attracts the interest of industry. Rights holders also have their own interests in regards to the adequate protection of their creations, while users in order to exercise their interests to access protected works invoke provisions which enshrine human rights (e.g., freedom of information and expression, etc.). Thus, the regulation of intellectual property is a complex issue due to the conflicting interests of the industry, the right holders and the public.

The present thesis will examine the interface of copyright law and fundamental rights law at the European level. Section II of the thesis will provide a general overview of

the interplay between intellectual property and human rights at the international and European level. Section III will give a short overview of the harmonisation process of the copyright law in the EU and will also examine the recent and controversial Directive on Copyright in the Digital Market (hereinafter DSM Directive).

After the overview of the copyright regulation, Section IV will analyse the regulation of the fundamental rights regime. The regulation of the regime is complex since the two applicable legal texts, the Charter of Fundamental Rights of the European Union (hereinafter ECFR) and the European Convention on Human Rights (hereinafter ECHR) confer competence to two different Courts. The European Court of Human Rights (hereinafter ECtHR) applies the provisions of the ECHR and the Protocols attached to it, and therefore Article 1 of the first Protocol to ECHR (hereinafter A1P1) and the European Court of Justice (hereinafter ECJ) applies the provisions of the ECFR when interpreting questions referred to by the Member States' national courts (see Section IV). The regulation of fundamental rights is analysed by taking into account the leading decisions of both courts and how fundamental rights have been applied to solve conflicts relating to copyright law. The analysis of the relevant case law is divided according to the court which delivered the decisions concerned (ECtHR's decisions in Section IV.4.2 and ECJ decisions in Section IV.4.4 and VI respectively) and according to the particular issue of the interaction between fundamental rights and copyright law each court has been called upon to answer.

The resort to fundamental rights law was caused from the problematic internal balancing system laid down in Article 5 of the InfoSoc Directive. Before resorting to

the fundamental rights regime, the ECJ dealt with the interpretation of this internal balancing system. However, the ECJ's case law is inconsistent, adding more complexity to the implementation of the exceptions and limitations by the Member States.

In Section V.5.1 the deficiencies of the system regarding the exceptions and limitations and the three-step-test laid down in Article 5 of the InfoSoc Directive will be analysed. The main focus will be placed on the provisions of the InfoSoc Directive, which has been the applicable regime since 2001 and has shaped the relevant case law of the courts. However, as of 9 June 2019, the DSM Directive came into force repealing the InfoSoc Directive. Section V.5.2 will discuss the relevant new provisions of the DSM Directive, in particular those that change the prior regulation of copyright under the InfoSoc Directive.

Along with the insufficiency of the exceptions and limitations system and the even more frequent intrusion of fundamental rights into the copyright system, the following question was raised: how should the external regime of fundamental rights, which has already been introduced in the EU copyright law, be handled? The answer to this question is connected with a broader question: what would be the most effective solution to the insufficient balancing system provided by the copyright system itself? One suggested solution is the 'constitutionalisation' of intellectual property rights through which copyright law will gain the social function that is inherent within any legal rule. According to this solution, the task of balancing the conflicting interests is addressed to the judiciary. The alternative solution suggests

that the balancing system, which the exceptions and limitations provide for, must be changed internally within the system itself through the amendment of the provisions. Here the task of balancing the conflicting rights is addressed to the legislature. This will be discussed in Section VI which will analyse both suggested solutions.

Finally, in summer 2019, only a few months after the entry into force of the new Copyright Directive the ECJ gave its position when it dealt with three coordinated references of the German Federal Supreme Court. The Court did not recognise an external limitation role of fundamental rights and held that they should only serve as an interpretative tool to implement fairly the copyright's system provisions (Section VIII).

II. The importance of human rights in the field of intellectual property

Over recent years, the interplay of human rights and copyright has evolved into a highly debated issue at the European level. While this debate may seem recent, the issue was raised on the international level in the 1990s. The first trace of connection is found in the provision stipulated in Article 27(1) of the Universal Declaration of Human Rights (hereinafter UDHR) which reads as follows: *'Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.'* According to the second paragraph of the same article *'[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of*

which he is the author.' The second factor, which gave room to the interplay between intellectual property and human rights, is the conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS).¹ The tendency towards the expansion of the protection scope of the intellectual property was also reflected at a political level in the inclusion of the intellectual property in the World Trade Organisation (hereinafter WTO) with the TRIPS. At the same time, an opposite tendency in the field of human rights law was developed focusing on the adverse impacts of the progressive expansion of the scope of intellectual property protection on economic, social and cultural rights. This tendency also led to scepticism against the role of multinational corporations with regard to possible violations of human rights.²

The aforementioned UDHR provision is evidence that the interplay between human rights and intellectual property can be found at the legislative level. Apart from the latter, the conclusion of the TRIPS Agreement elevated the status of intellectual property rights. TRIPS introduced intellectual property rights into discussions which then had an increasing focus on human rights.

The same issue also emerged at European level but in another way. In this case neither the then European Economic Community (hereinafter EEC) nor the EEC Treaty played a crucial role, since their focus consisted in establishing economic

¹ Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) 33 I.L.M 1197.

² Laurence Helfer, 'Mapping the Interface between human rights and intellectual property' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 6. For a detailed overview on the issue at international level see the following: Laurence Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' (2003) 5 MJLST 47 <<http://dx.doi.org/10.2139/ssrn.459120>> accessed 10 January 2020.

integration. Instead, the Council of Europe (hereinafter CoE) played the crucial role in the matter. Founded in 1949 as a pan-European organisation, the CoE's goal is *'to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.'*³ stating at the same time that *'every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council.'*⁴ One year after its foundation, the CoE drafted the main legal instrument to achieve the goals described in its Statute, namely the ECHR and its five Protocols.⁵ The ECHR established the ECtHR, an international court responsible for the observance of the rights set out in the ECHR through applications of individuals or States. One might ask what exactly the ECtHR's role has to do with intellectual property and in this case with copyright. The key issue is the reference of the ECtHR to Article 1 of Protocol No.1 to the European Convention on Human Rights (hereinafter A1P1) the first paragraph of which reads as follows: *'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'* The ECtHR's reference to A1P1 was significantly crucial, since it constituted for the first time the

³ Statute of the Council of Europe, Article 1(a) (5 May 1949) E.T.S No.001.

⁴ Statute of the Council of Europe, Article 3 (5 May 1949) E.T.S. No.001.

⁵ Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR) 1950.

legal basis for the two fields of law – human rights and intellectual property – to be interrelated.⁶

The interaction between human rights and intellectual property was developed at European level after the establishment of the CoE, the entry into force of the ECHR and the examination of relevant applications by the ECtHR. The EC played hardly any role in the matter, however, the landscape started to change gradually with the entry into force of the Treaty of Lisbon in 2009.⁷ The amendment of Article 6 of the Treaty on European Union (hereinafter TEU) raised the status of human rights in the European legal order since the new provision stipulated that the EU recognises the rights under the ECHR. The new provision brought significant changes, considering that the years before the conclusion of the Treaty of Lisbon human rights were merely recognised as general principles of EU law.⁸ The amendment of Article 6 TEU played an important role as well. The first paragraph states: *‘The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (...), which shall have the same legal value as the Treaties.’* Providing, after years of uncertainty, legally binding force to the ECHR.⁹ The second

⁶ The first ECtHR’s judgements in which the Court referred to AIP1 and stated that the protection of intellectual property rights falls under the respective provision are the following: *Dima v Romania* App no 58472/00 (ECtHR, 26 May 2005), case which concerned copyright protection under AIP1; *Anheuser-Busch Inc. v Portugal*, App no 73049/01 (ECtHR, 11 January 2007) regarding the protection of trademarks under AIP1; *Melnychuk v Ukraine* App no 28743/03 (ECtHR, 5 July 2005).

⁷ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/01.

⁸ Sionaidh Douglas-Scott, ‘The European Union and the Human Rights after the Treaty of Lisbon’ (2011) 11(4) HRLR 645.

⁹ Charter of Fundamental Rights of the European Union [2007] OJ C303/01, which drafted already in 2000 but entered into force with the entry into force of the Treaty of Lisbon in 2007, plays important

paragraph enshrines the EU's accession to the ECHR. The third paragraph stipulates: *'Fundamental rights as guaranteed by the European Convention of the Protection of Human Rights and Fundamental Freedoms as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'*

III. EU COPYRIGHT REGULATION

3.1 The bases of its regulation and the historical overview of the process of its harmonisation

In Section II, the importance of human rights in the intellectual property regime both at international and European level was analysed in order to acquire an overview of the history of the interaction of the two fields of law. However, the present thesis will focus exclusively on the interaction between copyright law and fundamental the rights at European level.¹⁰ Following the strengthening of fundamental rights' position in the European legal order, especially after the amendments of the Treaties of the EU, fundamental rights found room to interact with copyright law due to the then and still present deficiencies of the respective regime. In reality, the existing deficiencies of the European copyright *acquis* arise *inter alia* from the same

role in the issue, given that its Article 17(2) serves as a legal basis for the connection of intellectual property and thus copyright with fundamental rights.

¹⁰ Here it should be noted that the terms 'human rights' and 'fundamental rights' are used interchangeably in the present thesis.

characteristic which constitutes its main particularity: the piecemeal harmonisation. The reasons, which led to the respective characteristic of European copyright law, vary and concern not only the nature of copyright itself but also the approach which the EU took at the legislative and political level.

At the legislative level, the regulation of copyright by the EU is affected by the competence of the EU on intellectual property. The EU's competence is conferred by certain provisions of the European Treaties and governed by the principle of subsidiarity and the principle of proportionality. It should be noted that the Treaties do not provide for competence rules specifically related to intellectual property.¹¹ Instead, the regulation of copyright at European level can be based on Article 114 of the Treaty on the Functioning of the European Union (hereinafter TFEU)¹² which grants the EU the legislative power to harmonise the national laws of the Member States to the extent that is necessary for the effective function of the internal market and Article 352 TFEU which focuses on residual competence.¹³ In fact, Article 114 TFEU constitutes a 'powerful legal basis' and not only a mere provision which can

¹¹ Mireille van Eechoud, 'The European Concern with Copyright and Related Rights' in Bernt Hugenholtz (ed), *Harmonising European Copyright Law. The Challenge of Better Law Making* (Kluwer Law International 2009) 13.

¹² Article 114(1) TFEU: '*Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*'

¹³ Article 352(1) TFEU: '*If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.*'

serve as basis for EU actions with the purpose of the regulation of copyright.¹⁴ Other provisions, which can serve as legal bases for the regulation of the copyright by the EU, are the following: Article 167 TFEU¹⁵ which focuses on the EU's action in the field of culture with the purpose to foster cooperation among Member States for the promotion among others of 'artistic and literary creation', a purpose which is, at the same time, explicitly included in the list of the EU's objectives laid down in Article 3 TEU.¹⁶ The other legal basis is Article 169 TFEU¹⁷ which focuses on the EU action for the protection of the economic interests of consumers and according to paragraph 2 provides the EU for leeway to integrate consumers' interests into the definition and implementation of EU policies and activities, such as the harmonisation of intellectual property on the basis of Article 114 TFEU.¹⁸

¹⁴ Van Eechoud (n 11) 13.

¹⁵ Article 167(1) and (2) TFEU : '*1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. 2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:*

- *improvement of the knowledge and dissemination of the culture and history of the European peoples,*
- *conservation and safeguarding of cultural heritage of European significance,*
- *non-commercial cultural exchanges,*
- *artistic and literary creation, including in the audiovisual sector.'*

¹⁶ Article 3(3) TEU: '*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. (...)*
It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.'

¹⁷ Article 169 TFEU: '*(...) In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests. 2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:*
(a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;
(b) measures which support, supplement and monitor the policy pursued by the Member States.'

¹⁸ Van Eechoud (n 11) 14.

Based on Article 114 TFEU and accompanied by the principles of subsidiarity and proportionality, the EU's competence on the regulation of intellectual property has a broad scope. According to the principle of subsidiarity enshrined in Article 5(3) TEU, *'(...) in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The EU acts only to the extent that the objectives of the proposed action, first, cannot be sufficiently achieved by the individual Member States, and second, can be better achieved by the EU.'* The political and economic considerations lead to the conclusion that a certain issue is better addressed at the EU level. At the same time, the ECJ leaves to the EU institutions a wide margin of appreciation in the decision-making process.¹⁹ Consequently, where the particularities of national copyright law systems are different among Member States and have the effect of creating obstacles to the function of the internal market, the EU acquires competence to act and implement a solution.²⁰

Apart from the principle of subsidiarity, the principle of proportionality also plays a crucial role on the EU competence on the regulation of intellectual property and thus copyright. The respective principle governs the way in which the EU intervenes in the national legal systems and policies of the Member States. The ECJ has stated in many

¹⁹ Ibid 20.

²⁰ Ibid.

cases that the EU *'may reach no further than necessary in this respect, and, that the disadvantages caused shall not be disproportionate to the aims pursued.'*²¹ In any case, the respective principle enshrined in Article 5(4) TEU provides that *'(...) the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'* which implies a preference to the less intrusive legal instrument.²² Therefore, between directives and regulations, directives are to be preferred. They are less 'intrusive' and more flexible since they leave each Member State individually the leeway to choose the way, in which the legal rule to be transposed is going to be incorporated into their national legal system as long as the particular result of the directives can be achieved.²³ On the other hand, regulations possess direct binding effect and, thus, they are enforceable in all Member States at the same time without requiring any transposition measures taken by the Member States.²⁴ Directives are more flexible but they lead to harmonised law including also certain problems, given the differences in national laws of the Member States, and regulations are more 'intrusive', but lead to unified law. The starting point of the particularities of the copyright regime stems from the fact that the EU has chosen until now exclusively directives to regulate copyright even though, as it has been mentioned above, Article 114 TFEU allows both instruments.²⁵

²¹ Ibid.

²² Ibid.

²³ Ibid 21.

²⁴ Ibid 22.

²⁵ Ibid 21.

The other reasons why the EU has chosen the respective approach of the harmonisation of national law, instead of a full harmonisation with Regulations to ensure the uniform application of copyright law, can be found in the ‘1988 Green Paper on Copyright and the Challenge of Technology’²⁶ in which the main objectives of the Community were expressed: the establishment of the internal market; the strengthening of the competitiveness of copyrighted products and services;²⁷ and the fostering of intellectual and artistic creativity.²⁸ However, the first issue which had to be solved, was the conflict between the principle of territoriality and the principle of freedom of movement of goods (now Article 34 TFEU).²⁹ The ECJ clarified in two leading decisions³⁰ on the matter that the freedom of movement of goods does not prevail if the import of copyrighted goods was prevented due to differences between Member States’ national copyright law regimes. The ECJ extended the EC’s competence to copyright field before the discussion about the harmonisation of the respective field began and developed at the same time certain doctrines, namely the theory of exhaustion of rights and the distinction between the existence and the

²⁶ European Commission, ‘1988 Green Paper on Copyright and the Challenge of Technology’ COM (88) 172 final.

²⁷ Van Eechoud (n 11) 5.

²⁸ More specifically as phrased in the Green Paper on Copyright and the Challenge of Technology in para 1.4.4 *‘Intellectual and artistic creativity is a precious asset, the source of Europe’s cultural identity and of that of each individual State. It is a vital source of economic wealth and of European influence throughout the world. This creativity needs to be protected; it needs to be given a higher status and it needs to be stimulated.’*

²⁹ Annete Kur and Thomas Dreier, *European Intellectual Property Law. Text, Cases & Materials* (Edward Elgar 2013) 243.

³⁰ See in detail the following cases: C-158/86 *Warner Brothers v. Christiansen* [1988] ECR 02605 and C-341/87 *EMI Electrola v. Patricia* [1989] ECR 00079.

exercise of the rights.³¹ At this point, the first phase of the harmonisation of copyright commenced.³² This first generation of directives was based on ‘1988 Green Paper on Copyright and the Challenge of Technology’³³ in which the main objectives of the Community were expressed, namely the establishment of a single market and the need to enhance the competitiveness of the copyrighted products and services. Still after a few years the reluctance of the EU to tackle the issue was evident also from the same Green Paper in which it was stated that the ‘(...) *Community legislation should be restricted to what is needed to carry out the tasks of the Community.*’³⁴ Many issues of copyright law do not need to be subject of action at Community level. It is clear from the above mentioned, that the method the EU has chosen in the field of copyright law, is still away from the full harmonisation. However, it should not be overlooked that the current regulation of copyright law provides for a certain degree of harmonisation through the uniform interpretation of concepts which are regulated in directives given that they are considered to constitute autonomous concepts of EU law.

³¹ Anabelle Littoz-Monnet, ‘Copyright in the EU: *droit d’auteur* or right to copy?’ (2006) 13(3) JEPP 442.

³² *Ibid* 451.

³³ European Commission, ‘Green Paper on Copyright and the Challenge of Technology’ COM (88) 172 final.

³⁴ *Ibid* 7.

3.2. The current landscape of EU copyright regulation and its problems considering the entry into force of the new Copyright Directive

The current landscape of copyright law is regulated with the following nine Directives: the Computer Programs Directive;³⁵ Rental and Lending Rights Directive;³⁶ Satellite Broadcasting and Cable Transmission Directive;³⁷ Duration of Copyright Directive;³⁸ the Resale Right Directive;³⁹ the Orphan Works Directive;⁴⁰ Protection of Databases Directive;⁴¹ the ‘InfoSoc’ Directive, namely the Information Society Directive.⁴² The present thesis will place strong emphasis on the InfoSoc Directive since it was the legal instrument which stipulated the exclusive rights of authors and owners of related rights and contained a controversial list of exceptions and limitations regulating EU copyright law before the entry into force of the DSM Directive.

³⁵ Directive 2009/24/EC of the European Parliament and of the Council of 2009 on the legal protection of computer programs [2009] OJ L111/16.

³⁶ Directive 2006/115/EC of the European Parliament and the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376/28.

³⁷ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L248/15.

³⁸ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights [2006] OJ L372/12, amended by Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 [2011] OJ L265/1.

³⁹ Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L272/32.

⁴⁰ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L299/5.

⁴¹ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20.

⁴² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

The regulation of EU copyright law was driven by certain objectives. The primary focus of the EU was on the establishment of the internal market and the fostering of a competitive economy in the copyright field. These led to an overprotection of the right holders' exclusive rights not only through legal provisions laid down in copyright directives, especially the InfoSoc Directive, but also through the strengthening of the freedom of contract.⁴³ At the same time that the legal system of the InfoSoc Directive promotes the protection of investments, with the purpose to give incentives and thus making the products and services falling under its scope competitive, there appears to be a shift on the relevant market; the exploitation of the copyrighted works is no longer exercised by the right holders themselves but by companies which already possess a certain bargaining power and have one single aim: the maximisation of their profits.⁴⁴

The tendency towards the overprotection of the right holders, while the subjects of the exploitation of the copyrighted works are now companies of the exploitation sector, creates a growing imbalance, a conflict between the exclusive rights of the right holders and the rights and interests of the public. This already existing conflict within the copyright system is twofold: proprietary since it protects the works of the authors and enabling them to exploit their own works and public since it promotes the creativity as well as innovation and ensures the access to culture.

⁴³ Caterina Sganga and Silvia Scalzini, 'From Abuse of Right to European Copyright Misuse: A New Doctrine for EU Copyright Law' (2017) 48 IIC 412.

⁴⁴ Ibid.

There are two distinct theories with regard to copyright's rationales on which different copyright systems have been formed. The national law theory, according to which the author is the protagonist who deserves the granting of copyright protection through the positive enactment of exclusive rights as award for his labour on the creation. The national law theory is prominent in European civil law copyright systems (*droit d'auteur*) and understands that the exclusive rights are the rule as opposed to freedom which is the exception.⁴⁵ The utilitarian theory perceives copyright as an incentive for the promotion of the overall welfare of the society ensuring the movement of knowledge and information.⁴⁶ The utilitarian theory is prominent in the Anglo-American copyright system in which the system is structured in a more flexible way with focus on the incentives for new improved works and artistic expression and at the same time the integrity of the market place.⁴⁷ These two distinct theories on the justification of copyright form two different copyright systems which grant different degrees of protection⁴⁸ and provide for different system of limitations.⁴⁹

After briefly analysing the factors, that influenced the harmonisation of the European copyright law in its current form, the regulation of fundamental rights will be

⁴⁵ Martin Senftleben, Bridging the Differences between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine (2010) 53(3) CSUSA 521.

⁴⁶ Ibid 524.

⁴⁷ Ibid.

⁴⁸ The continental European '*droit d'auteur*' is based on strict and broad exclusive rights, since as it has been mentioned, in the respective system, the rights are the rule and the freedom the exception.

⁴⁹ More specifically, the '*droit d'auteur*' system uses a closed list of 'carefully crafted provisions' of exceptions and limitations, while the Anglo-American utilitarian system uses an open-ended fair use system leaving the task to identify the fair use to the courts on a case-by-case basis. See Senftleben (n 46) 524.

analysed since the respective regime exists parallel to the copyright regime. Their interaction, however, started recently due to the above mentioned gradual shifts in the market of the copyright economy together with the lack of flexibilities of the current regime to balance the increasing conflict between the overprotection of the rightholders and the weakening of third users' rights.

Statutory links between copyright and fundamental rights exist already within the copyright regime. However, the interplay of copyright with fundamental rights has been developed through the courts' practice to invoke fundamental rights as an external limit on copyright in cases where a balance has to be found but the copyright provisions cannot provide an effective solution to the conflicts at stake. Therefore, fundamental rights infiltrate into the copyright regime as 'transplanted doctrine'.

The existing landscape, even after the entry into force of the DSM Directive which amended the InfoSoc Directive and the Directive for the Protection of Databases, is still accompanied with the challenge to find an effective system which will fairly balance conflict between the exclusive rights of the copyright owners and the fundamental freedoms of the users – a system in order for the two distinct regimes to co-exist.⁵⁰ The DSM Directive, which entered into force on 6 June 2019, aims at modernising and harmonising copyright law in the digital market.⁵¹ However, as it has been argued '*(...) what started as a legislative instrument to promote the digital single market turned into an industry policy tool, shaped more by effective lobbying*

⁵⁰ Laurence Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' (2003) 5 MJLST 47.

⁵¹ João Pedro Quintais, 'The New Copyright in the Digital Single Market Directive: A Critical Look' (2020) 1 EIPR 1 (forthcoming) <<http://ssrn.com/abstract=3424770>> accessed 10 January 2020.

*than evidence and expertise.*⁵² The comprehensive text of the Directive with 86 articles and 32 recitals is structured as follows: Title (I) general provisions (Articles 1 and 2), Title (II) measures to adapt exceptions and limitations to the digital and cross-border environment (Articles 3 to 7), Title (III) measures to improve licensing practices and ensure wider access to content (Articles 8 to 14), Title (IV) measures to achieve a well-functioning marketplace for copyright (Articles 15 to 23) and Title (V) final provisions (Articles 24 to 32).

Title II is of primary importance to the discussion. In Title II the new exceptions regime is laid down which is mainly based on the previous regime of the InfoSoc Directive but with the following positive change; the exceptions are defined as mandatory, thereby leaving behind the complex national exceptions and limitations schemes that the previous optional list of Article 5 of the InfoSoc Directive formed. However, their narrow scope⁵³ and the possibilities of contractual derogations will probably not allow the Directive to lead to harmonisation of the *acquis* since unfortunately the new regime is still based on the fragmented previous system of the InfoSoc Directive.⁵⁴

The other relevant part of the DSM Directive is Title IV which includes the much-discussed Article 17. The respective article '*addressed the triangular relation between right-holders, online content-sharing service providers (hereinafter:*

⁵² Ibid.

⁵³ According to Article 7(2) of the Directive (EU) 2019/790: '*Article 5(5) of Directive 2001/29 shall apply to the exceptions and limitations provided for under this Title. The first, third and fifth subparagraphs of article 6(4) of Directive 2001/29/EC shall apply to Articles 3 to 6 of this Directive.*'

⁵⁴ See Quintais (n 51) 11.

OCSSPs) and users,⁵⁵ aiming at the regulation of the so-called ‘value gap.’⁵⁶ More specifically, the provisions of the article attempt to regulate the disproportionality between the profit that the OCSSPs generate and the revenue that is returned back to the rightholders.⁵⁷ The OCSSPs gain profit by allowing their users to upload and share copyright-protected works aiming at attracting larger audience and by placing advertisement on the platform or within the uploaded or shared content. The main change, that the article is accompanied with, concerns Article 14 of the E-Commerce Directive.⁵⁸ According to Article 17(1) of the DSM Directive,⁵⁹ the platforms become directly liable for the content that their users upload while at the same time being explicitly⁶⁰ excluded from the hosting safe harbour provision laid down in Article 14(1) of the E-Commerce Directive.⁶¹ Instead of the respective article, the OCSSPs

⁵⁵ Sebastian Schwemer and Jens Schovbo ‘What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime’ in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (4th edn, Wolters Kluwer 2020) (forthcoming).

⁵⁶ Ibid.

⁵⁷ See Quintais (n 51) 17.

⁵⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

⁵⁹ Article 17(1) of the Directive 2019/790: ‘Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users. An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter’.

⁶⁰ Article 17(3) Directive 2019/790: ‘When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article’.

⁶¹ Article 14(1) Directive 2000/31: ‘Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

have to ensure that the cumulative conditions laid down in Article 17(4)⁶² are met in order to avoid the liability for content uploaded by their users. It follows that the OCSSPs possess the main liability to filter the unauthorised content that their users upload or even re-upload.⁶³

Apart from its connection with the safe harbour provision under the E-Commerce Directive, Article 17 develops another interplay with fundamental rights. The explicit references to fundamental rights in its text⁶⁴ as well as the references⁶⁵ related to the mechanisms laid down in Article 17(9) constitute a welcome change towards the

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.'

⁶²Article 17(4) Directive 2019/790: *'If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have: (a) made best efforts to obtain an authorisation, and*

(b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event

(c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).'

⁶³ See Schwemer and Schobso (n 55) 5.

⁶⁴Recital 84 Directive 2019/790: *'This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter. Accordingly, this Directive should be interpreted and applied in accordance with those rights and principles'*.

⁶⁵Recital 70 Directive 2019/790: *'The steps taken by online content-sharing service providers in cooperation with rightholders should be without prejudice to the application of exceptions and limitations to copyright, including, in particular, those which guarantee the freedom of expression of users. Users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. That is particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union ('the Charter'), in particular, the freedom of expression and the freedom of arts, and the right to property, including intellectual property. Those exceptions and limitations should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union. It is important to ensure that online content-sharing service providers operate an effective complaint and redress mechanism to support use for such specific purposes.'*

strengthening of the users' rights. The references are formed at three levels: at the platform level, at which an *'effective and expeditious complaint mechanism'* has to be safeguarded; at the out-of-court level at which *a redress mechanism* has to be guaranteed; and, finally, at the judicial authority or court level. Despite the above mentioned internalised mechanisms of exceptions and limitations and the 'somewhat externalised' procedural safeguards the question remains: can the mechanisms balance the conflict between fundamental rights?⁶⁶ At the same time when it is argued that the *'(...) Directive may have provided users with strong 'rights' but without matching duties for platforms or a harmonised system for the enforcement of those user rights.'*⁶⁷

The present thesis takes into account the DSM Directive and the changes it introduces to the respective field, but it focuses mainly on the landscape that has been shaped through the national implementation of the InfoSoc Directive by the Member States and the relevant ECJ's case law regarding the interpretation of the respective Directive. It focuses on the examination of the flaws of the copyright system and it discusses the different solutions to the problematic system. The first solution suggests the 'constitutionalisation' of IP law, while the other suggests that the conflict has to be solved by using the options offered by the internal system of the copyright itself – through a redrafted list of exceptions and limitations and a different implementation of the three-step-test.

⁶⁶ See Schwemer and Schovbso (n 55) 17.

⁶⁷ Ibid.

Firstly, the present thesis will give an overview of the complex regulatory framework of the fundamental rights in the EU under the approach that the ECJ and the ECtHR have taken through the cases brought before them and the relevant case law they have shaped. Following the case law overview, the main two opposing opinions that have been expressed in modern scholarship will be discussed. The interplay of the two fields of law have been shaped through two connecting links. The internal link consists of the rationale of the regime with relevant reference in the recitals of the InfoSoc Directive and now with the provisions of the DSM Directive.⁶⁸ The external link is formed by the reference of both the ECJ and the ECtHR to fundamental rights implementing each time the scheme under which copyright as right to property is confronted with another fundamental right (e.g. the right to privacy or the right to information) in order to apply the balancing test and solve the conflict at stake. These two links constitute the bases which the two prominent proposed solutions have been based on: the ‘constitutionalisation’ of copyright, on the one hand, which accepts the external limiting role of fundamental rights, and, on the other hand, the correction of the already existing system of limitations and exceptions of the copyright regime. Finally, after the detailed examination of the two regimes, the way their interaction commenced and the relevant case law, the present thesis will conclude with the recent response of the ECJ in regards to the issue.

⁶⁸ Given that the DSM Directive came into force on 7 June 2019, the theoretical opinions and the relevant case law, which the present thesis analyses, are based on the provisions of the InfoSoc Directive and the interpretation of them by the ECJ and the ECtHR since this was the applicable regime since 2001.

IV. The European regulatory framework of fundamental rights – the two distinct regimes

4.1 The regulatory framework of fundamental rights under the ECHR

As discussed prior, the regulation of fundamental rights in Europe began with the conclusion of the ECHR and its Protocols between the members states of the Council of Europe (hereinafter CoE). The regulation of fundamental rights extended with the ECFR which constitutes the other legal text of the respective regime. With the entry into force of the Treaty of Lisbon, in 2009, the ECFR gained legally binding force pursuant to Article 6(1) TEU⁶⁹ while Article 6(2) TEU⁷⁰ stipulating that '*[t]he Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights (...)*' opened the way to the accession of the EU to the ECHR; both provisions upgraded the status of the fundamental rights in the European legal order.

⁶⁹ Article 6(1) TEU: '*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions*'.

⁷⁰ Article 6(2) TEU: '*The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.*'

Under substantive law aspect, the regulation of the fundamental rights consists of the ECHR and the ECFR. The first provides neither a specific provision of property⁷¹ nor on copyright.⁷² However, the provisions laid down in Article 10(1) guarantee the freedom of expression and communication: *‘Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.’* At the same time, the above freedoms can be restricted under the provisions laid down in Article 10(2): *‘The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’* The restriction of the freedom on the grounds of the protection of ‘rights of others’ constitutes a sign that the balancing⁷³ of competing freedoms has been done by the legislature included

⁷¹ Peter Oliver and Christopher Stothers, ‘Intellectual property under the Charter: Are the Court’s scales properly calibrated?’ (2017) 54 CMLR 517.

⁷² Christophe Geiger, ‘Copyrights’s Fundamental Rights Dimension at EU Level’ in Estelle Derclaye (ed) *Research handbook on the future of EU copyright* (Edward Elgar 2009) 28.

⁷³ For the principle of fair balance, as it is applied by the ECtHR when weighting the conflicting rights in cases which have been brought before it, see Alastair Mowbray, ‘A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights’ (2010) 10 HRLR 289.

inherently in the text of the ECHR. Furthermore, given that ‘the protection of rights of other’ includes also the rights of creators, the provision leads to the conclusion that the respective freedom possesses vertical effect, which enables individuals to invoke the provision that guarantees the respective freedom against the state. It possesses also a horizontal effect allowing the provision, under which the freedom is guaranteed, to be invoked by individuals in private disputes.⁷⁴ Shortly after the signing of the ECHR, the A1P1⁷⁵ was signed stipulating that *‘[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The precedent provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes of other contributions or penalties.’*

⁷⁴ Geiger (n 72) 29. At the same time there is also the different approach of the German Constitutional law, more specifically the ‘third-party effect’ theory of constitutional rights (in German: Die Drittwirkung der Grundrechte).

⁷⁵ For a detailed overview on the interpretation of A1P1 as it has been formed by the ECtHR see Council of Europe, ‘Guide on Article 1 of Protocol 1 No. 1 – Protection of property’ <https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf> accessed at 16 January 2020.

4.2 The ECtHR's relevant case law

Given its horizontal effect, the ECHR provisions and the provisions stipulated in its Protocols have been increasingly invoked by parties in private litigations brought before the ECtHR. The ECtHR's case law⁷⁶ on the issue is crucial since copyright protection falls under the scope of A1P1.

In *Dima v. Romania*⁷⁷ the ECtHR stated for the first time that intellectual property falls under the scope of A1P1. The case concerned a direct state action, where Romania refused to recognise Dima's graphic design as a protected work. Dima was a graphic designer working in the studio of Plastic Arts of the Romanian Defence Ministry Design. Dima participated in the public competition launched by the Romanian authorities to adopt a new emblem after the fall of the communist regime. The applicant's proposed design was chosen by the authorities. However, Dima's name was never mentioned by the Official Journal of Romania when they published the State Emblem and the Seal nor was he remunerated for his work. After the rejection of Dima's claims before the national Supreme Court on the grounds that, according to the applicable Copyright Decree the time that he was working on the design at stake, the State Emblem and the Seal, should not be copyrighted. Dima challenged the Supreme Court's decision before the ECtHR invoking A1P1 in order

⁷⁶ For a more extended overview on the ECtHR's case law regarding not only copyright but also the other IP rights see Christophe Geiger and Elene Izyumenko, 'Intellectual Property before the European Court of Human Rights' Center for International Intellectual Property Studies Research Paper No. 2018-01 <<https://ssrn.com/abstract=3116752>> accessed 15 January 2020.

⁷⁷ *Dima v. Romania* App no 58472/00 (ECtHR, 26 May 2005).

to assert copyright ownership and compensation for the loss of income resulting from the exploitation of his work.

The ECtHR stated that intellectual property is covered by the scope of A1P1. The Court examined then whether the applicant has a ‘possession’ or a ‘legitimate interest’ in acquiring a possession. Finally, the Court found the application inadmissible *ratione materiae*, namely due to the fact that Dima could not prove the protection of the subject-matter in question under the Romanian law. In any case, the impact of the decision is important given that for the first time the ECtHR connects the protection of copyright with A1P1.

The next case brought before the ECtHR concerned a dispute between private parties. In *Melnychuk v. Ukraine*⁷⁸ the applicant brought the case before the Court because a local newspaper, which published a critical review of his book, refused to publish his response. The applicant invoked Article 10 ECHR and argued that the critical reviews violated his copyright. The national courts rejected the applicant’s arguments as ‘insubstantiated’. The applicant then brought his case before the ECtHR which dismissed it as ‘manifestly ill-founded’ since the applicant failed to substantiate his claims repeating for a second time after *Dima v. Romania* that protection against copyright infringements is protected under A1P1.

Again, in *Balan v. Moldova*⁷⁹ it held the same position and developed it further. The case concerned the applicant’s (Balan’s) photography which the state had been using

⁷⁸ *Melnychuk v. Ukraine* App no 28743/03 (ECtHR, 05 July 2005).

⁷⁹ *Balan v. Moldova* App no 19247/03 (ECtHR, 29 January 2008).

in national identity cards without providing compensation. At national level, Balan succeeded in receiving compensation for the use of his work after a legal action against the state. However, Moldova continued to use his photography in the identity cards without providing compensation. Balan brought a legal action again before the national court, but the Supreme Court refused his claim. According to the Supreme Court's decision, the applicant was not entitled to further compensation since he had already been compensated for the use of his work and in his legal action he had not requested the prohibition of any potential future use of the work in question. Balan brought an application before the ECtHR alleging the violation of his right under A1P1 given the refusal of the national courts to award him compensation of the unlawful use of his protected work. In this case, contrary to *Dima v. Romania*, the Court found a violation of the applicant's copyrighted work and held that the state had interfered 'disproportionately' without succeeding in striking 'a fair balance' between the interest of the applicant and the public interest of issuing identity cards. The following two decisions of the ECtHR are crucial, as they deal with a recently emerging and challenging issue: the conflict between copyright and the freedom of expression. The *Ashby Donald v. France*⁸⁰ case concerned the criminal conviction of three fashion photographers for copyright infringement as they published photographs of a fashion show without the permission of the fashion houses concerned. In the first instance, the photographers based their defence on Article 10 ECHR (freedom of expression) and on Article L. 122-5 9° (Article of the French Intellectual Property

⁸⁰ *Ashby Donald v. France* App no 36769 (ECtHR, 10 January 2013).

establishing internal exception for the reproduction of artistic works for news reporting) and they prevailed. However, in the second instance the Court dismissed their arguments. The French Supreme Court dismissed their argumenation as well, holding that the internal copyright exception is not applicable to the seasonal fashion industry. The photographers brought an application before the ECtHR alleging that the publication of the photographs falls under the freedom to ‘impart information’ laid down in Article 10 ECHR. For the first time the ECtHR conceptualised the conflict between two different fundamental rights guaranteed under the ECHR; the right to freedom of expression under Article 10 ECHR and the right to property under A1P1. It was held that the copyright protection is to be considered as an interference with the right to freedom of expression. Given the interference, the ECtHR applied its well-known ‘three-part-test’ under Article 10(2). The three-part-test provides that in order for the restrictive measure to be justified, it has to be prescribed by law, pursue a legitimate aim and, finally, be ‘necessary in a democratic society’. The ECtHR went further by connecting the requirements of the test with the margin of appreciation that the national courts enjoy.⁸¹ According to the Court, in cases concerning ‘commercial speech’ the national courts possess a particularly wide margin of appreciation in contrast to ‘general public interest’ cases in which the courts enjoy only a reduced margin of appreciation.⁸² In cases of ‘commercial speech’ the gain of profit

⁸¹ Stijn van Deursen and Thom Snijders, ‘The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework’ (2018) 49(9) IIC 1080. In this article the case *Mouvement Raëlien Suisse* is mentioned, in which the Court made this distinction.

⁸² The respective distinction concerning the courts’ margin of appreciation was first developed in *Mouvement Raëlien Suisse v. Switzerland*, App No 16354/06 (ECtHR, 13 July 2012).

constitutes the main incentive for the publication of copyrighted works.⁸³ In *Mouvement Raelien Suisse v. Switzerland* the Court mentioned the types of cases that can fall under the label of ‘general public interest’ cases;⁸⁴ ‘use of public documents’ or ‘journalists and media exercising their public watchdog function in a democracy.’ In any case, the issue whether a specific exercise of the right to freedom of expression constitutes an aspect of ‘commercial speech’ or is characterised by the ‘general public interest’ is to be examined on a case-by-case basis.⁸⁵ In *Ashby and Donald*, the Court held that the publication in question fell under the ‘commercial speech’ category given its profit-motivated character. For this reason, the ECtHR held that the French Court enjoyed a wide margin of appreciation and it only conducted a marginal review⁸⁶ which led to the conclusion that there was no violation of Article 10. The revolutionary development in *Ashby and Donald* is that the Court allowed for a ‘second layer’ – to balance the potential copyright enforcement measures with conflicting fundamental rights beyond the then well-known internal system of exceptions and limitations.⁸⁷

The second case and the last decision delivered by the ECtHR which will be analysed, raised before the Court almost the same time as the above analysed is *The Pirate Bay* and concerned the same issue; the conflict of copyright and freedom of expression. The applicants, Fredrik Neij and Peter Sunde Kolmissopi, were involved

⁸³ Ibid paras 59-66.

⁸⁴ Ibid.

⁸⁵ Van Deursen and Snijders (n 81) 1090.

⁸⁶ Ibid 1091.

⁸⁷ Ibid. See also Bernd Justin Jütte, ‘The beginning of a (happy?) relationship: copyright and freedom of expression in Europe.’ (2016) 38 EIPR 11.

in one of the world's largest peer-to-peer file-sharing services on the Internet, the website 'The Pirate Bay' (hereinafter TBT). The two applicants with two other persons, who were also involved in different aspects of the respective website, were charged *inter alia* with abetting others, the users of the website who could come in contact with each other and exchange digital material through file-sharing, to commit criminal crimes in violation of the Swedish Copyright Act. More specifically, Section 53 of the Swedish Copyright Act reads as follows: '*Anyone who, in relation to a literary or artistic work, commits an act which infringes the copyright enjoyed in the work (..) shall, where the act is committed wilfully or with gross negligence, be punished by fines or imprisonment for not more than two years.*

Anyone who for his private use copies a computer programme which is published or of which a copy has been transferred with the authorisation of the author shall not be subject to criminal liability, if the master copy for the copying is not used in commercial or public activities and he or she does not use the copies produced of the computer programme for any purposes other than his private use. Anyone who for his private use has made a copy in digital form of a compilation in digital form which has been made public shall, under the same conditions, not be subject to criminal liability for the act.

The provisions of the first paragraph also apply if a person imports copies of a work into Sweden for distribution to the public, if such a copy has been produced abroad under such circumstances that a similar production here would have been punishable under that Paragraph.'

Based on the above provisions of Copyright Act, several private companies brought private claims within the criminal proceedings, with request for compensation for illegal use of copyrighted work (digital material concerning music, films and video games). According to the Swedish Supreme Court's decision, Neij and Sunde Kolmisoppi received prison sentences and a joint liability for damages amounting to millions of Euros.

As in the case of *Ashby and Donald*, the two applicants brought an application before the ECtHR invoking the right to freedom of expression under Article 10 ECHR. They based their argumentation on the assumption that Article 10 ECHR covers the right to offer an automatic service of transferring unprotected material between users following the fundamental principles of freedom of communication on the Internet. It follows, according to their view, that the respective article protects the arrangement of Internet services even if the services can be used either for legal or for illegal purposes, without the persons responsible for the provided services being also responsible for the acts committed by the users of the same services. The ECtHR held that certain actions, even if they entail violation of copyright laws, they still enjoy at the same time protection under the ECHR. Firstly, it stated that there is an interference under the first paragraph of Article 10 ECHR and, then, it went further to its 'three-part test' noting that, also, in this case there are two competing interests; the freedom of expression protected under Article 10 ECHR and the copyright holders' proprietary interest protected under A1P1. Following its precedent conclusion about the wide margin of appreciation that the national court enjoys in cases of 'commercial

speech' avoiding, however, to analyse here the respective term as it did in *Ashby and Donald*, it stated that the '*safeguards afforded to the distributed material, in respect of which the applicants were convicted, cannot reach the same level as that afforded to political expression and debate.*'⁸⁸ Thus, also in this case, the Court stated that given their wide margin of appreciation, the national courts have sufficient reasons to restrict the applicants' right to freedom of expression achieving a fair balance between the two competing interests.

While examining the last two decisions, it should be noted that these cases constitute a crystallisation of the conception of an emerging relationship between copyright and freedom of expression.⁸⁹ Their impact is summarised in two statements that the ECtHR made in both decisions: firstly, the admission that restrictions based on copyright enforcement constitute an interference with the right to freedom of expression and secondly, the suggestion that the balance between the two conflicting interests must be based on the question whether the action in question, which entails copyright infringement, is made in the context of 'general public interest' or not.⁹⁰

⁸⁸ *Neij and Sunde Kolmisoppi v. Sweden* App No 40397/12 (ECtHR, 19 February 2013).

⁸⁹ Christophe Geiger and Elena Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (2014) 45 IIC 316.

⁹⁰ *Ibid* 323

4.3 The regulation of fundamental rights under the ECFR and its interface with the ECHR regime

The importance of the ECHR and the ECtHR's case law on the issue is self-evident. However, the ECJ's case law cannot be overlooked. The ECFR and the ECJ constitute the other 'pillar' of the European framework regulating fundamental rights. They both form a second distinct regime, which is closely connected with the ECHR regime, considering that both the ECtHR and the ECJ are competent to deliver decisions relating to fundamental rights. The provisions, that demonstrate the close links⁹¹ between the two courts, are Article 52(3) and 53 ECFR which read as follows : *'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'* Article 53 ECFR respectively reads as follows: *'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and inter- national law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Funda- mental Freedoms, and by the Member States' constitutions.'*

⁹¹ Oliver and Stothers (n 71) 520.

Apart from the statutory provisions, the dynamic relationship between the two courts is proven by the references of the ECJ to the ECtHR's case law.⁹² In subsequent cases, the ECJ recognised that in cases concerning the interpretation of fundamental rights the ECtHR's case law has to be taken into account.⁹³

On the question whether there is binding effect of the ECtHR's case law for the ECJ, which consequently would 'force' ECJ to accord its case law in line with the case law of the former Court, the former President of the ECJ, Vassilios Skouris, has pointed out that theoretically in EU law *'there is no legal binding authority of any Court decision for subsequent decisions in other cases even similar ones.'*⁹⁴ However, the former President added that even in a system without the 'precedent doctrine' there are similar *de facto* effects.^{95,96}

Given that both the ECtHR and the ECJ deal with cases in the copyright law field by applying each one the relevant legal texts, namely the ECHR and the ECFR respectively, constantly opposing decisions would risk the legal certainty in the respective field of law in the European legal order. The observation of the former

⁹² The first explicit reference to the ECtHR's case law appears in 1996 in case C-13/94 *P v. S and Cornwall County Council* [1996] ECR I-2143 para 16 regarding the equal treatment of the rights of transsexuals.

⁹³ Joined Cases C-238/99, C-244/99, C-245/99, C-247/99, C-250/99 to C-252/99 and C-254/99 *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-08375, para 274; C-301/04 *Commission v SGL Carbon AG* [2006] I-05915 para 43.

⁹⁴ Juliane Kokott and Christoph Sobotta, 'Protection of Fundamental Rights in the European Union: on the relationship between EU fundamental rights, the European Convention and national standards of protection.' (2015) 34 YEL 65.

⁹⁵ *Ibid* 64.

⁹⁶ The close relationship between the two courts has been also recognised by the ECJ in its relevant Opinion on the EU's accession to the ECHR, in which it expressed considerations about the fact that with the accession to the ECHR, the EU as well as the ECJ will be subject to external control mechanisms – the mechanisms that the ECHR provides for, namely the ECtHR – a fact which would possibly transform the ECtHR as a *de facto* Court of appeal for the revision of the ECJ's decisions. See in detail Opinion 2/13 [2014] ECLI:EU:C:2014:2454 para 181.

President Skouris means that there is no strict legally binding obligation for the ECJ to follow ECtHR case law, but at the same time the need to ensure the legal certainty and convergence in the EU legal order requires that the ECJ has to ensure, at least, that its decisions do not differ considerably from those of the ECtHR.⁹⁷

Generally, it has become clear from the *Ashby and Donald* that the ECtHR seems to be more flexible to apply an ‘external’ balancing system than the ECJ which almost always applies the internal system especially in the category of cases concerning the conflict between copyright and the freedom of expression.⁹⁸

Consequently, given that the ECJ deals with copyright cases increasingly more often in the last years and the *de facto* interactive relationship between the two courts, the ECJ’s relevant case law has to be examined. The ECJ forms as an authoritative interpreter of EU law⁹⁹ a relevant case law after the initiation of references by the national courts of the EU Member States and regarding copyright law the references are consistently increased among others due to the particularities of the EU copyright law. Given the *de facto* interactive relationship between the ECtHR and the ECJ, the ECJ’s case law has to be examined.

On the other hand, the Court has increasingly invoked fundamental rights to support its reasoning, especially in the field of copyright law. It has been argued that this tendency leads to a shift of the Court’s role from a mere harmonising to a creative

⁹⁷ Van Deursen and Snijders (n 81) 1093.

⁹⁸ Ibid.

⁹⁹ For the distinction between the ECJ’s task of interpretation rather than that of application while examining the references by the national courts see in detail Paul Craig and Gráinne de Búrca, *EU Law: Text Cases and Materials* (6th edn, Oxford University Press 2015) 496.

role as well.¹⁰⁰ As Deursen and Snijders aptly mention there are three stages in which fundamental rights enter the copyright regime: the first stage concerns the exclusive rights of the copyright holder; the second stage concerns the exceptions and limitations to the exclusive rights; and the third stage relates to measures taken for the enforcement of the rights enshrined in the copyright regime.¹⁰¹

4.4 The ECJ's relevant case law

As demonstrated, the ECJ has resorted to the application of fundamental rights as a method to balance conflicting interests. Resultantly, two types of decisions have been shaped: the first category concerns cases in which copyright enforcement measures, that have been imposed on Internet Service Providers (hereinafter ISPs), conflict with fundamental rights of their users; the second category concerns cases in which the ECJ applies the system of limitations in order to strike a fair balance between conflicting interests of right holders and third parties and it uses fundamental rights only to interpret the applicable exceptions and limitations that the InfoSoc Directive provides for.¹⁰²

¹⁰⁰ Christophe Geiger, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union' in Irini Stamatoudi (ed), *New Developments in EU and International Copyright Law* (Kluwer Law International 2016) 435.

¹⁰¹ Van Deursen and Snijders (n 81) 1088.

¹⁰² The respective category will be analysed separately after the examination of the limitations and exceptions system provided for by the InfoSoc Directive (see Section VI).

One of the leading cases concerning the conflict that arose from certain enforcement measures and fundamental rights enshrined in the ECFR is the *Promusicae*.¹⁰³ The case related to the conditions under which national courts are entitled to order from ISPs the disclosure of their users' personal data. Promusicae is a non-profit organisation of producers and publishers of musical and audiovisual recordings which, in 2005, brought a claim before the Commercial Court No.5 in Madrid against Telefonica (Internet service provider). Promusicae alleged that Telefonica users have used the KaZaA (peer-to-peer) file exchange program to provide access to shared files. Promusicae argued that this action violated its members exploitation rights and requested the disclosure of the identities and the addresses of KaZaA users with the purpose to bring civil claims against them. The request had been accepted in first instance but Telefonica appealed against the decision on the ground that the Spanish legislation allows the disclosure of personal data only in criminal investigations or for the purpose of safeguarding public security and national defense and not in civil proceedings. On the other hand, Promusicae argues that the respective provision should be interpreted in light of Directives 2000/31, 2001/29, 2004/48 and Articles 17 and 47 of the UN Charter which contain other purposes allowing similar disclosures. Following these events, the Spanish Court stayed the proceedings and referred the following question to the ECJ: '*Does Community law, specifically Articles 15(2) and 18 of Directive [2000/31], Article 8(1) and (2) of Directive [2001/29], Article 8 of*

¹⁰³ Case C-275/06 *Productores de Música de España (Promusicae) v. Telefónica de España SAU* [2008] ECR I-11987.

Directive [2004/48] and Articles 17(2) and 47 of the Charter (...) permit Member States to limit to the context of a criminal investigation or to safeguard public security and national defense, thus excluding civil proceedings, the duty of operators of electronic communications networks and services, providers of access to telecommunications networks and providers of data storage services to retain and make available connection and traffic data generated by the communications established during the supply of an information society service?’¹⁰⁴

The Court recognised that the Directives aim to provide the effective protection of copyright and this is the reason why they allow certain measures for the prevention of infringements. However, the disclosure of personal data is not included in the measures provided for in the Directives. The Court held, in particular ‘(...) *that Directives 2000/31, 2001/29, 2004/48 and 2002/58 do not require the Member States to lay down, in a situation such as that in the main proceedings, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which*

¹⁰⁴ Ibid para 34.

would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.¹⁰⁵

In *Promusicae*, the ECJ employed the principle of fair balance between the competing interests – privacy and data protection, on the one hand, and the effective protection of right holders – and according to Griffiths the fair balance ‘(...) has allowed the Court to trace embryonic legal obligations in an area of the *acquis* that was previously regulated only very loosely.’¹⁰⁶

The ECJ held the same position in *Scarlet Extended*.¹⁰⁷ In this case, SABAM, a collective management organisation representing authors, composers and editors of musical works by authorising the use of their copyrighted works to third parties, concluded that Scarlet’s users (the ISP in the case) were downloading work from SABAM’s catalogue without authorisation and without paying royalties. SABAM brought interlocutory proceedings against Scarlet claiming that Scarlet had to take measures to stop copyright infringements committed by its users and in particular by requesting Scarlet to block or make it impossible for its users to send or receive in any way files which contain unauthorised works. After accepting SABAM’s requests the President of the Tribunal de première ordered Scarlet to apply measures that will make it impossible for its users to send or receive files containing works from SAMAM’s repertoire. Scarlet appealed then claiming that the requested measures, the

¹⁰⁵ Case C-275/06 *Productores de Música de España (Promusicae) v. Telefónica de España SAU* [2008] ECR I-11987 para 70.

¹⁰⁶ Jonathan Griffiths, ‘Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law’ (2013) 38 ELR 65.

¹⁰⁷ Case C-70/10 *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECR I-11959.

system for blocking or filtering peer-to-peer traffic, would lead to a *de facto* obligation for Scarlet to monitor communications on its network. According to Scarlet this would be against the protection of personal data, since Scarlet would have to process IP addresses which constitute personal data.

The Tribunal Court referred to the ECJ the question whether the applicable Directives, namely Directives 2001/29 and 2004/48 in light of the protection of personal data and freedom of protection, permit as an enforcement measure for the copyright protection that an ISP installs a system for filtering all electronic communications. The ECJ balanced the respective measures of the copyright protection against the freedom to conduct business,¹⁰⁸ the right to protection of personal data and the freedom to receive and impart information.¹⁰⁹

The ECJ followed the same approach in *SABAM V. Netlog*,¹¹⁰ a similar case to the aforementioned. SABAM, a Belgian collective management organisation, filed an injunction against Netlog, an online social network through which users could create profiles and share copyright protected content with each other. The defendant Netlog also claimed that granting SABAM's injunction would impose a general obligation to monitor the hosted content of its users, thereby breaching the protection of personal data under EU law. The case was brought before the ECJ which again noted that in those cases national courts and national authorities have to strike a 'fair balance' between the right to property and the fundamental rights of individuals that are

¹⁰⁸ Ibid para 46.

¹⁰⁹ Ibid para 50.

¹¹⁰ Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)* [2012] ECLI:EU:C:2012:85.

affected by the case. According to Kalimo, Meyer and Mylly, *'[t]he Court gives less voice to non-economic values such as data protection and freedom of expression so that its rhetoric does not expressly constitute value reconciliation.'*¹¹¹ In *SABAM v. Netlog* one can notice the economic approach underpinning the ECJ's reasoning, given that it stated emphatically that granting SABAM's injunction *'would result in a serious infringement of the freedom of the hosting service provider to conduct its business'*¹¹² while at the same time stating more subtly that *'the contested filtering system may also infringe the fundamental rights of that hosting service provider's service users, namely their right to the protection of their personal data and their freedom to receive or impart information (...).'*¹¹³ The critique regarding the above cases focuses on the vagueness in which the ECJ applies the concept of the 'fair balance'.¹¹⁴

The *Bonnier Audio* also concerned the same issue, namely the legitimacy of enforcement measures pertaining to the disclosure of ISP users' personal data. Bonnier Audio, a Swedish audio book publisher, brought an application for an order for disclosure against a Swedish ISP, 'ePhone', because the latter made available to its users via a file-sharing service, 27 audio books published by the former company. Bonnier Audio applied before the Solna District Court for an order for the disclosure of ePhone users' personal data. Ephone argued that the requested disclosure is against

¹¹¹ Harri Kalimo, Trisha Meyer and Tuomas Mylly, 'Of Values and Legitimacy – Discourse Analytical Insights on the Copyright Case Law of the Court of Justice of the European Union' [2018] 81 MLR 300.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Griffiths (n 106) 82.

Directive 2006/24.¹¹⁵ At first instance, the Solna District Court accepted the application for the order for the disclosure. Ephone then brought an appeal before the Stockholm Court of Appeal requesting the dismissal of the application for the order for the disclosure. The Court of Appeal held that in the respective Directive there is no provision that precludes the disclosure of subscribers' personal data by a party (in this case the ISP 'ePhone') to civil proceedings. Bonnier Audio subsequently appealed to the Supreme Court which stated that despite precedent decisions of the ECJ¹¹⁶ the question of whether EU law precludes the application of Article 53(c) of the Swedish law on copyright remains unanswered. Therefore, the Supreme Court referred the question¹¹⁷ of whether Directive 2006/24 precludes the application of the above national provision. The provision is based on Directive 2004/48¹¹⁸ and permits an ISP to give, in civil proceedings, a copyright holder or its representative information on the subscriber that used the IP address, which it is alleged that it was used in the infringement.

The ECJ held that Directive 2006/24 must be interpreted as not precluding the application of national legislation based on Directive 2004/48. The latter permits the disclosure of the IP address that the ISP's subscriber allegedly used in a copyright

¹¹⁵ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services and of public communications networks and amending Directive 2000/58/EC [2006] OJ L105/54.

¹¹⁶ In *Bonnier Audio* the ECJ referred to Case C-275/06 *Promusicae* [2008] ECR I-271, which it has been already analysed, and Case C-557/07 *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten* [2009] ECR I-1227.

¹¹⁷ Only the first question that the Supreme Court referred to the ECJ is quoted, since this one is the crucial for the present analysis and comparison with the precedent decision in *Promusicae*.

¹¹⁸ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195/16.

infringement. However, the most crucial point made by the Court is that Member States are required to strike a fair balance between competing fundamental rights protected by the EU legal order when transposing inter alia Directives 2002/58¹¹⁹ and 2004/48 into national law. As Griffiths notes the reference to the ‘fair balance’ demonstrates the Court’s recognition of the need to provide a legal construction for the right to property for the copyright holders. This time, in this case the fundamental rights regime led to the articulation of new rules in a certain area of the *acquis*.¹²⁰

The other category of ECJ’s case law consists of cases in which the Court resorted to the external system of fundamental rights for the interpretation of the exceptions and limitations laid down in the InfoSoc Directive. Before the analysis of the respective category, the deficiencies of the internal balancing system of copyright, namely the exceptions and limitations and the three-step-test of the InfoSoc Directive will be analysed. After that, the ECJ’s case law will be examined and following the case law the prominent suggested solutions will be discussed.

¹¹⁹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [2002] OJ L201/37.

¹²⁰ Griffiths (n 106) 81.

V. Copyright's internal system in deadlock

5.1 The problems of the limitations and exceptions system under the InfoSoc Directive

The problematic internal balancing system of exceptions and limitations along with the application of the three-step-test result in an insufficient copyright regime. The thesis will analyse the system under the InfoSoc Directive since during its application its flaws led to the refuge to fundamental rights regime. After the examination of the InfoSoc Directive the thesis will give an overview of the new system of exceptions and limitations that the DSM Directive provides for.

The need to ensure a fair balance between different interests of rightholders and third users has been already clear since the drafting of the InfoSoc Directive, which harmonises exclusive rights of the copyright holders. The need was reflected on Recital 31 of the Information Society Directive which reads as follows: *'A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more*

pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.' Consequently, in order for the Member States to respond to the obligation enshrined in Recital 31 a balancing system in the form of a closed list of exceptions and limitations has been adopted in Article 5 of the InfoSoc Directive.¹²¹

Article 5 of the InfoSoc Directive seems, at first sight, an essential balancing tool, which leads to the conclusion that the InfoSoc Directive has effectively contributed to the copyright harmonisation. Unfortunately, this is not the case. Article 5 and the internal balancing system of copyright are inherently flawed, thereby resulting in a fragmented framework.

If we look closely to Article 5 we will see that it stipulates 21 exceptions in paragraphs 1, 2, and 3. However, only the exception provided for in Article 5(1) is mandatory and the others in Article 5(2) and (3) are optional,¹²² which means that the

¹²¹ See here Recital 32 of the Information Society Directive 2001/29/EC: *'This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.'*

¹²² Article 5(2) InfoSoc Directive: *'Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases (...)'*.

Member States may enact as many or as few of the optional exceptions, as long as they are provided in the exhaustive list in Article 5(2) and (3).¹²³

The only mandatory exception enshrined in Article 5(1) reads as follows: *‘Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:*

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.’

The optional exceptions are enshrined in Article 5(2) and (3).

Article 5(2) provides for optional exceptions or limitations to the reproduction right for various purposes, which cover certain acts and can be summarised as follows:

(a) reproductions on paper or any similar medium, effected by the use of any kind of photographic technique provided that the rightholders receive fair compensation;

(b) reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation;

¹²³ Catherine Seville, *EU Intellectual Property Law and Policy* 49 (Edward Elgar 2009).

(c) specific acts of reproduction made by publicly accessible libraries, educational establishments or museums;

(d) in respect of ephemeral recordings;

(e) reproductions of broadcasts made by social institutions, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

Article 5(3) provides for additional exceptions with different purposes:

(a) use for the sole purpose of illustration for teaching or scientific research;

(b) uses, for the benefit of people with a disability;

(c) reproduction by the press;

(d) quotations for purposes such as criticism or review;

(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

(f) use of political speeches as well as extracts of public lectures;

(g) use during religious celebrations or official celebrations organised by a public authority;

(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(i) incidental inclusion of a work;

(j) use for the purpose of advertising the public exhibition or sale of artistic works;

(k) use for the purpose of caricature, parody or pastiche;

(l) use in connection with the demonstration or repair of equipment;

(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;

Article 5(4) provides that where Member States *‘(...) provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.’*

After the stipulation of the exceptions in Article 5(1) to (4), Article 5(5) stipulates that *‘[t]he exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only 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 interests of the rightholder’* incorporating in the InfoSoc Directive the so-called three-step-test following the relevant international provisions.¹²⁴

The above closed-list in Article 5(2) and (3) forms copyright’s internal balancing system with essentially crucial functions. Firstly, given the broad definition of the exclusive rights, this internal system of exceptions and limitations is the legal instrument which defines the exact scope of the exclusive rights.¹²⁵ Secondly, it offers balancing solutions to the thin relationship between the interests of right holders and the conflicting interests of users which emerge after the circulation of the copyrighted

¹²⁴ See the respective provisions at international level: Article 9(2) Berne Convention, Article 13 TRIPS and Article 10 WIPO Copyright Treaty (WCT).

¹²⁵ Thomas Dreier ‘Limitations: The Centerpiece of Copyright in Distress – An Introduction’ (2010) 1 JIPITEC 50 para 4.

works in the market.¹²⁶ The solutions provided for in the list vary: total exceptions, in the sense that neither a permission nor a payment is needed, and claims for compensation, in the sense that no permission is needed but ‘a fair compensation’ has to be paid.¹²⁷ Thirdly, it should be mentioned that limitations and exceptions do not benefit only the end-users.¹²⁸ They do not only concern the end-users but also examine the issue from a wider spectrum – the competition in the current information value-added production chain.¹²⁹

Despite the ambitious goals of the InfoSoc Directive for harmonisation in the respective fragmented field, the internal balancing system has not been effective enough. The first problem is that the exceptions and limitations provided for in the InfoSoc Directive are, in essence, optional; only one is mandatory, leaving the Member States the freedom to choose how many and which of the listed exceptions and limitations will transpose into their national jurisdictions. Notwithstanding the fact that the InfoSoc Directive was supposed to harmonise the copyright regime, it harmonised only the exclusive rights of the right holders.¹³⁰

Another particularity of the system is the wide margin of discretion on the part of Member States regarding the implementation of the list; Member States are not only free to choose the limitations and exceptions of the exhaustive list but are also free to

¹²⁶ Ibid.

¹²⁷ At this point, the focus is put on the differentiation between limitations laid down in Article 5(2)(a), (b) and (e), where the ‘fair compensation’ is provided for, and the other exceptions of Article 5.

¹²⁸ Dreier (n 125) 51.

¹²⁹ Ibid.

¹³⁰ Dreier (n 125) 52.

choose the way in which they want to implement them.¹³¹ More specifically, Article 5(2) to (5) provides for two categories of norms; the first category consists in specific norms, albeit under a broad wording, among which Member States can choose to legislate and the second category provides for general categories of situations for which Member States can adopt a limitation.¹³² However, given that the Directive does not provide for guidelines for determining the scope of the adopted limitations, Member States interpret differently the limitations while transposing them in their domestic legal regime. The different interpretation of the limitations of the list leads to a different implementation of the limitations enshrined in the Directive and, finally, to different rules-limitations among Members States for the same category of situations.¹³³ The list is implemented diversely among the EU creating a fragmented patchwork with different applicable rules for the same situations, creating obstacles to the cross-border services.¹³⁴

Contrary to its *prima facie* effectiveness, the list has not been proven effective nor flexible enough; it does not confer enforceable rights to end-users¹³⁵ while at the same time it can be overridden by contrary contractual provisions;¹³⁶ facts that diminish the effectiveness of the list regarding the position of the end-users. The list

¹³¹ Lucie Guibault, 'Why Cherry-Picking Never Leads to Harmonisation. The Case of the Limitations on Copyright under Directive 2001/29/EC' (2010) 1 JIPITEC 59.

¹³² Ibid 55 para 13.

¹³³ Ibid 58.

¹³⁴ Ibid.

¹³⁵ Sganga and Scalzini (n 43) 412, where it is mentioned that Member States and national courts do not see exceptions and limitations as subjective rights.

¹³⁶ Jonathan Griffiths, 'Unstriking the Center-Piece – The Liberation of European Copyright Law?' 1 (2010) JIPITEC 87 para 2.

is also characterised by a lack of flexibility. The lack of flexibility is connected to the lack of a US ‘fair use doctrine and the false conceptualisation of the three-step-test, provided for in Article 5(5).¹³⁷

The latter thus constitutes the third problem of the internal system, namely the way in which the three-step-test enshrined in Article 5(5) is implemented. It is demonstrated in the way national courts of Member States and the ECJ itself struggle to balance the conflicting interests that emerge in each case. The courts allow certain uses which are not expressly recognised in the national legislation, where it is assumed that the Member States must have transposed a certain number of exceptions and limitations, through the resort to doctrines external to the copyright *acquis*¹³⁸, namely the fundamental rights.

Another problem is the lack of clear guidelines regarding the fact that the exceptions and limitations provided for in the InfoSoc Directive can be overridden by contractual provisions. The Directive contains only few provisions on the issue and the main provision that actually may give an answer, even a blurred one, is found in Recital 45: *‘The exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law.’* The provision welcomes the conclusion of contractual agreements. However, can the contractual provisions with the purpose to ensure a fair compensation for the

¹³⁷ Dreier (n 125) 52.

¹³⁸ Bernt Hugenholtz and Martin Senftleben, ‘Fair Use in Europe. In Search of Flexibilities’ <<https://ssrn.com/abstract=1959554>> accessed 15 January 2020.

rightholders override the permitted uses under the list of exceptions and limitations? Some commentators give affirmative answer to the issue, while others argue that performance of certain uses without the permission of the rightholder is a parameter which is to be considered in the context of agreement regarding the price.¹³⁹

What also leads this internal system to deadlock along with the above mentioned, is the three-step-test this time laid down in Article 5(5).¹⁴⁰ The latter completes the puzzle of the internal balancing system in copyright, since the question of whether the exceptions and limitations in Article 5(1) to (4) are to be applied depends on the fulfillment of the cumulative requirements of the test.¹⁴¹ Here arise the problems regarding the three-step-test: they concern the recipient of the task of the implementation, namely whether it is the legislature or the judiciary, and the implementation of the test, namely whether it should serve as a legal instrument broadening or restricting the scope of the closed-list of exceptions. At the international level, where the three-step-test enshrined in Article 5(5) has its origin, the respective test is regarded as prohibiting the introduction of limitations and exceptions in a way that it is not compatible with its conditions.¹⁴² More specifically, its roots are found in Article 9(2) of Berne Convention,¹⁴³ Article 13 TRIPS¹⁴⁴ and

¹³⁹ Guibault (n 131) 59.

¹⁴⁰ See briefly Geiger's opinions on the problematic implementation of the three-step-test due to its 'uncertain' and 'contestable' use: Christophe Geiger 'Three-Step Test, 'A Threat to a Balanced Copyright Law?' (2006) 37 IIC 683.

¹⁴¹ It is clearly expressed in the Recital 44 of the InfoSoc Directive: '*Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the right holder or which conflicts with the normal exploitation of his work or other subject-matter*'.

¹⁴² Griffiths (n 136) 88.

¹⁴³ Article 9(2) of Berne Convention: '*It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction*

Article 10¹⁴⁵ of the WIPO Copyright Treaty. It is obvious that these provisions have the same wording but the incorporation of the three-step-test in the InfoSoc Directive raises the question who is the legal addressee of this instrument; the legislator when transferring a certain limitation to the national law or the judge when examining the application of a limitation that is invoked in a certain case brought before it.¹⁴⁶ The provision of Article 5(5) of the InfoSoc Directive seems to have a broader scope, in the sense that the provision is to be taken into account not only by the national legislature but also by the national judiciary.¹⁴⁷ According to Geiger, the latter poses the risk for the system of limitations to be challenged by the judiciary of Member States. This risk poses a burden of responsibility on the courts, especially in case of restrictively implementing the test, since a use *a priori* falling under a limitation provided for in national law could be *a posteriori* regarded as unlawful bringing as consequence legal uncertainty and the hesitation of the users to rely upon stipulated limitations.¹⁴⁸ The latter has already appeared in the case *Mulholland Drive* delivered

does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author’.

¹⁴⁴ Article 13 TRIPS: ‘Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder’.

¹⁴⁵ Article 10 WIPO Copyright Treaty: ‘Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author’.

¹⁴⁶ Christophe Geiger, ‘The Role of the Three-Step-Test in the Adaptation of Copyright Law to the Information Society’ e-Copyright Bulletin (2007) 13.

¹⁴⁷ Ibid 15.

¹⁴⁸ Ibid.

by the French Supreme Court.¹⁴⁹ The respective case constitutes a clear illustration of the problems relating to the three-step-test. It concerned the application of the exception of private copying under the French Intellectual Property Code. A purchaser of a DVD of the film ‘Mulholland Drive’ tried to copy the DVD for private use unsuccessfully due to the technical protection measures that have been applied by the film producers to prevent the respective acts. The case has been brought before the French Supreme Court which interpreted the applicable provisions of the national law in light of the three-step-test holding for the first time¹⁵⁰ that the applicant could not rely on the provision of the private copying exception against the enforcement of technical protection measures. According to its view, the private copying exception conflicts with the ‘normal exploitation’ of the film. In other words, the Court used the second requirement of the three-step-test in a significantly broad sense and without providing for any definition of the term, to avoid the application of a statutory provision under French law, which permitted the respective act of copying for private use. The Court did not continue to the examination of the third step of the test since according to its view, when a conflict with the ‘normal exploitation’ arises there is no need for further analysis. This is the main mistake, apparent in the Court’s reasoning, that leads until now to a misleading conceptualisation of the test. This is the main problem with accepting that the three-step-test can be implemented directly by the judiciary; while the test is formed to apply after a cumulative assessment of its

¹⁴⁹ Cour de cassation française, Case 05-15824, February 28, 2006, Mulholland Drive: JCP éd. G 2006, II, 10084.

¹⁵⁰ Geiger (n 146) 16.

requirements, the courts assess the requirements merely quantitatively.¹⁵¹ Thus, the test is understood as consisting of three separate but decisive factors, the steps, with the application of each being conditioned on the fulfillment of the former one. That is the reason why the French Supreme Court stopped its analysis on the second step and did not continue to the third one. The focus that the Court puts on the commercial interests of the copyright owner leads to the prevalence of the right holder's commercial interests over the public interest that constitutes the justification basis of the exceptions and limitations, regardless of the particularity of the respective case.¹⁵² On top of everything mentioned, the fragmentation of the InfoSoc Directive's system can be found in the problematic regulation of the technological protection measures (hereinafter: TPMs) laid down in Article 6 of the Directive.¹⁵³ The 'sclerosis' of the system is enhanced by the TPMs which cover the space left to the exceptions and limitations. The two concepts are inherently conflicting, since the limitations and exceptions enhance the access and the dissemination of copyright protected works, while TPMs, in contrast, enhance the protection of the exclusivity.¹⁵⁴ What causes the main problem is that the InfoSoc Directive does not provide for a clearly defined regulation of the relationship of the two concepts.¹⁵⁵ Apart from it, it privileges

¹⁵¹ Guisepppe Maziotti, *EU Digital Copyright Law and the End-Users* (Springer Verlag Heidelberg 2008) 303.

¹⁵² Ibid 304.

¹⁵³ Article 6 para 1 Directive 2001/29: '*Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.*'

¹⁵⁴ Quintais (n 51) 6.

¹⁵⁵ Sganga and Scalzini (n 43) 415.

private autonomy in Article 6(4)¹⁵⁶ overlooking the differences in the parties' bargaining powers.¹⁵⁷

5.2 The new system of limitations and exceptions introduced by the Digital Single Market Directive

As it has been mentioned above in Section III.3.2, the new exceptions and limitations system is provided for in Title II of the DSM Directive which covers Articles 3 to 7. The system aims at providing effective measures that correspond to the challenges of the digital and cross-border environment. The new system includes welcome changes that can potentially alter the prior problematic scenery. However, at the same time, it cannot be overlooked that the newly introduced system is primarily based on the InfoSoc Directive's system¹⁵⁸ which creates doubts regarding the consequences of its implementation.

¹⁵⁶ Article 6(4)(1) Directive 2001/29: *'Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.'*

Article 6(4)(2): *'The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.'*

¹⁵⁷ Sganga and Scalzini (n 43) 415.

¹⁵⁸ Quintais (n 5) 4.

The most drastic change that this Directive brings is that the measures laid down in Articles 3 to 7 are defined as mandatory, thereby leaving behind the optional list of Article 5 of the InfoSoc Directive which caused a problematically fragmented system.¹⁵⁹

Articles 3 and 4 include TDM-related exceptions. More specifically, Article 3¹⁶⁰ stipulates an exception for acts concerning scientific research and is connected with the former Article 5(3)(a) of the InfoSoc Directive.¹⁶¹ Article 4 stipulating an exception for acts of reproduction and extraction of lawfully accessed works¹⁶² can provide legal certainty for the acts that did not fall under Article 5(1) of the InfoSoc Directive.^{163,164}

¹⁵⁹ Ibid 7.

¹⁶⁰ Article 3(1) Directive 2019/790: *'1.Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, and Article 15(1) of this Directive for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access.'*

¹⁶¹ Article 5(3)(a) Directive 2001/29: *'Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;'*

¹⁶² Article 4(1) Directive 2019/790: *'Member States shall provide for an exception or limitation to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC and Article 15(1) of this Directive for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining.'*

¹⁶³ Article 5(1) Directive 2001/29: *'Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2'*

¹⁶⁴ Quintais (n 51) 8.

Article 5 of the DSM Directive stipulates an exception for the use of works in digital and cross-border activities.¹⁶⁵ However, it covers only ‘the purpose of illustration for teaching’ excluding uses by other institutions while it is subject to further conditions. In addition, the second paragraph of the Article stipulates that ‘(...) *Member States may provide that the exception or limitation adopted pursuant to paragraph 1 does not apply or does not apply as regards specific uses or types of works to the extent that suitable licences authorising the acts referred to in paragraph 1 of this Article and covering the needs and specificities of educational establishments are easily available on the market.*’ This possibility of exclusion is highly criticised since it overlooks the public interest and the fundamental rights dimension that underlie the exceptions and limitations system.¹⁶⁶

Finally, Article 6 stipulates exception for acts of reproduction of certain works carried out by cultural heritage institutions for purposes of preservation.¹⁶⁷

Almost all the above mentioned exceptions, except for the exception laid down in Article 4, cannot be overridden by contractual provisions.¹⁶⁸ This change which will

¹⁶⁵ Article 5(1) Directive 2019/790: ‘*Member States shall provide for an exception or limitation to the rights provided for in Article 5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC, Articles 2 and 3 of Directive 2001/29/EC, Article 4(1) of Directive 2009/24/EC and Article 15(1) of this Directive in order to allow the digital use of works and other subject matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, on condition that such use: (a) takes place under the responsibility of an educational establishment, on its premises or at other venues, or through a secure electronic environment accessible only by the educational establishment's pupils or students and teaching staff; and (b) is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.*’

¹⁶⁶ Quintais (n 51) 9.

¹⁶⁷ Article 6(1) Directive 2019/790: ‘*Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) of Directive 2009/24/EC and Article 15(1) of this Directive, in order to allow cultural heritage institutions to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for purposes of preservation of such works or other subject matter and to the extent necessary for such preservation.*’

create a stable and predictable framework, providing legal certainty and leaving behind the InfoSoc Directive's fragmented patchwork of exceptions and limitations. However, the connection of the new system with the precedent one still hinders the simplification of the system; the fact that the above new exceptions are subject to the three-step-test laid down in Article 5(5) , which is mostly interpreted by the ECJ strictly, and partly to Article 6(4) will narrow their scope.¹⁶⁹

In conclusion, despite the welcome developments of the new system, especially as regards its mandatory character, it is highly questionable whether it will lead to a simplified and harmonised regime that corrects the InfoSoc Directive's flaws.¹⁷⁰ At this point, we can only have an overview of the deficiencies of the precedent regime and only make assumptions about the consequences that the new regime will cause. We have to wait for the implementation of the new copyright system and the new landscape in the EU copyright field that will be shaped.

VI. The ECJ's case law on the interpretation of exceptions and limitations and the three-step-test laid down in the InfoSoc Directive

After analysing the problems of the internal balancing system of the copyright *acquis* and the new system that the DSM Directive introduces, the relevant case law of the

¹⁶⁸ Article 7(1) Directive 2019/790: '*Any contractual provision contrary to the exceptions provided for in Articles 3, 5 and 6 shall be unenforceable.*'

¹⁶⁹ Article 7(2) Directive 2019/790: '*Article 5(5) of Directive 2001/29/EC shall apply to the exceptions and limitations provided for under this Title. The first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to Articles 3 to 6 of this Directive.*'

¹⁷⁰ Quintais (n 51) 11.

ECJ follows. As it is mentioned above, the ‘sclerosis’ of the system, due to the lack of flexible clauses, is also reflected on the ECJ’s decisions. In these decisions, the Court resorted to the fundamental rights regime in order to fill the gaps and correct the deficiencies of the current system. Unfortunately, the Court’s reasoning was delivered in an unclear way, resulting in multiple contradictory decisions. Therefore, instead of offering clear and consistent solutions, the copyright regulation is even more blurred than before.¹⁷¹

The first decision in which the ECJ dealt with the interpretation of exceptions and the three-step-test was in the *Infopaq*¹⁷² case. Infopaq, a media monitoring and analysis business, selected summaries of certain articles from Danish daily newspapers and other periodicals and sent those articles to its customers by e-mail. Infopaq used the ‘data capture’ process comprising of the following five phases: in the first phase the selected publications are registered manually in an electronic database; in the second phase, the selected and stored publications are scanned and TIFF files are created for each page; in the third phase the TIFF files are converted in text; in the fourth phase the converted text file is processed so that the search work can be found each time through the capture of an extract of 11 words comprising of the five words which come before and after the search word; in the last phase, a cover sheet is printed out taking into all the pages that include the search word.

¹⁷¹ Geiger (n 100) 446, where he characterises the ECJ’s role as disruptive regarding the interpretation of the limitations and exceptions system and the application of the three-step-test. See also Kalimo, Meyer and Mylly (n 111) 282 for analysis of the ECJ’s case law under discourse analysis approach.

¹⁷² Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569.

The DDF, a professional association of Danish newspaper publishers aiming at protecting its members against copyright infringements, complained to Infopaq for not obtaining authorisation from the relevant rightholders. Infopaq brought an action against DDF before the court requesting to order DDF to acknowledge that Infopaq can use the respective process without the consent of DDF or of its members. After the rejection of Infopaq's request it brought an appeal before the referring court.

The main dispute was whether the actions carried out through the 'data capture' are considered as reproduction acts enshrined in Article 2 and in case of an affirmative answer, if both actions are covered by the exception laid down in Article 5(1) of the InfoSoc Directive.

The ECJ held that the extract of 11 words of a protected work, which is stored and printed out falls under the concept of reproduction in part within the meaning of Article 2 of the InfoSoc Directive.¹⁷³ However, the most crucial part of the decision concerns the ECJ's view on the interpretation of Article 5(1) and the application of Article 5(5). It stated that while examining whether the act in question fulfills the cumulative requirements of the aforementioned exception it must be taken into account that *'(...) the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly'¹⁷⁴(...)*. It formed a scheme under which the reproduction right enshrined in Article 2 is the general principle while a reproduction act covered by Article 5(1) is the derogation. In

¹⁷³ Ibid para 51.

¹⁷⁴ Ibid paras 56-57.

addition, the Court also stated that the interpretation of Article 5(1) is to be carried out in light of the three-step-test enshrined in Article 5(5).¹⁷⁵

The Court's reasoning regarding the interpretation of both provisions seems problematic. The first conclusion on the narrow interpretation of Article 5(1) is a problematic generalisation of the method of narrow interpretation and as such can lead to a falsely disguised harmonisation of this field of copyright which is not harmonised in the Directive itself and is in fact undemocratic.¹⁷⁶ Not only the conclusion of the narrow interpretation of the exceptions is questionable but also the conclusion of the three-step-test as an instrument to assist together with the narrow interpretation to the application of exceptions favouring right holders. At international law level, under the Berne Convention and the TRIPS,¹⁷⁷ the three-step-test was addressed to the national legislature and restricted it to introduce exceptions which do not fulfill the requirements of the test. Under Article 5(5) of the InfoSoc Directive the judiciary also becomes an addressee of the test given that in order to apply the test he has to make sure that its requirements are fulfilled. However, in *Infopaq* the three-step-test seems to have taken an extended role which has never been suggested in any legal provision. In *Infopaq*, the ECJ applied the three-step-test together with the principle of narrow interpretation to justify the application of exceptions in favour of the right holders.

¹⁷⁵ Ibid para 58.

¹⁷⁶ Griffiths (n 136) 88.

¹⁷⁷ More specifically Article 9(2) Berne Convention and Article 13 TRIPS Agreement.

In later cases, the Court changed its view, focusing on the interpretation of the exceptions and limitations and taking into account their objective and their justifications.¹⁷⁸ More specifically, in *FAPL*,¹⁷⁹ a case which concerned the right to communication to the public enshrined in Article 3 of the InfoSoc Directive, the ECJ while examining the interpretation of Article 5, the application of which has been called upon question, stated that ‘(...) *the interpretation of those conditions must enable the effectiveness of the exception thereby established to be safeguarded and permit observance of the exception’s purpose.*’¹⁸⁰

In *Deckmyn*,¹⁸¹ the Court confirmed its view and moved away from the narrow interpretation of limitations. The case concerned a drawing on the cover page of calendars that Deckmyn handed out on a reception and that was an altered version of the drawing of a political comic completed by Vandersteen. The latter brought an action against Deckmyn for infringement of copyright. Before the Court of Appeals, Mr Deckmyn and the Vrijheidsfonds argued that the specific drawing was a political cartoon which fell within the scope of parody accepted under point (6) of Article 22(1) of the Law of 30 June 1994 on Copyright and Related Rights. Vandersteen and Others argued that parody must fulfill certain criteria which in the

¹⁷⁸ As Geiger mentions the entry into force of the Treaty of Lisbon affected the situation. See Geiger (n 72) 28.

¹⁷⁹ Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen* [2011] ECR I-09083.

¹⁸⁰ *Ibid* para 163.

¹⁸¹ Case C-201/13 *Johan Deckmyn, Vrijheidsfonds VZW v Helena Vandersteen, Christiane Vandersteen, Liliana Vandersteen, Isabelle Vandersteen, Rita Dupont, Amoras II CVOH, WPG Uitgevers België* [2014] ECLI:EU:C:2014:2132.

case at issue were not met. The Court of Appeal referred to the ECJ questions regarding the concept of ‘parody’ and the conditions that must be met in each case.

The Court after stating that the concept of parody, as it appears in the provision of Article 5(3)(k) of the InfoSoc Directive, is an autonomous concept,¹⁸² held explicitly that a restrictive transposition of exceptions and limitations in the national laws of the Member States would be incompatible with the objective of the InfoSoc Directive, namely the harmonised legal framework among Member States.¹⁸³ It confirmed the position that was taken in *FAPL* on the interpretation of exceptions and limitations in the light of their objective to strike a fair balance between the competing fundamental rights in each case.¹⁸⁴ In *Deckmyn*, the ECJ held, in conclusion, that parody is covered by the freedom of expression and thus a fair balance had to be struck between the reproduction right and the right of communication to the public and the freedom of expression of a user of a protected work who invokes the exception laid down in Article 5(3)(k).¹⁸⁵

The ECJ’s shift of view from the narrow to liberal interpretation of exceptions and limitations was welcomed, given that in this way a more comprehensive application of the system could be achieved.¹⁸⁶ In addition, given the need for flexibility of the exceptions and limitations system and the human rights nature inherently present in

¹⁸² Ibid paras 14-17.

¹⁸³ Ibid para 24.

¹⁸⁴ Ibid para 25.

¹⁸⁵ Ibid paras 28-34.

¹⁸⁶ Christophe Geiger, Jonathan Griffiths, Martin Senftleben, Lionel Bently and Raquel Xalabarder, ‘Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion of the European Copyright Society on the Judgement of the CJEU in Case C-201/13’ (2015) 46 ICC 93.

the copyright regime the adoption of a purposive interpretation should have been preferred.¹⁸⁷

The ECJ confirmed the above analysed view in *Painer*¹⁸⁸ as regards the right of quotation laid down in Article 5(3)(d). The case concerned a photo of an Austrian girl taken by the freelancer photographer Painer. After the abduction of the Austrian girl, and since only Painer's photos were current, Austrian and German authorities used the same photos that the security authorities launched but without indicating Painer as the photographer. Painer brought an action before the Austrian Court for copyright infringement, since the reproduction of photos was carried out without her consent and without even indicating her as author.

The Austrian Court referred to the ECJ the question on the required conditions under which photographs can be published without the author's consent and the conditions in which the protected photographs and generally a protected work can be quoted.

The ECJ after mentioning that the essential purpose of the press in a democratic society is to inform the public and that in order for this function to be achieved only the strictly necessary restrictions are permitted,¹⁸⁹ it held that Article 5(3)(d) of the InfoSoc Directive aimed at striking a fair balance between the users' right of freedom of expression and the reproduction right of the right holders.¹⁹⁰ In conclusion, it held that in *Painer* the fair balance is carried out by privileging the exercise of the right to

¹⁸⁷ Ibid 97.

¹⁸⁸ Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co. KG, Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co. KG* [2013] ECR I-12533.

¹⁸⁹ Ibid paras 113-114.

¹⁹⁰ Ibid para 134.

the freedom of expression of the users over the interest of the author to prevent the reproduction of extracts from his work even in case in which they have been made available lawfully to the public.¹⁹¹ The Courts' decision is a clear indication of its view that the interpretation of Article 5(3)(d) is a task that is to be carried out within the regime the ECFR provisions forms.¹⁹²

Another example of the ECJ's resort to fundamental rights is found in *DR and TV2 Danmark*.¹⁹³ The Court continued with the broad interpretation of the provision laid down in Article 5(2)(d). DR and TV2 Danmark, a public radio and television broadcasting organisation and a commercial public television broadcasting organisation respectively, which broadcast programmes produced internally or by third parties with the conclusion of specific agreements. The dispute between DR and TV2 Danmark and NCB, a company which administers the rights to record and copy music for composers and songwriters concerns the issue whether Article 5(2)(d) covers recordings made by third parties pursuant to a subcontract with the broadcaster.

The ECJ followed again the broad interpretation of the provision and referred to fundamental rights laid down in the ECFR. According to its view, a broad interpretation of Article 5(2)(d) of the InfoSoc Directive means that the provision covers ephemeral recordings made not only at broadcasting organisation's own

¹⁹¹ Geiger (n 100) 445.

¹⁹² Jonathan Griffiths, 'Taking power tool to the acquis – The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law' in Christophe Geiger, Craig Allen Nard and Xavier Seuba (eds), *Intellectual and the Judiciary* (Edward Elgar 2018) 151.

¹⁹³ Case C-510/10 *DR, TV2 Danmark A/S v NCB — Nordisk Copyright Bureau* [2012] ECLI:EU:C:2012:244.

facilities but also at the facilities of any third party acting on behalf of or under the responsibility of that organisation. This interpretation allows broadcasting organisation to have a '*greater enjoyment to conduct a business, set out in Article 16 of the Charter of Fundamental Rights of the European Union, while at the same time not adversely affecting the substance of copyright.*'¹⁹⁴

The above mentioned ECJ decisions indicate the Court's shift of view. From the strict and narrow interpretation, it went to a broad and purposive interpretation of exceptions and limitations. Unfortunately, the ECJ does not hold a stable and consistent position on the issue. In *ACI Adam*,¹⁹⁵ and despite its reasonings in the previous decisions, the Court returned to the restrictive interpretation.¹⁹⁶ More specifically, in order to solve the issue in the respective case, which concerned whether the private copy exception laid down in Article 5(2) covers also the copies of a protected work that have been made available unlawfully, it used the three-step-test to exclude from the scope of this provision the unlawful reproductions.¹⁹⁷

The blurred and inconsistent position of the ECJ is perfectly illustrated by the fact that a restrictive interpretation of limitations was adopted again in *ACI Adam*, while two weeks prior it held a different position in *UPC Telekabel*.¹⁹⁸ The case concerned the attempt by two film production companies to force UPC Telekabel, an ISP, to

¹⁹⁴ Ibid para 57.

¹⁹⁵ Case C-435/12 *ACI Adam BV and Others v Stichting de ThuisKopie, Stichting Onderhandeligen ThuisKopie vergoeding* [2015] ECLI:EU:C:2014:254.

¹⁹⁶ Ibid paras 22-23.

¹⁹⁷ Ibid para 58.

¹⁹⁸ Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft GmbH* [2014] ECLI:EU:C:2014:192.

block the access to its customers to websites which made available cinematographic works without their consent.

While examining whether it is compatible with the EU law to prohibit an ISP from allowing its customers to access certain websites, which contain unauthorised material, and the parameters that the addressee of an injunction has to take into account, the ECJ mentioned that ‘ (...) *when the addressee of an injunction such as that at issue in the main proceedings chooses the measures to be adopted in order to comply with that injunction, he must ensure compliance with the fundamental right of internet users to freedom of information.*’¹⁹⁹

As indicated through these decisions, it is clear that the ECJ has not held a consistent position on the issue until now. Its case law on the issue constitutes the perfect example of the role of the ECJ. As Geiger²⁰⁰ notes, the ECJ’s position has a harmonising, creative but also a disruptive effect due to the lack of consistency in its decisions. The Court’s case law adds even more complexity to the fragmented and full of gaps copyright *acquis*. The Court has often used the route of ‘autonomous concepts of EU law’ in many cases that have been brought before it. In this way, the role of the Court is both a harmonising and a creative one. The respective method, which has been characterised as an ‘express’ harmonisation, consists in the imposition of a uniform interpretation of the list of exceptions and limitations.^{201,202}

¹⁹⁹ Geiger (n 100) 445.

²⁰⁰ Ibid.

²⁰¹ Raquel Xalabarder, ‘The Role of the CJEU in Harmonising EU Copyright Law’ (2016) 47 IIC 638.

Apart from the latter, the Court ‘renews’ the legal sources as a basis for the solutions that it offers playing this time a creative role.²⁰³ The ECJ resorts frequently to the fundamental rights regime even in the cases concerning the interpretation of Article 5 of the InfoSoc Directive. However, the Court’s role seems at the same time disruptive. It moves from the narrow interpretation of the list laid down in Article 5 (in *Infopaq*), to an interpretation in light of the objectives of the exceptions and limitations (in *FAPL* and *Deckmyn*). It uses fundamental rights as a basis of interpretation (*Painer* and *UPC Telekabel*) and, finally, it returns back to the restrictive interpretation (*ACI Adam*).

The disruptive role that the ECJ possesses but also the harmonisation effort that the Court attempts is problematic. It has been argued that the ECJ while delivering decisions in a stable and consistent way achieves what the InfoSoc Directive itself has not achieved: the harmonisation of the fragmented copyright *acquis* not only in the field of the exclusive rights but also in the field of the exceptions and limitations.²⁰⁴

VII. Suggested solutions to the deficiencies of the copyright *acquis*

Given the ‘sclerosis’ of the existing copyright system, different solutions have been suggested and have been already implemented by the judiciary. There are two main

²⁰² More specifically in *Deckmyn* and *Painer*, mentioned above, dealing with parody and quotation right respectively, it held that Member States can choose to adopt the limitation or exception from the relevant list of Article 5 but not their scope.

²⁰³ Geiger (n 100) 442.

²⁰⁴ Xalabarder (n 201) 639.

solutions:²⁰⁵ the first solution is to ‘constitutionalise’ the general field of intellectual property addressed to the judiciary and the alternative solution is to correct the internal balancing system addressed to the legislature. The judiciary is already confronted with the balancing problems between the competing interests, yet cannot offer legislative solutions such as those provided for in the *acquis*. The lack of legislative solutions has led the national courts of the Member States as well as both the ECJ and the ECtHR to resort to external legal instruments to strike a fair balance. Therefore, the solutions already implemented, consist in the resort to competition law, to media law, to the theory of abuse of rights and to the application of fundamental rights.^{206,207}

The resort to a fundamental rights regime described as ‘constitutionalisation’ is inextricably linked to the broader assumption of the social function of law and thus of any legal rule.²⁰⁸ The starting point is the legitimacy of positive law.²⁰⁹ Positive law consists of statutory provisions which in an abstract wording describe actions and the legal consequences which they entail. But where is its legitimacy derived from? The answer, according to many legal philosophers, is found in the purpose of positive law

²⁰⁵ Other solutions that have been suggested is the abuse of right doctrine or the introduction of open clauses- open norms into the copyright system to provide it with flexibility.

²⁰⁶ Christophe Geiger, “‘Constitutionalising’ Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union’ (2006) 37 4 IIC 390.

²⁰⁷ The other fields of law are merely mentioned here to obtain a broad overview of the ECJ’s practice. However, the present thesis focuses exclusively on the the application of fundamental rights in the copyright regime.

²⁰⁸ Christophe Geiger ‘The Social Function of Intellectual Property Rights, or How Ethics can Influence the Shape and Use of IP Law’ in Graeme B. Dinwoodie (ed), *Intellectual Property Law: Methods and Perspectives* (Edward Elgar 2013) 153.

²⁰⁹ Ibid.

to serve the common good, the overall welfare.²¹⁰ The moment this purpose is not served anymore, the rights lose their legitimacy.²¹¹ Thus, the statutory rights are just and legitimate to the extent they serve a public interest and must, therefore, always be restricted.²¹² In order for this to be achieved, the concept of balance is employed to draw the line between the conflicting rights through which the interests are represented and finally they set the limits in which the rights are legitimate.²¹³ The concept of balance is also applied in the field of property rights which are incorporated into national constitutions.²¹⁴ What is crucial for the ‘constitutionalisation’ of intellectual property rights is the following: given the social function of property rights, the inclusion of intellectual property rights within the constitutional protection of property rights extends the property rights’ social function to additionally cover intellectual property.²¹⁵

Apart from the social function that the intellectual property will gain, the ‘constitutionalisation’ of the field will elevate its position in the legal order, namely

²¹⁰ Ibid 157.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Ibid 167-176. Geiger mentions the means of the implementation of the social function of intellectual property rights: firstly, by the legislature, when it confers rights drawing the scope of the rights and the scope of the exceptions and limitations taking into account for the latter the fundamental rights that have to be guaranteed; by the judiciary which can make use not only the internal mechanisms of intellectual property, namely the interpretation of the exceptions and limitations system, but also the external mechanisms, namely the fundamental rights. In the latter case the judge can employ the abuse of right doctrine. According to the doctrine, when a right holder exercises his right in a way, which diverts from the purpose of right, the right holder exercises it abusively. Except for the abuse-doctrine, which includes its own deficiencies regarding the burden of proof of the abuse, the judges can more efficiently use directly fundamental rights within the proportionality test that they carry out; the proportionality test inherent within the concept of balance that accompanies the application of fundamental rights aims at the exercise of rights in accordance with their purpose, namely their social function.

the hierarchy of norms and their binding force as regards the legislature when it legislates legal provisions transposing directives into national legal systems and the judiciary when it balances conflicting rights that emerge in disputes.

‘Constitutionalisation’ means the incorporation of certain provisions in the constitutional legal order. The effect this has on the rights incorporated is that the rights acquire a high level of protection in the legal order; once a certain right is protected under constitutional law, it holds the highest position in the hierarchy of norms. Fundamental rights are traditionally protected under constitutional law. The other particularity of fundamental rights, except for the high level position in the hierarchy of legal norms, is that they possess a synthesis of both natural law and utilitarianism which constitute the two justifications of copyright protection. The fundamental rights regime can therefore be connected with intellectual property and copyright in particular. Nonetheless, intellectual property and fundamental rights are closely connected due to the human-centered and societal aspect of both regimes.

Considering these particularities of fundamental rights, the penetration of the fundamental rights regime in the copyright entails the following consequences:

(i) Fundamental rights can function as a new, balanced framework for copyright law.²¹⁶ As fundamental rights possess the highest status in the hierarchy of legal norms, they are protected under national constitutions and therefore, they bind not only the judiciary but also the legislature to respect them. For instance, Member States’ legislatures have to take into account fundamental rights in the EU legal order

²¹⁶ Geiger (n 206) 382.

and in their national constitutions when the Directives, that are to be transposed, leave them a certain margin of appreciation.²¹⁷ As far as the judiciary is concerned, fundamental rights can serve as a corrective basis in cases where the legislation does not correspond to the values incorporated in national constitutions – values which are inherent in the fundamental rights regime and bind Member States’ legislatures.²¹⁸ What can provide a stable and balanced framework is the method through which the tension between the property right and personality right will be balanced. Given the equality that exists between fundamental rights, since there is no hierarchical link between them, the protection of copyright is treated as a property right and the competing personality rights are confronted by different fundamental rights (e.g., freedom of expression, freedom of information or the right to privacy). The respective scheme is clear enough to allow the courts to carry out the proportionality test while weighing the conflicting rights.²¹⁹ The acceptance of the regime as copyright’s new foundation would ‘internalise’ the conflict between property rights and human rights under the ‘fundamental rights scheme’, leaving only the judiciary to determine whether the application of a certain copyright provision complies with the existing fundamental-rights objective.²²⁰

²¹⁷ Graig and de Búrca, *EU Law: Text, Cases and Materials* (3rd edn, Oxford University Press 2003) 337.

²¹⁸ Geiger (n 206) 374.

²¹⁹ *Ibid* 385.

²²⁰ *Ibid* 397.

(ii) The fundamental rights regime can guide the reorganisation of the copyright regime.²²¹ The interference of a new basis with the copyright regime will affect the regime in its current form. The currently applied principles, such as the restrictive interpretation of the exceptions and limitations as well as the reading of the three-step-test applied by the ECJ cannot find justification in a fundamental-rights copyright system.²²² Thus, the penetration of the fundamental rights regime can serve to correct the internal copyright balancing system. The exceptions and limitations are already based on fundamental rights and they should not be considered mere interests but rather rights of users.²²³ On the other hand, the fundamental rights regime will affect the other internal balancing mechanism, namely the three-step-test which will have to be read reversely starting from the third step which requires a balance between the competing interests.²²⁴

The other consequence that the fundamental-rights new foundation will bring is a graduated protection system.²²⁵ In a fundamental-rights based system the justification of protection is differentiate the scope of protection. That means that different works will enjoy different degree of protection; creativity and investment as protection justifications will no longer lead to the same degree of protection,²²⁶ but rather to a

²²¹ Ibid 385

²²² Ibid 398.

²²³ Geiger (n 206) 401.

²²⁴ Ibid 398.

²²⁵ Ibid.

²²⁶ Ibid 402.

broad protection when the level of creativity is high and to a narrow protection in the case of investment.²²⁷

(iii) Finally, the acceptance of the interference of fundamental rights in the copyright regime, ‘allows the subject matter to be “humanised”’.²²⁸ By interference is meant the advent of the spectrum of fundamental rights and constitutional rights in the copyright regime which has been examined so far exclusively under the economic spectrum.²²⁹ In this way, the copyright regime will gain back the legitimacy through the recovery of its social function.²³⁰ Leaving behind the existing gap between the regulation of copyright and the society, due to overprotection tendencies, the copyright *acquis* will acquire again its lost coherence.²³¹

Despite the advantages, this solution also contains flaws. The flaws consist in the lack of normative criteria under which the conflict between copyright and fundamental rights has to be solved;²³² the false assumption of the equality between all fundamental rights²³³ even if the cases concern always the conflict between the right to property and other individual freedoms (e.g., freedom of expression, right to privacy, right to conduct business). What is regarded as problematic is the assumption that since all fundamental rights are of equal value with no hierarchical order between

²²⁷ Ibid 403.

²²⁸ Christophe Geiger, ‘Fundamental Rights, a Safequard for the Coherence of Intellectual Property Law?’ (2004) 35 3 IIC 279.

²²⁹ Ibid 406.

²³⁰ Ibid 280.

²³¹ Ibid.

²³² Alexander Peukert, ‘The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature’ in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2016) 134.

²³³ Ibid 135.

them, the same balancing method should be applied. However, it is mentioned that individual freedoms require a ‘preceding state activity’ and more specifically the lack of such an activity.²³⁴ They protect human activities against unjustified state activities introducing ‘the principle of equal negative liberty’ and the emerging conflicts have to be balanced under the principle of *praktische Konkordanz* (consistency in practice).²³⁵ On the other hand, the right to property, given its substantially different subject matter, which does not concern any human activity but the enjoyment of property rights based on a legal basis, has to be confronted with different rules. Peukert notes that there is a paradox inherent within the fundamental right to property. As the right is vested through provisions written by the state legislators, the right is a result of state activity. However, the right to property is also protected from unjustified state interference.²³⁶ Peukert suggests as a solution to the paradox the justification paradigm. Under the paradigm, the justification paradigm. Before the creation of an IP right, when the legislature interferes with the public domain granting the owner a certain right, the interference has to be justified.²³⁷ After the creation of an IP right the justification method is different. In this case the interference of the legislature does not concern the public domain but the fundamental right to property and it must, therefore, be lawful and pursue a legitimate aim with proportionate means.²³⁸ According to Peukert the latter method, the justification paradigm,

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Ibid 141.

²³⁷ Ibid.

²³⁸ Ibid 142.

established in constitutional courts offers *‘an advanced constitutional methodology which promises a more coherent, comprehensive and transparent reasoning than a mere balancing of competing interests.’*^{239,240}

Apart from the above mentioned opinions that focus on ‘constitutionalising’ copyright law, the alternative solution, that is also strongly supported by scholars, concerns the correction of copyright’s deficiencies internally through the amendment of certain provisions or the change of their established interpretation by the courts. The deficiencies of the *acquis* stem from a bundle of factors – as it has been mentioned in Sections II and IV. The *acquis* is harmonised and regulated with directives instead of regulations which would lead to uniform law. This is how the fragmentation of the system is created which in combination with the inflexible balancing system of exceptions and limitations and the three-step-test hinder the exercise of the users’ rights and the adaption of the system to the rapidly emerging developments of the digital economy and the information society.

The second suggested solution to these problems focuses on the changes regarding the internal balancing mechanisms, such as the changes in the list of limitations and exceptions as well as the three-step-test. Two initiatives have developed regarding the issue. The first initiative, the Draft European Copyright Code,²⁴¹ a proposed model for future harmonisation initiatives, includes a re-drafted and mandatory list of

²³⁹ Ibid.

²⁴⁰ See the need for a constitutional criterion in civil-copyright law in Orit Fischman Afori, ‘Proportionality – A New Mega Standard in European Copyright Law’ (2014) 45 IIC 898.

²⁴¹ Institute for Information Law (ed), ‘European Copyright Code – Introduction’ (26 April 2010) <https://www.ivir.nl/copyrightcode/introduction/> accessed at 20 January 2020.

exceptions and limitations.²⁴² The list was drafted in a more flexible manner²⁴³ than the list of the InfoSoc Directive leaving necessary leeway to the judiciary in order to correspond to the rapidly changing circumstances. The draft code also proposes an open ‘meta-exception’²⁴⁴ in Article 5(5) which provides that : *‘Any other use that is comparable to the uses enumerated in Art. 5.1 to 5.4(1) is permitted provided that the corresponding requirements of the relevant limitation are met and the use does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the legitimate interests of third parties.’*

The rationale of the above exception is included in the explanatory comments on Article 5 which sets out the list of exceptions and limitations: *‘Chapter 5 reflects a combination of a common law style open-ended system of limitations and a civil law style exhaustive enumeration. On the one hand, the extension to similar uses provides the system with a flexibility which is indispensable in view of the fact that it is impossible to foresee all the situations in which a limitation could be justified. On the other hand, the possibility of flexibility is narrowed down in two ways. Firstly, the extension applies to uses ‘similar’ to the ones expressly enumerated. Thus, a certain normative effect is bestowed on these examples; the courts can only permit uses not expressly enumerated insofar as a certain analogy can be established with uses that are mentioned by the Code. Secondly, such similar uses may not conflict with the*

²⁴² European Copyright Code, Article 5.

²⁴³ European Copyright Code, Article 5(4).

²⁴⁴ Griffiths (136) 89.

normal exploitation of the work and not unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the legitimate interests of third parties.'

The suggested provision would add the desirable flexibility to the currently rigid system, allowing it to correspond effectively to the changing conditions of the market.²⁴⁵ However, if it is addressed only to the legislature, it will lead to a vicious circle with a lack of flexibility since *'users would still depend upon the slow-moving and heavily lobbied legislative process.'*²⁴⁶

At the same time, legal instruments capable of providing the necessary flexibility addressed to the judiciary have been proposed by copyright scholars. More specifically, the 'productive use' of the three-step-test and further the adoption of a fair-use system based on flexible and open criteria have been proposed.²⁴⁷ The suggested fair use-type solution should derive restrictions from the three-step-test and in particular from the second step.²⁴⁸ In other words, the normal exploitation of work would constitute, under the respective solution-scheme, one of the criteria that have to be taken into account when the courts implement a limitation.

However, the solution was rejected due to the unpredictable character of the US fair use doctrine on which it is based. In particular, the fair use doctrine is stipulated in section 107 of the US Copyright Act: *'Notwithstanding the provisions of*

²⁴⁵ Ibid 90.

²⁴⁶ Ibid.

²⁴⁷ Martin Senftleben, 'Fair Use in the Netherlands – a Renaissance?' (2009) 33 AMI 1.

²⁴⁸ Geiger (n 140) 698.

sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.'

Section 107 codifies a 'pre-existing, judge-made doctrine' after the closed exceptions laid down in Sections 106 and 106A, providing for the following advantages: 'ad hoc' exceptions, leeway for the courts to take into account the specific circumstances of each case and the effective response of the regime to unforeseen development of

the market.²⁴⁹ On the other hand, the main counter argument is the unpredictability which accompanies the respective doctrine and, thus, the proposed fair use-type system. This flexibility within the ‘open, factor-based’ system could jeopardise not only the rights of the copyright holders but also the position of users who would hesitate to use the limitations in such an unpredictable system where it is not guaranteed what does and does not constitute as fair use.²⁵⁰

Another solution regarding the three-step-test that has been proposed is the reverse reading of it. In particular, it would be preferable to set the third step as the starting point of the reading of the test, and then move further to the second step, as a corrective instrument against the emerging abusive conflicts with the normal exploitation of the work.²⁵¹ The main problem of the interpretation of the test followed by the courts (see above Section VI) is that once a conflict with the normal exploitation included in the second step is found, there is no longer any need for the court to examine the third step.²⁵² This is, however, incompatible with the purpose of the test which must be read in accordance with the ECHR, which in turn prevails over the InfoSoc Directive within the hierarchy of norms in the EU legal order.²⁵³ The latter leads to an analysis of the three-step-test under the aspect of the economic interests of the right holder; an aspect which is incompatible with a fundamental-

²⁴⁹ Griffiths (n 136) 91.

²⁵⁰ Ibid.

²⁵¹ Geiger (n 146) 18

²⁵² Geiger (n 140) 697.

²⁵³ Ibid.

rights approach derived from the ECHR.²⁵⁴ It must be somehow guaranteed that the judges will examine all the steps without giving up their examination on the second step. For this purpose, a restrictive interpretation of the concept of normal exploitation should be adopted so that the third step, which leads to the balancing of the competing interests, will be examined each time the test is applicable.²⁵⁵ Given that the restrictive interpretation of the normal exploitation is not sufficient, the reverse reading of the test has been suggested, so that the third step will be placed at the center of the examination.

The second initiative, the “Declaration on a Balanced Interpretation of the ‘Three-Step-Test’²⁵⁶ in Copyright Law” concerns the application of the three-step-test. The Declaration suggests a comprehensive overall assessment instead of the current usual step-by-step applications of the test as its wording misleadingly implies that no single step is to be prioritised.²⁵⁷ The initiative declares that *‘the three-step-test should be interpreted in a manner that respects the legitimate interests of third parties, including interests deriving from human rights and fundamental freedoms; interests in competition, notably on secondary markets; and other public interests, notably in scientific progress and cultural, social, or economic development.’*

²⁵⁴ Geiger (n 228) 276.

²⁵⁵ Geiger (n 146) 19.

²⁵⁶ Christophe Geiger, Jonathan Griffiths and Reto Hilty, ‘Declaration on a Balanced Interpretation of the “Three-Step-Test” in Copyright Law’ (2008) 39 IIC 6 707.

²⁵⁷ Ibid 709.

VIII. Crucial digression: the three coordinated references and the ECJ's answer

The issues surrounding copyright *acquis* are overtly complex and have been aggravated by the decisions of the ECtHR and the ECJ. The recent decisions of the ECJ on the issue shed light on the Court's positions as regards the exact role of fundamental rights in the copyright *acquis*. In July 2019, the ECJ expressed its opinion on the issue responding to three co-ordinated references that were received from the German Federal Supreme Court in *Funke Medien*²⁵⁸ *Pelham GmbH*²⁵⁹ and *Spiegel Online*.²⁶⁰ The series of questions that the German Federal Supreme Court referred to the ECJ concern the interplay of copyright law and national constitutional norms. The ECJ's answers in its decisions are almost identical in each of cases referred to ECJ. The next section will discuss the facts of the cases and the questions submitted by the German Federal Supreme Court, followed by the response of the ECJ in its three decisions.

In *Funke Medien* (also known as Afghanistan Papers) the dispute concerned the Federal Republic of Germany and Funke Medien, which operates the website of the German daily newspaper *Westdeutsche Zeitung*. Germany prepares a military status reports on deployment and brought an action for injunction against Funke Medien,

²⁵⁸ ECJ Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2019:623.

²⁵⁹ ECJ Case C-476/17 *Pelham GmbH, Moses Pelham, Martin Haas v Ralf Hütter, Florian Schneider-Esleben* [2019] ECLI:EU:C:2019:624.

²⁶⁰ ECJ Case C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] ECLI:EU:C:2019:625.

which obtained a large proportion of reports categorised as classified documents and published them. The case was brought before the German Federal Supreme Court which referred the following questions to the ECJ: (i) whether there is a certain latitude to national courts for the interpretation of provisions which confer rights and stipulate exceptions under national legislation which implements the InfoSoc Directive ('the latitude question'); (ii) in which way should the courts take fundamental rights under ECHR into account when examining the scope of exceptions and limitations provided for in the Information Society Directive ('the broad Charter question'); (iii) whether the rights of freedom of information and the freedom of media laid down in Article 11(1) and (2) respectively can justify exceptions beyond those provided for in the InfoSoc Directive ('the Charter exceptions question').

In *Pelham* the dispute concerned Mr Hütter and Mr Scheider-Esleben, members of the music group Kraftwerk which produced the sound recording which features *Metall auf Metall*. They claim that Mr. Pelham and Mr. Haas, producers of the Pelham's GmbH *Nur mir*, had copied approximately two seconds of a rhythm sequence from the *Metall auf Metall* and incorporated it as a continuous loop in the *Nur mir*. The case was brought before the referring court, which submitted to the ECJ the following questions: (i) whether the reproduction of such short extracts from sound recording constitutes infringement of the reproduction right; (ii) whether a sound recording containing short audio snatches of an earlier sound recording constitutes a copy of the earlier recording; (iii) whether the free use doctrine under Article 24(1) of the German Copyright Act is in accordance with the EU copyright

law; (iv) whether the use of an extract of work can fall under the quotation exception in the case in which it is not evident that another person's work has been used. Once again, as in *Funke Medien*, it referred to the 'latitude question' and the 'general Charter question'.

In *Spiegel Online*, the dispute arose between Volker Beck, a German politician, and Spiegel Online. In 1988, his name has been linked to a controversial essay published under his name. However, he tried to distance himself from the opinions expressed in the respective essay arguing that the editor of the collection, in which the essay was published, made changes without asking for his permission. In 2013, he published two versions of his essay, namely the original manuscript version and the version of the essay as it has been published. However, Spiegel Online published an article in which it claimed that the editor has not significantly changed the content of the essay, providing both versions of the essay online via a hypertext link.

The case was brought before the German Federal Supreme Court which referred to the ECJ the following questions: (i) the latitude question; (ii) the broad Charter question; (iii) the Charter exceptions questions; (iv) questions on the interpretation of the exception for reporting current events laid down in Article 5(3)(c) of the InfoSoc Directive in case of making available copyright-protected works on the web portal of a magazine; and (v) questions on the quotation exception under Article 5(3)(d).

In his Opinion, the Advocate General Szpunar referred to the inherent conflict between copyright and the freedom of expression given that any use of a copyrighted-work by an individual is based on their right to freedom of expression and, thus, the

need for a fair balance to be found.²⁶¹ In *Funke Medien*, the Advocate General acknowledges that in certain cases the courts may be required to allow uses of copyright-protected works and apply in this way provisions not included in the copyright *acquis*. By applying Charter's provisions²⁶² the ECJ admits that copyright may be subject to *'the same checks and tests that any other restriction on freedom of expression has to undergo in a democratic society.'*²⁶³ However, in *Pelham* and *Spiegel Online* his general concern about the possible destabilising effect of fundamental rights' penetration in the *acquis* becomes clear.²⁶⁴ In the latter cases, he focused on the need to guarantee that the application of fundamental rights enshrined in the ECFR as external limitations to copyright will not threaten the copyright harmonisation.²⁶⁵ He accepts, though, such application 'in exceptional cases', 'when the essence of a fundamental right'²⁶⁶ is affected.

The ECJ, taking into account the Advocate's General Opinion, began its analysis with the purpose of the InfoSoc Directive which consists in the harmonisation in the field of copyright and which in turn aims at striking a fair balance between the interests of

²⁶¹ For the respective conflict between copyright and freedom of expression, which emerged in these cases and the A.G's Szpunar's opinion, see Christophe Geiger and Elena Izyumenko 'Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way' (2019) 41(3) EIPR 131.

²⁶² *Funke Medien NRW GmbH* paras 69-70.

²⁶³ Geiger and Izyumenko (n 261) 136.

²⁶⁴ Jonathan Griffiths 'European Union copyright law and the Charter of Fundamental Rights – Advocate General Szpunar's Opinions in (C-469/17) *Funke Medien*, (C-476/17) *Pelham GmbH* and (C-516/17) *Spiegel Online*' (2019) 20 ERA Forum 47.

²⁶⁵ *Pelham* para 56; *Spiegel Online* para 63.

²⁶⁶ *Pelham*, Opinion of AG Szpunar paras 94, 98 and *Spiegel Online*, Opinion of AG Szpunar paras 62, 64.

the right holders and the interests and fundamental rights of the users.²⁶⁷ For this purpose, there is the internal balancing system of exceptions and limitations that it has been also mentioned in *Pelham*.²⁶⁸ The Court connects the internal balancing mechanism of the *acquis* with the fundamental rights stating that the former favours fundamental rights over the interests of the right holders, but without threatening the interests of the latter.²⁶⁹ Given that an internal balancing system already exists, the Court does not accept an external balancing system deriving from fundamental rights enshrined in the ECFR. This would not only be incompatible with the EU lawmaker's objective set out in Recital 32 and the Explanatory Memorandum to the Copyright Directive, but would also jeopardise the effectiveness of the Directive and the objective of achieving legal certainty.²⁷⁰

However, the Court notes that the transposition of measures that are not to be fully harmonised and the interpretation of the implementation of those measures is affected by fundamental rights. It stated that fundamental rights can serve as an interpretative tool used to strike a fair balance between the competing interests at stake.²⁷¹ Fundamental rights interfere with the copyright system through their interpretative role. They bind Member States at the level of legislature when it implements the

²⁶⁷ *Pelham* para 59; *Spiegel Online* para 42; *Funke Medien* para 56.

²⁶⁸ *Pelham* para 60.

²⁶⁹ *Funke Medien* para 60; *Spiegel Online* para 45.

²⁷⁰ *Spiegel Online* para 47; *Pelham* para 63; *Funke Medien* para 62.

²⁷¹ *Spiegel Online* para 59.

internal mechanisms of the Directive into domestic law and at the level of the judiciary when it interprets those provisions.²⁷²

It is clear that the ECJ followed Advocate's General opinion rejected a potential external limiting role of fundamental rights to the copyright system. The ECJ's response is important considering the highly debated discussion on the role of fundamental rights in the copyright regime. It is also crucial considering its impact on the future of the regime and its objectives; the effective harmonisation and the legal certainty.²⁷³

However, there is a contradiction in Advocate's General Opinion which must be mentioned. In his Opinion, in *Funke Medien*, it was stated that under certain circumstances copyright '*must yield to an overriding interest relating to the implementation of a fundamental right or freedom.*'²⁷⁴ In other words, under certain circumstances the external role of fundamental rights should be accepted even though it contradicts with the idea that the Directive's mechanisms safeguard sufficiently these rights.²⁷⁵ In any case, it is evident by the ECJ's case law that the Court does not want to promote the respective theoretical conception and leaves fundamental rights

²⁷² Thom Snijders and Stijn van Deursen 'The Road Not Taken – the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – a Case Note on the Pelham, Spiegel Online and Funke Medien Decisions' (2019) 50 IIC 1176.

²⁷³ The objective of legal certainty in the respective regime is essentially challenging given the complexity that surrounds the regulation of the regime; as it has been mentioned above (Section III) EU Copyright is a fragmented regime harmonised through a bundle of Directives and further regulated by ECHR – since intellectual property is protected under the AIP1 of the ECHR – and the ECFR – since the protection of intellectual property falls under Article 17(2) – constituting both of the two distinct regimes in the EU legal order.

²⁷⁴ *Funke Medien* Opinion of Advocate General Szpunar para 40.

²⁷⁵ Griffiths (n 264) 38.

in the same unchanged role, in interpreting exceptions and limitations laid down in Article 5 of the Directive.

It is clear that the strict approach the ECJ took in the respective decisions, is based on the Directive's objectives, namely the effectiveness of its harmonisation and the establishment of legal certainty in the respective regime.²⁷⁶ At the same time it remains unclear what impact the respective ECJ's decisions will have on the legislative and judicial practices among Member States.²⁷⁷ As the ECJ has stated in the respective judgements, the transposition and the implementation of the exceptions and limitations cannot 'be used to compromise the objectives of the Directive',²⁷⁸ namely the fair balance between the interests of right holders and users as well as the respect of the fundamental rights enshrined in the ECFR. Therefore, the ECFR, as a legal basis which protects fundamental rights in the EU legal order and intellectual property rights under Article 17(2), could have a harmonising effect on the *acquis*, since Member States could use it to implement certain exceptions and limitations into their domestic law in spite of their optional nature.²⁷⁹

However, the impact also relates to the judicial practice of the Member States. Fundamental rights intervene at the judiciary level since they are explicitly stipulated through the ECFR and ECHR provisions. The issue is complex since according to Article 52(3) ECFR '(...) *in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and*

²⁷⁶ *Spiegel Online* para 47; *Pelham* para 63; *Funke Medien* para 62.

²⁷⁷ Snijders and van Deursen (n 272) 1189.

²⁷⁸ *Ibid* 1190.

²⁷⁹ *Pelham*, Opinion of AG Szpunar para 77 and *Funke Medien*, Opinion of AG Szpunar paras 38-39.

Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.' The competing interests take the form of protected rights which fall under both legal texts, ECFR and ECHR. At the same time, due to the direct effect and the primacy of EU law over the national law of the Member States the application of either ECFR or ECHR arises each time a case is brought before the ECJ.²⁸⁰ However, the two courts follow different approaches when employing fundamental rights in copyright cases. The ECtHR allows a broader margin of appreciation in the proportionality test. The different approaches of the courts, the unclear answer of the ECJ in the triad of cases and the obligation enshrined in Article 52(3) ECFR can cause a problematic scenery in the judicial practice among Member States where their national courts are confronted with different standards and method of appreciation.²⁸¹

This triad of decisions includes useful indications. It has been argued that their effect is twofold. Firstly, the Court attempted to clarify the role of fundamental rights on the interpretation of the exceptions and limitations provided for in the InfoSoc Directive. Secondly, it attempted to clarify their role on the transposition and implementation of the Directive's provisions into the national law of the Member States with the

²⁸⁰ This is the core of the issue of the twofold regulation of the copyright and human rights regime in the EU legal order at both levels of substantive law – with the application of ECFR and ECHR – and procedural law – given that ECJ's and ECtHR's competence derive from ECFR and ECHR respectively.

²⁸¹ This can be problematic in light of the aim of a parallel interpretation of the CFR and the ECHR. See Joint communication from Presidents Costa and Skouris, available at https://www.echr.coe.int/Documents/UE_Communication_Costa_Skouris_ENG.pdf. On the relationship between the CFR and the ECHR in general, see also Jan H. Jans, Sascha Prechal and Rob J.G.M. Widdershoven, *Europeanisation of public law* (2nd edn, Europa Law Publishing 2015) 155-159.

purpose to ensure the effectiveness of both the Copyright Directive and the ECFR.²⁸²

In conclusion, the decisions are not clear-cut, but they hopefully, open a new phase²⁸³ in which a unified solution is expected.

CONCLUSION

In the era when innovation and creativity play a crucial role an efficient copyright system which will protect the right holders, the users and will correspond to the challenging developments of the digital and globalised market is needed. The exchange of information, the innovation at the level either of the improvement of the offered goods and services or the introduction of new breakthrough production processes and forms of services constitute the new pillar of the modern globalised economy. At the same time, the key role of the Internet, which has been expanded rapidly to the service sector, changes the regulatory framework of copyright. It has led to the oversimplification of purchases of goods and services given that it has eliminated factors that hindered the transactions. In the era of the fast exchange of information, the adequate protection offered by copyright law has become crucial.

²⁸² Snijders and van Deursen (n 272) 1190.

²⁸³ Caterina Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU From Promusicae to Funke Medien, Pelham and Spiegel Online' (2019) 11 EIPR 696.

The above aspect concerns the copyright protection in the sense of the exclusive rights that the system grants to the owners and enable them among other to exploit their protectable intellectual work. However, in the era of the information society the users need to ‘participate’ in the monopoly established by the copyright regime. This need is expressed through the enactment of rights and further the articulation of a separate regime of law; the fundamental rights regime which guarantees the respect of rights of personal and social nature. Consequently, the modern copyright system has to provide an adequate protection to the right holders in the digital scenery of the modern economy and at the same time leave sufficient leeway to the public to enjoy the copyright-protected works.

This is the starting point of the interplay between copyright and fundamental rights, the fact that their rationales conflict with each other. The copyright regime primarily protects the owner by granting him exclusive rights and by creating in this way a monopoly. The fundamental rights regime establishes rights to the enjoyment of freedoms and can serve as a legal instrument to mitigate the rigid copyright monopoly. However, given that copyright’s rationale also possesses a public aspect the two regimes coincide.

As regards the regulation of the copyright regime, it has become clear that its malfunctions caused by the fragmented harmonisation lead to different national regimes among Member States. Its strict, highly inflexible InfoSoc Directive’s system, which attempted to somehow provide a balancing solution between the interests of the right holders and the interests of the public, did not allow it to

correspond to the of the modern digital market. However, and despite the ambitious provisions of the DSM Directive it is doubted whether it will be proved more efficient than the InfoSoc Directive.

Given the fluidity of the digital market, what is needed more than ever is a flexible, consistent regulatory framework. The regulation under the InfoSoc Directive needed flexibility, and as a result thereof, external regimes²⁸⁴ entered the copyright regime, to provide flexibility and to fill the regulatory gaps. Both competent courts, the ECtHR and the ECJ, have already resorted to fundamental rights regime to interpret the problematically unclear balancing system of the *acquis*. The courts also resorted to fundamental rights to balance the competing interests in cases relating to new digital environment – more specifically in cases relating to enforcement measures imposed to ISPs. The *acquis* could not respond to these cases. The courts resorted frequently to fundamental rights structuring a certain scheme. Under this scheme, copyright is perceived as an aspect of the right to property enshrined in Article 17(2) ECFR and in AIP1 is confronted with another fundamental right (the conflicts that emerge are most of the times between the right to property and either the right to freedom of expression, or the right to privacy or the right to conduct a business) enshrined either in the ECFR or in ECHR. Both courts take as starting point the assumption that the conflicting rights are equal and always acknowledge the need for a fair balance to be found. For this purpose, they carry out the proportionality test in order to determine

²⁸⁴ It has been mentioned above that except for the fundamental rights regime other regimes interfere with the copyright regime, such as competition law or media law.

which one of the conflicting rights has to be restricted over the other conflicting right and to which degree.

Given that the InfoSoc Directive's internal balancing system was not adequate, the task of balancing the conflicting rights was passed on from the legislative to the judicial level. Then the gaps and the deficiencies of the system were revealed, marking the start of a new phase of copyright law in which its malfunctions had to be somehow solved. Its malfunctions are rooted in a bundle of factors which characterise the complexity of the system and the complexity of the way in which it has been structured at EU level. The problem is the lack of adequate balancing system inherent in the *acquis*. Should the copyright regime be redrafted with a more comprehensive and reinforced internal system of exceptions and limitations without the connections to the InfoSoc system that the SDM Directive includes? This is obviously addressed to the EU legislature and consequently to the legislature of the Member States which will have to transpose the new provisions of the Directive. Or should the balancing method, that has been already implemented by the courts, become accepted with no further legislative change? Who is to bear the balancing task? The lawmaker or the judge?

The balance carried out by the legislature undoubtedly contains legal certainty since the result is foreseeable through legislated provisions that solve the conflicts leaving the judges only the leeway to interpret them. Despite the legal certainty that the legislative provisions offer the balance should be left to the judges. A stable and coherent interpretation of the internal balancing system based among others on

fundamental rights will provide the copyright regime the humanised aspect that it needs. Finally, the regime will regain its legitimacy.

The allocation of the balancing task to the legislature seems a significantly uneasy case. The EU legislature has shown until now a general reluctance to deal with the problematic aspects of the copyright regime, given that a piece-meal harmonisation has been chosen and that the new system that the DSM Directive introduces is still connected to the precedent problematic system of the InfoSoc Directive. The reluctance was evident especially in the field of the adoption of the optional exceptions and limitations of the InfoSoc Directive which led to a problematic landscape, since different exceptions and limitations had been adopted among Member States. Why the slow, time-consuming and reluctant legislature should be preferred at the same time when the courts use quite effectively the interaction of copyright (and the IP regime in general) with the fundamental rights regime? When the human-rights aspect can be merely re-enforced and consequently the social function in any legal rule without requiring explicit legal provisions to confirm it?

Unfortunately, the decision on the issue is more complex; the ECJ delivering the triad of decisions, analysed above in Section VIII, rejected the application of external rules for purposes other than the mere interpretation of the already stipulated exceptions and limitations on the grounds of legal certainty of the effectivity of the copyright's harmonisation. However, how effective is the current harmonisation is an issue that the ECJ has not referred to.

The humanisation of the copyright, and in general intellectual property, through the proposed ‘constitutionalisation’ of the regime is the most efficient way to create a flexible, balanced and fair copyright regime in the modern information society where intangible goods and innovation play a crucial role. A fair copyright regime will adequately protect the interests of the right holders without restricting the public from the access to the copyrighted works. The answer to an intensively commercialised market is humanisation through ‘constitutionalisation’.

In conclusion, the example of the reaction of various educational and cultural institutions amid the current quarantine period which provided the public with free access to normally protected works under copyright is crucial. It demonstrates that the protective scope of the exclusivity is a relative value. On the other hand, a reinforced role of fundamental rights regime would provide not only flexibility and efficiency in the balancing process of competing interests within the EU copyright system but it would also lead to a reviewed, more strengthened position of fundamental rights in the EU legal order. In times like these when the economic system at global level is tested, the reconsideration of the current structures is needed.

The issue has been discussed in the context of a globalised digital market driven by the information and innovation and the rapid advent of artificial intelligence in the large scale market. Even in this context, fundamental rights regime was still on the table of discussion. In the new phase that the global economy and the society are going through and the challenging phase that they will enter into the preceding status quo will definitely not be the same. These issues have demonstrated that the

humanisation of copyright law is needed; and *de jure* it can be achieved through the strengthening of the social function inherent in any legal rule and therefore in any legal system. The social function of the copyright system will be revealed through the employment of fundamental rights the role of which should be reinforced in essence this time as a new corrective instrument that can pierce the rigid imbalances of the globalised market.

BIBLIOGRAPHY

Legislation

International Treaties

Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) 33 I.L.M. 1197 Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 3

Berne Convention for the Protection of Literary and Artistic Works (9 September 1886, as revised on July 24 1971 and amended in 1979) 1161 U.N.T.S. 3 (the amended version does not appear in the U.N.T.S. or I.L.M.)

Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950) E.T.S. 5

WIPO Copyright Treaty (10 December 1996) 2186 U.N.T.S. 121

EU Treaties and Directives

Charter of Fundamental Rights of the European Union [2007] OJ C303/01

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L299/5

Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L248/15

Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [2002] OJ L201/37

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195/16

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

Directive 2009/24/EC of the European Parliament and of the Council of 2009 on the legal protection of computer programs [2009] OJ L111/16

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20

Directive 2006/115/EC of the European Parliament and the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376/28

Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L272/32

Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services and of public communications networks and amending Directive 2000/58/EC [2006] OJ L105/54

Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights [2006] OJ L372/12, amended by Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 [2011] OJ L265/1

Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/01

Cases

ECtHR cases

Dima v Romania App no 58472/00 (ECtHR, 26 May 2005)

Melnychuk v Ukraine App no 28743/03 (ECtHR, 5 July 2005)

Anheuser-Busch Inc. v Portugal, App no 73049/01 (ECtHR, 11 January 2007)

Balan v. Moldova App no 19247/03 (ECtHR, 29 January 2008)

Ashby Donald v. France App no 36769 (ECtHR, 10 January 2013)

Mouvement Raëlien Suisse v. Switzerland, App No 16354/06 (ECtHR, 13 July 2012)

Neij and Sunde Kolmisoppi v. Sweden App No 40397/12 (ECtHR, 19 February 2013)

ECJ cases

Case C-158/86 *Warner Brothers v. Christiansen* [1988] ECR 2605 and C-341/87 *EMI Electrola v. Patricia* [1989] ECR 79

C-13/94 *P v. S and Cornwall County Council* [1996] ECR I-2143

Joined Cases C-238/99, C-244/99, C-245/99, C-247/99, C-250/99 to C-252/99 and C-254/99 *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-08375

Case C-301/04 *Commission v SGL Carbon AG* [2006] ECR I-05915

Case C-275/06 *Productores de Música de España (Promusicae) v. Telefónica de España SAU* [2008] ECR I-11987

Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569.

Case C-403/08 and C-429/08 *Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen* [2011] ECR I-09083

Case C-70/10 *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECR I-11959

Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)* [2012] ECLI:EU:C:2012:85

Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co. KG, Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co. KG* [2013] ECR I-12533.

Case C-510/10 *DR, TV2 Danmark A/S v NCB — Nordisk Copyright Bureau* [2012] ECLI:EU:C:2012:244.

Case C-435/12 *ACI Adam BV and Others v Stichting de ThuisKopie, Stichting Onderhandeligen ThuisKopie vergoeding* [2015] ECLI:EU:C:2014:254.

Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft GmbH* [2014] ECLI:EU:C:2014:192.

Case C-201/13 *Johan Deckmyn, Vrijheidsfonds VZW v Helena Vandersteen, Christiane Vandersteen, Liliana Vandersteen, Isabelle Vandersteen, Rita Dupont, Amoras II CVOH, WPG Uitgevers België* [2014] ECLI:EU:C:2014:2132.

Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2019:623

Case C-476/17 *Pelham GmbH, Moses Pelham, Martin Haas v Ralf Hütter, Florian Schneider-Esleben* [2019] ECLI:EU:C:2019:624

Case C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] ECLI:EU:C:2019:625

Books

Craig P and de Búrca G, *EU Law: Text Cases and Materials* (6th edn, Oxford University Press 2015)

Derclaye E, *Research handbook on the future of EU copyright* (Edward Elgar 2009)

Geiger C, *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015)

Geiger C, Nard C A and Seuba X, *Intellectual and the Judiciary* (Edward Elgar 2018)

Stamatoudi I, *New Developments in EU and International Copyright Law* (Kluwer Law International 2016)

Kur A and Dreier T, *European Intellectual Property Law. Text, Cases & Materials* (Edward Elgar 2013)

Maziotti G, *EU Digital Copyright Law and the End-Users* (Springer Verlag Heidelberg 2008)

Torremans P, *Intellectual Property Law and Human Rights* (4th edn, Wolters Kluwer 2020) (forthcoming)

Seville C, *EU Intellectual Property Law and Policy* (Edward Elgar 2009)

Articles

Afori O F, 'Proportionality – A New Mega Standard in European Copyright Law' (2014) 45 IIC 898

Douglas-Scott S, 'The European Union and the Human Rights after the Treaty of Lisbon' (2011) 11(4) HRLR 645

Dreier T, 'Limitations: The Centerpiece of Copyright in Distress – An Introduction' (2010) 1 JIPITEC 50

Geiger C, 'Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?' (2004) 35 3 IIC 279

__ 'Three-Step Test, 'A Threat to a Balanced Copyright Law?' (2006) 37 IIC 683

__ "'Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (2006) 37 4 IIC 390

__ 'The Role of the Three-Step-Test in the Adaptation of Copyright Law to the Information Society' e-Copyright Bulletin (2007) 13

__ 'The Social Function of Intellectual Property Rights, or How Ethics can Influence the Shape and Use of IP Law' in Graeme B. Dinwoodie (ed), *Intellectual Property Law: Methods and Perspectives* (Edward Elgar 2013) 153

__ 'Copyrights's Fundamental Rights Dimension at EU Level' in Estelle Derclaye (ed) *Research handbook on the future of EU copyright* (Edward Elgar 2009) 28

__ 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union' in Irini Stamatoudi (ed), *New Developments in EU and International Copyright Law* (Kluwer Law International 2016) 435

Geiger C, Griffiths J, Senftleben M, Bently L and Xalabarder R, 'Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European

Union – Opinion of the European Copyright Society on the Judgement of the CJEU in Case C-201/13’ (2015) 46 ICC 93

Geiger C, Griffiths J and Hilty R, ‘Declaration on a Balanced Interpretation of the “Three-Step-Test” in Copyright Law’ (2008) 39 IIC 6 707

Geiger C and Izyumenko E, ‘Intellectual Property before the European Court of Human Rights’ Center for International Intellectual Property Studies Research Paper No. 2018-01 <<https://ssrn.com/abstract=3116752>> accessed 15 January 2020

Geiger C and Izyumenko E, ‘Copyright on the Human Rights’ Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression’ (2014) 45 IIC 316

Geiger C and Izyumenko E, ‘Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way’ (2019) 41(3) EIPR 131

Griffiths J, ‘Unstriking the Center-Piece – The Liberation of European Copyright Law?’ 1 (2010) JIPITEC 87

__ ‘Costitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law’ (2013) 38 ELR 65

__ ‘Taking power tool to the acquis – The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law’ in Christophe Geiger, Craig Allen Nard and Xavier Seuba (eds), *Intellectual and the Judiciary* (Edward Elgar 2018) 151

__ ‘European Union copyright law and the Charter of Fundamental Rights – Advocate General Szpunar’s Opinions in (C-469/17) Funke Medien, (C-476/17) Pelham GmbH and (C-516/17) Spiegel Online’ (2019) 20 ERA Forum 47

Guibault L, ‘Why Cherry-Picking Never Leads to Harmonisation. The Case of the Limitations on Copyright under Directive 2001/29/EC’ (2010) 1 JIPITEC 55

Helfer L, ‘Mapping the Interface between human rights and intellectual property’ in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 6

__ ‘Human Rights and Intellectual Property: Conflict or Coexistence?’ (2003) 5 MJLST 47 <<http://dx.doi.org/10.2139/ssrn.459120>> accessed 10 January 2020

Hugenholtz B and Senftleben M, 'Fair Use in Europe. In Search of Flexibilities' <<https://ssrn.com/abstract=1959554>> accessed 15 January 2020

Jütte B J, 'The beginning of a (happy?) relationship: copyright and freedom of expression in Europe.' (2016) 38 EIPR 11

Kalimo H, Meyer T and Mylly T, 'Of Values and Legitimacy – Discourse Analytical Insights on the Copyright Case Law of the Court of Justice of the European Union' [2018] 81 MLR 282

Kokott J and Sobotta C, 'Protection of Fundamental Rights in the European Union: on the relationship between EU fundamental rights, the European Convention and national standards of protection.' (2015) 34 YEL 65

Littoz-Monnet A, 'Copyright in the EU: *droit d'auteur* or right to copy?' (2006) 13(3) JEPP 442

Oliver P and Stothers C, 'Intellectual property under the Charter: Are the Court's scales properly calibrated?' (2017) 54 CMLR 517

Peukert A, 'The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2016) 134

Quintais J P, 'The New Copyright in the Digital Single Market Directive: A Critical Look' (2020) 1 EIPR 1 (forthcoming) <<http://ssrn.com/abstract=3424770>> accessed 10 January 2020

Schwemer S and Schovbo J, 'What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (4th edn, Wolters Kluwer 2020) (forthcoming)

Senftleben M, 'Fair Use in the Netherlands – a Renaissance?' (2009) 33 AMI 1

___ 'Bridging the Differences between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine' (2010) 53(3) CSUSA 521

Sganga C and Scalzini S, 'From Abuse of Right to European Copyright Misuse: A New Doctrine for EU Copyright Law' (2017) 48 IIC 412

Sganga C, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU From Promusicae to Funke Medien, Pelham and Spiegel Online' (2019) 11 EIPR 696

Snijders T and van Deursen S, 'The Road Not Taken – the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – a Case Note on the Pelham, Spiegel Online and Funke Medien Decisions' (2019) 50 IIC 1176

van Eechoud M, 'The European Concern with Copyright and Related Rights' in Bernt Hugenholtz (ed), *Harmonising European Copyright Law. The Challenge of Better Law Making* (Kluwer Law International 2009) 13

van Deursen S and Snijders T, 'The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework' (2018) 49(9) IIC 1080

Xalabarder R, 'The Role of the CJEU in Harmonising EU Copyright Law' (2016) 47 IIC 638

European Institutions' documents

Statute of the Council of Europe, Article 1(a) (5 May 1949) E.T.S No.001

Council of Europe, 'Guide on Article 1 of Protocol 1 No. 1 – Protection of property' <https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf> accessed at 16 January 2020

European Commission, '1988 Green Paper on Copyright and the Challenge of Technology' COM (88) 172 final

European Copyright Code, < <https://www.ivir.nl/copyrightcode/european-copyright-code/>> accessed at 20 January 2020

European Court of Human Rights, 'Joint communication from Presidents Costa and Skouris' <https://www.echr.coe.int/Documents/UE_Communication_Costa_Skouris_ENG.pdf> accessed at 16 January 2020