

2020

Copyright and Human Rights in the Ballroom: A Minuet between the United States and the EU

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Recommended Citation

Montagnani, Maria Lillà and Trapova, Alina (2020) "Copyright and Human Rights in the Ballroom: A Minuet between the United States and the EU," *Mitchell Hamline Law Review*: Vol. 46 : Iss. 3 , Article 4.
Available at: <https://open.mitchellhamline.edu/mhlr/vol46/iss3/4>

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COPYRIGHT AND HUMAN RIGHTS IN THE BALLROOM: A MINUET BETWEEN THE UNITED STATES AND THE EU

Maria Lillà Montagnani¹ and Alina Trapova²

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I. INTRODUCTION

With roots in France, the minuet dance dominated the ballrooms of Louis XIV and spread throughout Europe and beyond. A social baroque dance, the minuet sees the two partners dancing separately in plain steps forward, backward, and sideways, while gradually and gracefully coming close to one another. Eventually, the pair come to hold hands, briefly continuing their dance together until separated again by their own movement. Throughout the entire dance, the two partners repeatedly come close, only to separate from one another. A similar movement can be observed between the U.S. and the EU in the

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interaction of copyright laws and human rights¹—the two jurisdictions continuously come close to one another, walking similar paths, then separate, spinning off in their own direction, only to then reunite for a few more steps in harmony.

Similar to the graceful forward, backward and sideways movements in a minuet,² the dynamics between intellectual property (IP) and human rights have intensified to the extent that human rights law is now characterized as IP's new frontier.³ More specifically, when balancing various interests at stake in both the United States and the European Union, copyright laws engage internal as well as external mechanisms. Interestingly, the application of these tools takes place not only within the legislative powers of the two jurisdictions but, most prominently, within the judiciary. In this respect, the jurisprudence of the United States and the European Union have often harmoniously intertwined in an elegant move towards one another, before gradually swirling away into disparate interpretations.

That said, the European Union and the United States bear a relative degree of similarity as far as their general frameworks are concerned. In the European Union, the external safeguards are defined by the Charter of Fundamental Rights of the European Union (the Charter),⁴ while the First Amendment⁵ to the U.S. Constitution serves that role across the Atlantic. A parallel can also be drawn from the internal safeguards of each jurisdiction. Main tools in this realm are the idea-expression dichotomy—applicable equally in both jurisdictions—and certain permitted uses,⁶ such as fair use in the U.S. Copyright Act of 1976⁷ and limitations and exceptions enshrined in Article 5 of Directive 2001/29/EC in the EU⁸

Such mirroring legislative structures imply that the United States and the EU theoretically do not stand too far from one another when it comes to the intersection of copyright and fundamental rights. Indeed,

¹ In this work, “copyright/human rights” and “copyright/fundamental rights” interaction will be used interchangeably when the discussion pertains to both the U.S. and EU jurisdictions. When the purview is on the United States, the former term will be used; when the EU is concerned, the latter will be employed.

² Laurence R. Helfer, *Mapping the Interface Between Human Rights and Intellectual Property*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 6–15, 9 (Christophe Geiger ed., 2015).

³ Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INTL L.J. 1, 1 (2008).

⁴ Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1.

⁵ U.S. CONST. amend. I.

⁶ This work uses the term “permitted uses” to collectively refer to the exceptions and limitations regime in the fair use doctrines of the EU and the United States.

⁷ 17 U.S.C. § 107 (2018).

⁸ 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 O.J. (L 167) 10 [hereinafter InfoSoc Directive].

when tracing the leading jurisprudence in both territories, one observes that the two jurisdictions start from similar steppingstones. Despite this common background, the copyright and fundamental rights intersection somehow takes different interpretative routes and balancing exercises that involve diverging methodologies. While for a certain period of time, it seemed as though the EU had not entirely shut the door to external balancing,⁹ the United States appeared willing to foreclose external balancing after the landmark ruling of the U.S. Supreme Court in *Eldred v. Ashcroft* in 2003.¹⁰

Nonetheless, the most recent jurisprudence of the Court of Justice of the EU (CJEU) suggests that internal balancing based on permitted uses and the idea-expression dichotomy is well-suited to address conflicts based on the copyright and fundamental rights intersection.¹¹ Eventually, the EU and the United States have apparently gradually reunited in their affirmation that the copyright legislative framework is self-sufficient to internalize the conflict.

The overall purpose of this article is to analyze the extent to which the approach in the EU differs from that in the United States. To do so, we first look at the essence of the internal and external safeguards (Part II). We then turn our focus to the leading case law in the United States and compare it to the CJEU's practice. In this respect, we seek to verify whether and to what extent the decision-making process in the two jurisdictions has converged or diverged over the years (Part III). In the final part, we conclude by suggesting that, at the moment, it seems that the two systems are dancing side-by-side in the same direction.

II. THE ESSENCE OF INTERNAL AND EXTERNAL SAFEGUARDS

All coherent copyright legislations aim to establish an internal equilibrium between the interests of the rightsholders and the public. In this respect, copyright legislation regularly refers to the need to maintain a fair balance of rights and interests between the different categories of

⁹ See Case C-484/14, *McFadden v. Sony Music Entm't Ger. GmbH* (Sept. 15, 2016), <http://curia.europa.eu/juris/document/document.jsf?docid=183363&doclang=en>; Case C-360/10, *SABAM v. Netlog NV* (Feb. 16, 2012), <http://curia.europa.eu/juris/document/document.jsf?docid=119512&doclang=en>; Case C-70/10, *Scarlet Extended SA v. SABAM*, 2011 E.C.R. I-11959; Case C-275/06, *Promusicae v. Telefónica de España SAU*, 2008 E.C.R. I-271.

¹⁰ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

¹¹ Case C-476/17, *Pelham GmbH v. Hütter* (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?docid=216552&doclang=en>; Case C-516/17, *Spiegel Online GmbH v. Beck* (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?docid=216543&doclang=en>; Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland* (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?docid=216545&doclang=en>.

rightsholders, the public, and users of protected subject matter.¹² In other words, copyright laws grant rightsholders exclusive rights while providing internal mechanisms to sufficiently balance and protect the interests of the public and users of copyright protected works. Ostensibly, copyright could be considered an island of exclusivity in a sea of freedom, in line with the idea that intellectual property rights (IPRs) are “islands of protection in a sea of competition.”¹³

One such internal mechanism is the idea-expression dichotomy, according to which, ideas roam free and copyright protects only the original expression of such ideas.¹⁴ The dichotomy is a significant tool in preserving the balance of copyright and fundamental rights within the copyright law system.¹⁵ The essence of the idea-expression dichotomy is that rightsholders have only a limited capacity to control the expression of their ideas and cannot restrain the use of the underlying ideas themselves.¹⁶ This supports the grander theme that ideas enrich the public domain, which, in turn, is the milieu that nurtures creativity.¹⁷

Nonetheless, the idea-expression dichotomy acquires a different flavor in common law versus civil law jurisdictions. This is rooted in the difference in theories that rationalize the existence of copyright in the first place.¹⁸ For instance, viewed from a utilitarian perspective, restricting copyright protection to the sole expression of ideas has a two-fold objective. On the one hand, the dichotomy ensures free access to knowledge such as methods, systems, facts, utilitarian objects, titles,

¹² InfoSoc Directive, *supra* note 8, at recital 31; 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 & 2001/29/EC, 2019 O.J. (L 130) 92, recital 6, art. 18(2).

¹³ See Jerome H. Reichman, *Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System*, 13 CARDOZO ARTS & ENT. L.J. 475, 517 (1995); Jerome H. Reichman, *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation*, 53 VAND. L. REV. 1743, 1748 n.17 (2000); Christophe Geiger, *Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?*, 35 INT'L REV. INTEL. PROP. & COMPETITION L. 268, 268 (2004).

¹⁴ MICHEL VIVANT & JEAN-MICHEL BRUGUIÈRE, *DROIT D'AUTEUR ET DROITS VOISINS* 151 (4th ed. 2019).

¹⁵ Abraham Drassinower, *Exceptions Properly So-Called*, in LANGUAGE AND COPYRIGHT 205, 230–31 (Ysolde Gendreau & Abraham Drassinower eds., 2009).

¹⁶ Christopher Buccafusco, *A Theory of Copyright Authorship*, 102 VA. L. REV. 1229, 1247 (2016); Neil Netanel, *Copyright and the First Amendment: What Eldred Misses—and Portends*, in COPYRIGHT AND FREE SPEECH: COMPARATIVE AND INTERNATIONAL ANALYSES 127 (Jonathan Griffiths & Uma Suthersanen eds., 2005) (criticizing the adequacy of internal safeguards with specific reference to the idea-expression dichotomy and the fair use doctrine).

¹⁷ Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 969 (1990).

¹⁸ Maurizio Borghi, *Owning Form, Sharing Content: Natural-Right Copyright and Digital Environment*, in 5 NEW DIRECTIONS IN COPYRIGHT LAW 197 (Fiona Macmillan ed., 2007).

themes, plots, *scène à faire*, styles or—as Professor Litman describes it—a “hodgepodge of unprotectable subject matter.”¹⁹ This, in turn, enables progress since raw material is always available to everyone to build upon. On the other hand, the idea-expression dichotomy is a fundamental tool in striking the balance between copyright and free speech and, more generally, is a constitutive element of any utilitarian copyright rationale.²⁰ The dichotomy sometimes encroaches upon freedom of speech “in that it abridges the right to reproduce the ‘expression’ of others” in favor of the “greater public good in the copyright encouragement of creative works.”²¹ Other times, instead, it “encroaches upon the author’s right to control his works in that it renders his ‘ideas’ per se unprotectible, but this is justified by the greater public need for free access to ideas as part of the democratic dialogue.”²²

On the other end, the dichotomy also plays a role in personality rights theory, which sees copyright works as expressions of the individuality or the personality of the author, thereby belonging by nature to them. Authors can decide whether, in which form, and to what extent to communicate their works to other people. By sharing works with others through talking in public or publishing, authors’ ideas become known to third parties. These third parties, in turn, make permitted uses of the shared work, draw inspiration from them, and even judge and criticize them. In this context, the idea-expression dichotomy defines the boundaries between the author’s property and the public’s ownership.²³

Another widely utilized internal set of tools are “permitted uses,” also referred to as “exceptions and limitations” in the EU²⁴ and “fair use” in the United States.²⁵ Bearing their own peculiarities, these statutorily permitted uses are crucial in delineating the scope of copyright protection. Nonetheless, it has been widely accepted that the fair use doctrine is much more flexible than the regime of exceptions and limitations dominating the EU copyright framework.²⁶ Thanks to such

¹⁹ Litman, *supra* note 17, at 993.

²⁰ See Dale P. Olson, *The Uneasy Legacy of Baker v. Selden*, 43 S.D. L. REV. 604, 609 (1998) (“The idea-expression dichotomy has been characterized as a ‘hallowed principle of copyright law’ and Professor Nimmer labelled it an ‘axiom of copyright law’ which advanced a First Amendment value of limiting copyright protection in a manner consistent with free expression.”).

²¹ Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1192 (1970).

²² *Id.*

²³ Borghi, *supra* note 18, at 9 (“[A] shared work becomes ‘property of mankind’ and acquires the status of a ‘twofold belonging’ (author on one side, mankind on the other).”).

²⁴ InfoSoc Directive, *supra* note 8.

²⁵ 17 U.S.C. § 107 (2018).

²⁶ See Jonathan Griffiths, *Unsticking the Centre-Piece—The Liberation of European Copyright Law?*, 1 J. INTEL. PROP., INFO. TECH. & ELEC. COM. L. 87, 90 (2010); Tito

flexibility, the fair use doctrine has maintained the balance between free speech and exclusive intellectual property rights in the form of copyright while also allowing copyright law to adapt to technological developments.²⁷ The doctrine has permitted the U.S. judiciary to employ a flexible approach in determining the application of copyright in response to social and technological changes.²⁸

That said, these two instruments are not the only internal tools maintaining the balance between copyright law and fundamental rights. The “tool-box of copyright”²⁹ comprises further means of balancing—namely, the notion of a work of authorship that features the requirement of originality; the scope of economic rights, such as the right of reproduction and the right of communication to the public; the doctrine of exhaustion (known as “the first-sale doctrine” in the United States); and the limited term of protection, among others.

Outside of the copyright bubble, additional external safeguards strive to maintain the equilibrium of copyright and fundamental rights. These mechanisms are found in other branches of the law, such as competition law—where compulsory licenses are usually imposed³⁰—and bills of rights (or “laws on fundamental rights and freedoms” in the EU). In relation to the latter, the most prominent instruments are the First Amendment of the U.S. Constitution and the European Charter of Fundamental Rights in the EU.

Notably, however, the internal and external mechanisms of copyright regimes do not correspond strictly to two separate realms even though it may seem so at first sight. In principle, it may appear that the need to resort to an external balance arises when the internal safeguards—here, the idea-expression dichotomy and permitted uses—do not adequately carry out the balancing exercise between rightsholders and the public. Along this line, a conflict between instances grounded in copyright law would require the application of internal safeguards, while a conflict rooted in different grounds—such as copyright exclusive rights, on the one hand, and the freedom of

Rendas, *Destereotyping the Copyright Wars: The “Fair Use vs Closed List” Debate in the EU*, SSRN ELECTRONIC J. 1, 8 (Sept. 8, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657482 [<https://perma.cc/MP3S-R6YH>]; Guido Westkamp, *The “Three-Step Test” and Copyright Limitations in Europe: European Copyright Law Between Approximation and National Decision Making*, 56 J. COPYRIGHT SOC’Y U.S.A. 1, 65 (2008).

²⁷ See Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U. L. REV. 1607, 1609 (2009).

²⁸ Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright’s Fair Use Doctrine*, 11 MICH. TELECOMM. TECH. L. REV. 381, 419 (2005).

²⁹ P. BERNT HUGENHOLTZ & RUTH L. OKEDIJI, *CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT*, AMSTERDAM L. SCH. LEG. STUD. RES. PAP. 11-12 (2008).

³⁰ *Id.* at 12.

expression of copyright users of copyright material, on the other—would necessitate the interaction of copyright legislation and human rights norms.

Even though “the inside/outside location metaphor” may be perceived as a distinction between the kinds of considerations required to resolve a given dispute,³¹ the case law in both the United States and the EU demonstrates that fundamental rights considerations actually fuel the internal safeguards and that such a distinction is extremely blurred in practice.³² The reason is that many of the so-called external safeguards are already internalized in the copyright system through, for example, permitted uses. This is certainly the case with limitations for purposes such as news reporting, criticism, and parody, which, in the fundamental rights arena, protect the freedom of expression and information.³³ In some of these cases, however, there may still be room for a balancing exercise between different rights and interests even if the external aspect of the dispute is already internalized through the adoption of an exception.³⁴ In other words, while exceptions aimed at safeguarding the fundamental rights of information users³⁵ may be, at first sight, considered internal safeguards—since they are encompassed within copyright statutes—in reality, they are much more. As Professor Drassinower points out, they can be considered “invitations to apply the structure of proportionality to mediate claims arising in distinct legal regimes.”³⁶

A typical instance where such internal balancing tools may fall short of internalizing instances grounded in fundamental rights is when new ways of expressing creativity arise or new technologies enable access to creative works in ways not known before.³⁷ One such case, related to digital sound sampling, *Pelham GmbH v. Hütter*, was recently the center of the CJEU’s attention.³⁸ In *Pelham*, the clash between copyright law and the fundamental right of freedom of the arts became evident. As such, the issue was whether the conflict between copyright and

³¹ Drassinower, *supra* note 15, at 230.

³² *Williams v. Gaye*, 895 F.3d 1106, 1138 (9th Cir. 2018); Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, para. 60 (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?docid=216545&doclang=en>.

³³ P. BERNT HUGENHOLTZ, *FIERCE CREATURES—COPYRIGHT EXEMPTIONS: TOWARDS EXTINCTION?* 11 (1997), <https://www.ivir.nl/publicaties/download/PBH-FierceCreatures.pdf> [<https://perma.cc/GYF2-NQGV>].

³⁴ Drassinower, *supra* note 15, at 222 (conceptualizing exceptions properly called “the nexus of an encounter between copyright and other juridical interests”).

³⁵ HUGENHOLTZ & OKEDJI, *supra* note 29.

³⁶ Drassinower, *supra* note 15, at 222.

³⁷ Maria Lillà Montagnani, *A New Interface Between Copyright Law and Technology: How User-Generated Content Will Shape the Future of Online Distribution*, 26 *CARDOZO ARTS & ENT. L.J.* 719, 755 (2009).

³⁸ Case C-476/17, *Pelham GmbH v. Hütter*, para. 16 (Dec. 12, 2018), <http://curia.europa.eu/juris/document/document.jsf?docid=208881&doclang=en>.

fundamental rights should be pushed outside the boundaries of the copyright statute. The following sections study the approach to such cases in the EU and the United States with the aim of locating the balancing exercise—internally or externally.

III. THE UNITED STATES: INTERNAL BALANCING TAKES THE LEAD

One of the most well-known U.S. cases, where the balance of copyright and fundamental rights played a crucial role, is *Eldred v. Ashcroft*.³⁹ In this 2003 case, the U.S. Supreme Court heard a constitutional challenge of the 1988 Copyright Term Extension Act.⁴⁰ In its judgment, the Court upheld *Harper & Row*,⁴¹ yet it also eased the way for copyright law to fall, in certain circumstances, under First Amendment scrutiny.⁴²

More precisely, the controversy concerned the extension of the copyright term of protection under the Copyright Term Extension Act (CTEA), which, in line with the EU copyright duration, extended the duration of copyright protection in the United States to the life of the author plus seventy years.⁴³ Although this was not the first extension of the term of protection,⁴⁴ this raised broad concerns from individuals and businesses that utilized copyright works already in the public domain. Indeed, the Act was accused of being a content-neutral regulation of speech that failed to pass heightened judicial scrutiny.⁴⁵

The Supreme Court emphasized that one of the purposes of copyright law is to promote free speech since its main objective is the creation and publication of expression.⁴⁶ For this reason, the Copyright Clause of the U.S. Constitution is compatible with the First Amendment and in line with the “Framers’ view [that] copyright’s limited monopolies are compatible with free speech principles.”⁴⁷ Besides, the Court highlighted that copyright already “contains built-in First Amendment

³⁹ 537 U.S. 186 (2003).

⁴⁰ *Id.* at 193.

⁴¹ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (holding that the unauthorized use of an unpublished manuscript of a public figure has no basis in the First Amendment, and its publication is not a “fair use” of the manuscript).

⁴² *Eldred*, 537 U.S. at 221.

⁴³ *Id.* at 195–96 (citing 17 U.S.C. § 302(a) (2000)).

⁴⁴ See U.S. Copyright Act of 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439 (1831 Act) (extending the term of copyright protection from fourteen to twenty-eight years); Act of Mar. 4, 1909, ch. 320, §§ 23–24, 35 Stat. 1080–1081 (1909 Act) (extending the renewed term of a copyright from fourteen to twenty-eight years); U.S. Copyright Act of 1976, 17 U.S.C. §§ 301–305 (1976 Act) (extending the term of copyright protection from twenty-eight years to the lifetime of the author plus seventy years).

⁴⁵ *Eldred*, 537 U.S. at 218–19 (rejecting the application of heightened scrutiny to evaluate the measure as being “uncommon” for such content-neutral regulations).

⁴⁶ *Id.* at 219.

⁴⁷ *Id.*

accommodations⁴⁸—namely, the idea-expression dichotomy and the fair use doctrine,⁴⁹ both analyzed below.

As to the idea-expression dichotomy, it “strikes a definitional balance between the First Amendment and copyright law by permitting free communication of facts while still protecting an author’s expression.”⁴⁹ In this context, the fair use doctrine also plays a significant role, allowing the use of “not only facts and ideas contained in a copyrighted work, but also [of]expression itself in certain circumstances.”⁵⁰

Aside from reinforcing the principles of *Harper & Row*, the Supreme Court, in *Eldred*, went further by affirming that a conflict between copyright and free speech is not excludable. In that sense, it maintained that while “[t]he First Amendment securely protects the freedom to make—or decline to make—one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.”⁵¹ Such scrutiny may, however, be possible only if Congress altered “the traditional contours of copyright protection,”⁵² which apparently had not occurred in *Eldred*.

Despite the suggestion of a possible clash between copyright protection and human rights, should Congress attempt to change the traditional contours of copyright, further cases have yet to make such an argument, suggesting by corollary that all current interventions in copyright law are in line with the spirit of copyright and free speech protection. Instead, U.S. cases that followed *Eldred* turned to the well-known traditional internal safeguards, namely the idea-expression dichotomy and the fair use doctrine. Even if many of these claims could have walked through the door implicitly opened by *Eldred* as potential First Amendment infringements, the parties instead seemed to rely entirely on the internal safeguards. Interestingly, in some cases even the courts themselves, instead of recognizing a possible free-speech-copyright conflict, immediately referred to the boundaries that *Eldred* built to dismiss such an assumption. As a result, the turning point that *Eldred* could potentially create remains untested.

For example, *Kahle v. Gonzales*⁵³ examined a dispute similar to that in *Eldred* with the CTEA under attack once again.⁵⁴ The plaintiffs argued that the traditional contours of copyright law were altered, thereby asking the court to determine whether there was a First

⁴⁸ *Id.* at 219–20.

⁴⁹ *Id.* at 219 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985)).

⁵⁰ *Id.*

⁵¹ *Id.* at 221.

⁵² *Id.*; see also Raymond Shih Ray Ku, *F(ree) Expression—Reconciling Copyright and the First Amendment*, 57 CASE W. RES. L. REV. 863, 873 (2016).

⁵³ 487 F.3d 697 (9th Cir. 2007).

⁵⁴ *Id.* at 698.

Amendment violation prerogative of those utilizing works already in the public domain.⁵⁵ The Court, however, once again emphasized that traditional internal safeguards—the idea-expression dichotomy and fair use—were sufficient tools to vindicate the speech interests of those affected.⁵⁶

The idea-expression dichotomy has continued to play a major role as an internal safeguard in many cases. For example, following Professor Melville Nimmer’s opinion that the idea-expression dichotomy adequately serves the interests underlying both copyright law and freedom of speech, the Ninth Circuit’s 2015 judgment in *Bikram’s Yoga College of India* denied copyright protection to a sequence of yoga poses.⁵⁷ While protection may be granted to “the particular selection and arrangements of ideas, as well as a given specificity in the form of their expression which warrants protection under the law of copyright,” ideas fall on the free speech side, and are, therefore, free.⁵⁸

More specifically, the court considered the issue of whether twenty-six yoga poses and two breathing exercises were copyright protectable subject matter to be a question going to the core of the idea-expression dichotomy, “a fundamental principle underlying constitutional and statutory copyright protection.”⁵⁹ First, the Ninth Circuit Court of Appeals referred explicitly to § 102(b) of the Copyright Act of 1976,⁶⁰ whereby ideas, procedures, processes, and the like are excluded from protection, regardless of the form in which they are described, explained, illustrated, or embodied.⁶¹ Second, it highlighted that the idea-expression dichotomy “has two constitutional foundations: the Copyright Clause and the First Amendment.”⁶²

In particular, the court noted that the copyright system was established to promote the progress of science.⁶³ Referencing *Feist*, the court explained that copyright grants authors exclusive rights over their original expression but also ensures that others can freely utilize and build upon ideas and information communicated by a work.⁶⁴ In addition, the decision directly referred to *Eldred* to remind once again that the idea-expression dichotomy constitutes a “built in First Amendment accommodation,”⁶⁵ which, in the case at hand, had

⁵⁵ *Id.*

⁵⁶ *Id.* at 700.

⁵⁷ *Bikram’s Yoga Coll. of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1044 (9th Cir. 2015).

⁵⁸ Nimmer, *supra* note 21, at 1190.

⁵⁹ *Bikram’s Yoga Coll. of India*, 803 F.3d at 1034.

⁶⁰ 17 U.S.C. § 102(b) (2018).

⁶¹ *Bikram’s Yoga Coll. of India*, 803 F.3d at 1037.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* (citing *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991)).

⁶⁵ *Id.* (citing *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)).

remained firmly in place, regardless of Congress's responses to new technologies and evolving understanding of creative expression.⁶⁶ In other words, the court demonstrated that the dichotomy retains an applicable role in maintaining constitutional limits even when copyright categories expand.

Another case that offers an interesting perspective on the application of the idea-expression dichotomy is the Second Circuit Court of Appeals' decision in *Zaleski v. Cicero Builder Development*, where a creator of home designs brought a lawsuit against builders alleging copyright infringement of architectural works and wholesale copying.⁶⁷ The court held that although the defendant's work shared the style of the plaintiff, it nonetheless took nothing from the original expression since an important distinction is to be made between copying and wrongful copying—two elements very often confused.⁶⁸

The decision pointed out that “[n]ot every portion or aspect of a copyrighted work is given copyright law’s protection.”⁶⁹ Moreover, “the history [a work] describes, the facts it mentions, and the ideas it embraces, are in the public domain free for others to draw upon.”⁷⁰ It is instead the peculiar expressions of that history, those facts, and those ideas that belong exclusively to their author.⁷¹ Eventually, what was deemed to be copied in *Zaleski* were just the unprotected elements of the original designs, which were a function of consumer expectations, standard house design, and the design features of a particular house style.⁷² Colonial homes possess certain design conventions that must be followed and, in *Zaleski*, were definitely followed by the builders.⁷³ For these reasons, the court concluded that the copyright was very thin, and only a very close copying would have constituted infringement.⁷⁴

Another important case is the well-known dispute in *Williams v. Gaye*.⁷⁵ In *Williams*, the estate of Marvin Gaye brought a copyright infringement claim against Pharrell Williams and Robin Thicke, among others, based on similarities between Marvin Gaye's song “Got To Give It Up” and Pharrell Williams's and Robin Thicke's song “Blurred Lines.”⁷⁶ The music industry and academia highly criticized the

⁶⁶ *Id.* at 1044.

⁶⁷ *Zaleski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 98 (2d Cir. 2014).

⁶⁸ *Id.* at 100; see also WILLIAM F. PATRY, 3 PATRY ON COPYRIGHT § 9:164.10 (2019) (explaining the differences between “copying” and “wrongful copying”).

⁶⁹ *Zaleski*, 754 F.3d at 100.

⁷⁰ *Id.* at 102.

⁷¹ *Id.*

⁷² *Id.* at 106.

⁷³ *Id.*

⁷⁴ *Id.* at 107.

⁷⁵ *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018).

⁷⁶ *Id.* at 1159.

judgment.⁷⁷ However, the most striking disapproval of the majority's opinion came from the dissenting voice of Judge Nguyen. By reference to *Eldred* and *Bikram's Yoga*, Judge Nguyen underlined that if it were not for the freedom to borrow others' ideas and express them in new ways, artists would not come up with new works, and this would be of great detriment to our society, which will see a decrease in creativity and works of art.⁷⁸

Eventually, all these cases demonstrate the point eloquently expressed by Professor Nimmer already in 1970: "while the idea/expression dichotomy may come in the way of free speech, it is nevertheless justified as it facilitates the democratic dialogue."⁷⁹

The other internal safeguard to free speech proposed by *Eldred* is the fair use doctrine. Originally rooted in case law, this is now codified in § 107 of the U.S. Copyright Act of 1976.⁸⁰ Described as the most important and far reaching safeguard to free speech, fair use acts as a defense to copyright infringement and shields users from copyright infringement liability.⁸¹ Justice Story's words from 1841, that "a fair and bona fide abridgement of an original work is not a piracy,"⁸² laid the foundation for the modern fair use doctrine, which now includes four factors weighed in light of the purposes of copyright law.⁸³ Because of its roots in equity, the fair use doctrine is inherently open to interpretation, and this produces most case law within the context of copyright defenses.⁸⁴

In order to appreciate fair use's interaction with free speech, one should, again, trace the jurisprudence. For example, in *A & M Records, Inc. v. Napster, Inc.*—an important decision pre-dating the *Eldred* case—the Court of Appeals for the Ninth Circuit addressed the claim that

⁷⁷ See Yvette Joy Liebesman, *Revisiting Innovative Technologies to Determine Substantial Similarity in Musical Composition Infringement Lawsuits*, 59 IDEA 157, 171 (2018).

⁷⁸ *Williams*, 885 F.3d at 1184–85 (Nguyen, J., dissenting).

⁷⁹ Nimmer, *supra* note 21, at 1192.

⁸⁰ See *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841).

⁸¹ L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 1–36 (1987) (explaining how fair use policies strike a balance between the economic rights of the copyright holder, the dissemination of ideas, and the learning function of copyrighted material).

⁸² *Folsom*, 9 F. Cas. at 345.

⁸³ *Campbell v. Acuff-Rose*, 510 U.S. 569, 578 (1994) (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110–11 (1990); Shira Perlmutter & W.F. Patry, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 685–87 (1993)).

⁸⁴ See generally Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions*, 156 U. PA. L. REV. 549 (2008) (explaining that, in the twenty-eight years from the January 1, 1978, effective date of the 1976 Copyright Act to the year 2005, there were 306 reported federal court opinions from 215 cases that made substantial use of section 107's four-factor test).

defendant's First Amendment rights were infringed by virtue of plaintiff's preliminary injunction request.⁸⁵ The case concerned the contributory and vicarious liability of Napster, a peer-to-peer file sharing platform.⁸⁶ The Ninth Circuit Court of Appeals found Napster liable, rejected the argument that Napster users were covered by fair use, and did not even begin to analyze Napster's First Amendment claim.⁸⁷

Following *Eldred*, two further cases decided by the federal courts of appeals demonstrate once again that the judiciary has always deemed the fair use doctrine an adequate internal safeguard of the copyright system, obviating any reference to First Amendment concerns. In 2006, a case involved the famous visual artist, Jeff Koons, who was accused of copyright infringement by the photographer Andrea Blanch.⁸⁸ For one of his projects, *Easyfun-Ethereal*, Jeff Koons collected images from advertisements, which he then scanned and digitally superimposed against backgrounds of pastoral landscapes.⁸⁹ The resulting work, *Niagara*, depicted four pairs of women's feet and lower legs, confections such as a chocolate fudge brownies, donuts and pastries, and the Niagara Falls in the background.⁹⁰ One of the images of the pairs of legs was taken from a photograph by the plaintiff.⁹¹ As a professional fashion photographer, Andrea Blanch had shot the photograph as part of an advertisement for *Allure* magazine.⁹² She claimed copyright infringement since the photo was used without her authorization.

The court, however, ruled that Koons's use was fair, and he did not infringe the copyright of the photographer since the two works had a different objective.⁹³ More precisely, Koons' work was deemed to be transformative.⁹⁴ While Blanch aimed at depicting the "erotic sense" and "sexuality" of the photographs,⁹⁵ Koons had juxtaposed women's legs against a backdrop of food and landscape in order to comment on how some of our most basic appetites as a society are mediated by popular images,⁹⁶ and to "satirize life . . . when seen through the prism of slick fashion photography."⁹⁷

Indeed, subsequent jurisprudence followed the same line of reasoning—using a copyrighted expression as raw material and

⁸⁵ *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027–28 (9th Cir. 2001).

⁸⁶ *Id.* at 1010–1011.

⁸⁷ *Id.* at 1027–28.

⁸⁸ *Blanch v. Koons*, 467 F.3d 244, 246 (2d Cir. 2006).

⁸⁹ *Id.* at 247.

⁹⁰ *Id.*

⁹¹ *Id.* at 247–48.

⁹² *Id.*

⁹³ *Id.* at 252–53.

⁹⁴ *Id.* at 253.

⁹⁵ *Id.* at 248.

⁹⁶ *Id.* at 247, 261.

⁹⁷ *Id.* at 255.

transforming it into new information, new aesthetics, insights, and understandings is the precise type of activity that the fair use doctrine strives to protect with the aim of enriching our society.⁹⁸ A transformative use, whereby something new is inserted with a novel purpose, changes and alters the first work by conferring on it a new expression, meaning, or message, which is precisely the free speech aspect that one would aim to safeguard.

Interestingly, *Koons* never mentioned the First Amendment. Still, when one looks at the cases to identify their objective, the free speech concerns somehow crystallize. Indeed, saying that *Koons* used an earlier image as “fodder for his commentary on the social and aesthetic consequences of mass media”⁹⁹ is just another way of saying that artists exercise their free speech prerogative in an attempt to satirize the culture and attitudes promoted in mass media.

In another fair use case, *Cariou v. Prince*, the Second Circuit Court of Appeals approved an allegedly infringing work because it represented a new expression employing new aesthetics with creative and communicative features.¹⁰⁰ There, photographer Patrick Cariou sued the world-famous appropriation artist, Richard Prince, for incorporating thirty of Cariou’s Rastafarian photographs in an exhibition.¹⁰¹ When assessing the transformative nature of the work, the court found it important that the work presented a new aesthetic and that Prince’s paintings would reasonably be perceived as different from Cariou’s photographs.¹⁰² Indeed, Cariou’s photographs were black-and-white and 9 ½” x 12,”¹⁰³ while Prince’s works were in color, included distorted human forms, and were between ten and a hundred times the size of the original photographs.¹⁰⁴ The composition, presentation, scale, color palette, and media of Prince’s work were fundamentally different and “new” compared to Cariou’s photographs, meaning the expressive nature of Prince’s work was different.¹⁰⁵ This seemed to be the decisive aspect and could be considered a form of expressive freedom for which the fair use doctrine was implicated in the case.

In *Cariou*, the court, by leniently assessing transformative purpose, permitted the Prince’s work to overcome the hurdle of fair use, as it transformed the copyrighted work into “something new,” without actually specifying what this new something was.¹⁰⁶ This demonstrates

⁹⁸ See *id.* at 251–52 (citing *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp, Inc.*, 150 F.3d 132, 142 (2d Cir. 1998)).

⁹⁹ *Id.* at 253.

¹⁰⁰ *Cariou v. Prince*, 714 F.3d 694, 707–08 (2d Cir. 2013).

¹⁰¹ *Id.* at 698–99.

¹⁰² *Id.* at 707.

¹⁰³ *Id.* at 706.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 706.

¹⁰⁶ See *id.* at 710.

that the internal safeguard of free speech, in the context of the fair use doctrine, can be very flexible and far reaching. Consequently, in U.S. jurisprudence, internal safeguards—namely the idea-expression dichotomy and the fair use doctrine—govern the interaction between copyright and human rights.

In addition to these mechanical internal balancing instruments, U.S. courts tend to resort to the “shared goal argument” as another substantive internal safeguard.¹⁰⁷ According to this argument, both copyright and free speech aim at promoting progress¹⁰⁸—the former provides incentives for the production of speech, while the latter is responsible for protecting that production.¹⁰⁹ In doing so, they take different routes to achieve the same goal of promoting speech, which is supplemented by the division of labor argument.¹¹⁰ In such a case, a conflict between copyright and free speech rarely arises, as the copyright system itself is more than equipped to accommodate free speech.

IV. THE COURT OF JUSTICE OF THE EU: DANCING TO THE CHARTER’S TUNE?

In the EU, concerns for the functioning of the EU’s internal market have traditionally driven legislative action in the field of copyright.¹¹¹ Thus, the need to harmonize copyright laws with directives and regulations emerges whenever differences in the legislations of the Member States risk jeopardizing the free movement of goods and services.¹¹² The key provisions in this respect are Articles 26 and 114 of the Treaty on the Functioning of the European Union. These two legal bases are rather general in their wording. The former broadly states that the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, while the latter entails the specific

¹⁰⁷ See Michael Birnhack, *Copyrighting Speech: A Trans-Atlantic View*, in COPYRIGHT AND HUMAN RIGHTS—FREEDOM OF EXPRESSION—INTELLECTUAL PROPERTY—PRIVACY 37, 46, 49–50, 60 (Paul L.C. Torremans ed., 2004) (explaining and providing examples of courts using the “shared goal argument”).

¹⁰⁸ See Greg A. Perry, *Copyright and the First Amendment: Nurturing the Seeds for Harvest*; Harper & Row, Publishers v. Nation Enterprises, 105 S.Ct. 2218 (1985), 65 NEB. L. REV. 631, 652 (1986) (“[C]opyright and the first amendment serve the same laudable purpose—the fullest possible dissemination of ideas and information for the ultimate benefit of the general public.”).

¹⁰⁹ See PAUL L.C. TORREMANS, INTELLECTUAL PROPERTY LAW AND HUMAN RIGHTS (3d ed. 2015).

¹¹⁰ Birnhack, *supra* note 107, at 46, 49.

¹¹¹ See ELEONORA ROSATI, COPYRIGHT AND THE COURT OF JUSTICE OF THE EUROPEAN UNION 10 (2019); Maria José Schmidt-Kessen, *EU Digital Single Market Strategy, Digital Content and Geo-Blocking: Costs and Benefits of Partitioning EU’s Internal Market*, 24 COLUM. J. EUR. L. 561, 570–71 (2018) (explaining the conflict between territorial copyright restrictions and the EU’s efforts to create an internal market).

¹¹² ROSATI, *supra* note 111.

EU legislative procedure for achieving that aim, namely the ordinary legislative procedure.¹¹³

This legal arrangement has produced a long list of directives and regulations in the field of EU copyright law in a highly fragmented manner. Consequently, when it comes to copyright disputes, Member States are now in a situation where the law to be applied is a hodgepodge of EU and national law.¹¹⁴ Such a piecemeal harmonization often leads to situations in which national courts are obliged to apply a provision of EU law, yet are somewhat unclear as to the interpretation of the provision. Certain norms are not precisely defined in EU laws because Member States struggle to reach political agreement on key notions, and, at the same time, the EU legislature has intentionally left certain concepts undefined in order to avoid the need for political compromises.¹¹⁵ Inevitably, what happens in these circumstances is that the national courts, unsure of how to interpret various EU norms, stays the proceedings and refers specific questions for guidance to the CJEU. This procedure is called “preliminary reference.”¹¹⁶ By providing its interpretation of the unclear norm at stake, the CJEU has taken up the task of filling in the apparent gaps¹¹⁷ and defining certain notions as autonomous concepts of EU law to further the harmonization agenda.¹¹⁸ This has led some scholars to characterize the court as a co-legislator.¹¹⁹

The conflict between copyright and fundamental rights materializes in front of the CJEU as a result of preliminary references by national courts. In fact, this happens quite often.¹²⁰ In this process of interpretation of the legislative *acquis*, the CJEU has regularly referred to the Charter as a guiding principle to such an extent that academics

¹¹³ ROBERT SCHÜTZE, *EUROPEAN CONSTITUTIONAL LAW* 151 (2d ed. 2015).

¹¹⁴ Niilo Jääskinen, *Europeanisation of National Law: A Legal-Theoretical Analysis*, 40 *EUR. L. REV.* 667, 668 (2015).

¹¹⁵ Vincent Cassiers & Alain Strowel, *Intellectual Property Law Made by the Court of Justice of the European Union*, in *INTELLECTUAL PROPERTY AND THE JUDICIARY* 175, 178 (Christophe Geiger, Craig Allen Nard, & Xavier Seuba eds., 2018).

¹¹⁶ Treaty on the Functioning of the European Union, art. 267, 2012 O.J. (C 326) 47, 163.

¹¹⁷ Jonathan Griffiths, *Taking Power Tools to the Acquis—the Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law*, in *INTELLECTUAL PROPERTY AND THE JUDICIARY* 144, 144 (Christophe Geiger, Craig Allen Nard, & Xavier Seuba eds., 2018); see also Cassiers and Strowel, *supra* note 115, at 183–85.

¹¹⁸ ROSATI, *supra* note 112, at 79; PAUL TORREMANS & IRINI STAMATOUDI, *EU COPYRIGHT LAW: A COMMENTARY* 11 (2014).

¹¹⁹ Cassiers & Strowel, *supra* note 115.

¹²⁰ Bernd Justin Jütte & João Pedro Quintais, *Conference on Freedom of Expression and Copyright: Luxembourg, 7 November 2019*, *KLUWER COPYRIGHT BLOG* (Sept. 24, 2019), <http://copyrightblog.kluweriplaw.com/2019/09/24/conference-on-freedom-of-expression-and-copyright-luxembourg-7-november-2019/> [https://perma.cc/T9WN-R4P5].

have labelled this development the “constitutionalization” of IP law.¹²¹ The need to balance copyright law with other fundamental rights has emerged primarily in the context of economic rights,¹²² exceptions and limitations,¹²³ and intermediaries’ liability for third parties’ copyright infringement online.¹²⁴ Despite these numerous instances in which concerns for fundamental rights formed part of the court’s judgment, the CJEU does not always delve deep into the discussion of balancing copyright and fundamental rights. The two areas in which this discussion has indeed taken place more evidently are the cases on intermediaries’ liability and, more recently, the field of exceptions and limitations. For that reason, this analysis focuses on these two subjects.

¹²¹ See Griffiths, *supra* note 117, at 144; see also Christophe Geiger, “Constitutionalising” *Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union*, 37 INT’L REV. INDUS. PROP. & COPYRIGHT L. 371, 371 (2006); Jonathan Griffiths, *Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law*, 38 EUR. L. REV. 65, 65 (2013) [hereinafter Griffiths, *Constitutionalising or Harmonising?*]; Tuomas Mylly, *The Constitutionalisation of the European Legal Order: Impact of Human Rights on Intellectual Property in the EU*, RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 103, 103 (Christophe Geiger ed., 2015).

¹²² See Case C-160/15, *GS Media BV v. Sanoma Media Netherlands BV* (Apr. 7, 2016), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=175626&pageIndex=0&doclang=EN>; Case C-479/04, *Laserdisken ApS v. Kulturministeriet*, 2006 E.C.R. I-8093;

¹²³ See, e.g., Case C-516/17, *Spiegel Online GmbH v. Beck* (Jan. 10, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=209682&pageIndex=0&doclang=EN>; Case C-476/17, *Pelham GmbH v. Hütter* (Dec. 12, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=208881&pageIndex=0&doclang=EN>; Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland* (Oct. 25, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=207024&pageIndex=0&doclang=EN>; Case C-201/13, *Deckmyn v. Vandersteen* (May 22, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152656&pageIndex=0&doclang=EN>; Case C-145/10, *Painer v. Standard VerlagsGmbH*, 2011 E.C.R. I-12533; Case C-467/08, *Padawan SL v. SGAE*, 2010 E.C.R. I-10055.

¹²⁴ See, e.g., Case C-484/14, *Tobias McFadden v. Sony Music Entertainment Germany GmbH* (Mar. 16, 2016), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=175130&pageIndex=0&doclang=EN>; Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH* (Nov. 26, 2013), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=144944&pageIndex=0&doclang=EN>; Case C-360/10, *SABAM v. Netlog NV* (Feb. 16, 2012), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=119512&pageIndex=0&doclang=EN>; Case C-461/10, *Bonnier Audio AB v. Perfect Communication Sweden AB* (Nov. 17, 2011), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=114613&pageIndex=0&doclang=EN>; Case C-70/10, *Scarlet Extended SA v. SABAM* (Apr. 14, 2011), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=81776&pageIndex=0&doclang=EN>; Case C-275/06, *Promusicae v. Telefónica de España SAU* (July 18, 2007), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=62901&pageIndex=0&doclang=EN>.

Before exploring these two areas of copyright law further, we need to map out the tools that the court uses in its analysis. The first tool in the EU is the Charter of Fundamental Rights, which bears the status of primary law.¹²⁵ A strong peculiarity of the Charter, without a counterpart in the United States, is Article 17(2), which boldly affirms that intellectual property shall be protected. For that reason, the first section below explores the status of IP as a fundamental right. On the basis of this premise, the next two parts then turn to the jurisprudence of the CJEU on intermediaries' liability and permitted uses respectively, where the CJEU was prompted to take fundamental rights concerns into account.

A. Intellectual Property as a Fundamental Right

With the entry into force of the Lisbon Treaty in 2009, the Charter of Fundamental Rights of the EU became an integral part of the EU legal order, enjoying the status of the founding treaties, with primacy over secondary EU law, namely directives and regulations. The most relevant fundamental right in the discourse on copyright law is the right of property enshrined in Article 17 of the Charter. The text of the Charter goes even further by stating, in Article 17(2), that intellectual property shall be protected. Such a bold statement, described by academics as a “mysterious provision with an unclear scope,”¹²⁶ is certainly not to be considered as granting IP some “special super-protected status,” but just as a confirmation that Article 17(1) shall also include the right of IP.¹²⁷ Therefore, considering that the right to property is not an absolute right but has a qualified status and, as such, may be restricted in light of general interest,¹²⁸ the same is applicable to Article 17(2) in the context of intellectual property. Indeed, the CJEU case law that followed confirms this position.¹²⁹ In any case, even prior to the Charter, IP was, as part of the right of property, already considered a fundamental right under the European Convention of Human Rights.¹³⁰

Consequently, given the fundamental nature of IP rights, when a copyright case is referred to the CJEU, the court ought to ascertain the legitimacy of the measures required to prevent copyright infringement

¹²⁵ Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, 8.

¹²⁶ Christophe Geiger, *Intellectual Property Shall be Protected?! Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope*, 31 EUR. INTEL. PROP. REV. 113, 113 (2009).

¹²⁷ Griffiths, *supra* note 117, at 151.

¹²⁸ See Case C-280/93, Germany v. Council, 1994 E.C.R. I-4980.

¹²⁹ See Case C-70/10, Scarlet Extended SA v. SABAM, 2011 E.C.R. I-11959, para. 43.

¹³⁰ See Peter Oliver & Christopher Stothers, *Intellectual Property Under the Charter: Are the Court's Scales Properly Calibrated?*, 54 COMMON MKT. L. REV. 517, 520 (2017).

in light of the other fundamental rights protected under the Charter—mainly, freedom of expression, but also the right to privacy and the freedom to conduct business. All of these human rights are equal and, thus, none can prevail automatically over the others.¹³¹

Interestingly, the Charter itself encompasses how to carry out this assessment—the proportionality test.¹³² Referred to as a “mega” or “golden” standard in European copyright law,¹³³ the test is rooted in German administrative law.¹³⁴ It has now spread to other fields and refers to the understanding that constitutional rights are relative and not absolute and, therefore, should be balanced against each other.¹³⁵ Today, the test is regularly called upon to outline the constitutional limits of a particular norm in a democratic society.¹³⁶ In the context of EU copyright law, the test has been employed as a general principle of EU law and also as a principle enshrined in the EU copyright directives themselves.¹³⁷

Four steps traditionally form the proportionality test: “proper purpose, rational connection, necessary means[,] and a proper relation between the benefit gained by realizing the proper purpose and the harm caused to the constitutional right.”¹³⁸ In other words, after establishing the legitimacy of the pursued objective,¹³⁹ one then turns to the principle of suitability, also called the principle of appropriateness.¹⁴⁰ At this stage, the question becomes whether the measure chosen is suitable to pursue the legitimate objective. The measure would be

¹³¹ Peggy Ducoulombier, *Conflicts Between Fundamental Rights and the European Court of Human Rights: An Overview*, in *CONFLICTS BETWEEN FUNDAMENTAL RIGHTS* 217, 234 (Eva Brems ed., 2008).

¹³² Charter of Fundamental Rights of the European Union, art. 52(1), 2000 O.J. (C 364) 1, 28.

¹³³ See Orit Fischman Afori, *Proportionality—A New Mega Standard in European Copyright Law*, 45 *INT’L REV. INTEL. PROP. & COMPETITION L.* 889, 892 (2014); Alain Strowel & Hee-Eun Kim, *The Balancing Impact of General EU Law on European Intellectual Property Jurisprudence*, in *THE EUROPEANIZATION OF INTELLECTUAL PROPERTY LAW: TOWARDS A EUROPEAN LEGAL METHODOLOGY* 112 (Justine Pila & Ansgar Ohly eds., 2013).

¹³⁴ Alec Stone Sweet & Jud Mathews, *Proportionality, Balancing and Global Constitutionalism*, 47 *COLUM. J. TRANSNAT’L L.* 75, 75 (2008).

¹³⁵ AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* 177 (2012).

¹³⁶ VICKI JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* 40 (2013).

¹³⁷ ROSATI, *supra* note 112, at 45.

¹³⁸ BARAK, *supra* note 135, at 131.

¹³⁹ Wolf Sauter, *Proportionality in EU Law: A Balancing Act?*, 15 *CAMBRIDGE Y.B. EUR. LEGAL STUD.* 439, 448 (2013); Stone Sweet and Mathews, *supra* note 134, at 76.

¹⁴⁰ Sauter, *supra* note 139, at 448–49; *see also* Case C-331/88, *R v. Ministry of Agric., Fisheries and Food*, 1990 E.C.R. I-4023.

suitable if it possesses a minimum degree of effectiveness.¹⁴¹ Next is the principle of necessity, also dubbed as strict necessity, which requires that no other equally suitable, less restrictive measure is available.¹⁴² Traditionally, at this stage, the chosen measure should not restrict the right more than it is necessary to achieve the legitimate objective.¹⁴³ The final step is proportionality in the narrow sense (*stricto sensu*), whereby the measure should not disrupt the fair balance between the conflicting rights or destroy the essence of the right that is restricted.¹⁴⁴ At this final stage, the actual balancing takes place. The benefit gained by the purpose of the law is weighed against the harm caused to the fundamental right.¹⁴⁵ This last stage creates a relationship by balancing without damaging the core of the fundamental right.¹⁴⁶ The four elements of the test, while evaluated separately, eventually come to function as communicating vessels.¹⁴⁷

Against this background, it has been observed that, in the contemporary digital environment, it is particularly difficult to reconcile fundamental rights—such as freedom of expression, privacy, data protection, and freedom to conduct business—with copyright law as a fundamental right of its own.¹⁴⁸ The proportionality test outlined above is often combined with a reference to the need to strike a fair balance between different rights and interests.¹⁴⁹

When one turns to analyze the copyright case law of the CJEU, two fields stand out: intermediaries' liability and permitted uses. The former pertains to the balancing of many crucial fundamental rights. From the point of view of the copyright holder, the right to property under Article 17 of the Charter is key, which, as observed, also covers copyright. From the point of view of internet users, on the other hand,

¹⁴¹ JONAS CHRISTOFFERSEN, *FAIR BALANCE: A STUDY OF PROPORTIONALITY, SUBSIDIARITY AND PRIMACY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 96 (2009); Stone Sweet & Mathews, *supra* note 134, at 76.

¹⁴² Stone Sweet & Mathews, *supra* note 134, at 75 (“[T]he core of necessity analysis is the deployment of a ‘least-restrictive means’ (LRM) test: the judge ensures that the measure does not curtail the right any more than is necessary for the government to achieve its stated goals.”).

¹⁴³ *Id.* at 76.

¹⁴⁴ BARAK, *supra* note 135, at 131–33, 340–70; CHRISTOFFERSEN, *supra* note 141, at 19–20.

¹⁴⁵ BARAK, *supra* note 135, at 343.

¹⁴⁶ Peter Teunissen, *The Balance Puzzle: The ECJ’s Method of Proportionality Review in EU Copyright Law*, 40 *EUR. INTEL. PROP. REV.* 579, 582 (2018).

¹⁴⁷ *Id.*

¹⁴⁸ Sari Depreeuw, Irina Baraliuc & Serge Gutwirth, *Copyright Enforcement in the Digital Age: A Post-ACTA View on the Balancing of Fundamental Rights*, 21 *INT. J.L. INF. TECH.* 92, 92 (2013).

¹⁴⁹ ROSATI, *supra* note 112, at 50 (stating that sometimes the fair balance is actually an expression of the proportionality assessment as opposed to a self-standing standard of its own).

the freedom of information pursuant to Article 11 and the protection of personal data under Article 8 are discussed, especially when injunctions, coupled with the imposition of filtering measures, are concerned.¹⁵⁰ Finally, from the intermediaries' perspective, the freedom to conduct business under Article 16 is often implicated.¹⁵¹ Such a wide diversity of fundamental rights necessitates a fair balance assessment between many different interests since, in these cases, the relevant secondary legislation does not deal explicitly with the intersection of copyright and fundamental rights.¹⁵²

The second category of cases, that of permitted uses, has come under the detailed scrutiny of the CJEU in three very recent Grand Chamber judgments.¹⁵³ Also referred to as “the triad,”¹⁵⁴ these cases focus on the nature of balancing—internal or external—and pertain to the brittle interaction between exceptions and limitations in EU law and exclusive economic rights. For these reasons, the following sections dive deep into the reasoning of the court and underpin its leading methodology. In all cases, the Charter does indeed figure as a relevant element in the discussion. Yet, very often, the actual balancing exercise lacks sound methodology, an approach Professor Peukert describes as “ad hoc balancing lacking a clear transparent normative framework.”¹⁵⁵

B. Intermediaries' Liability Cases

Because the field is entirely characterized by technology, the cases regarding online intermediaries' liability have attracted particularly high

¹⁵⁰ See Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs compositeurs et éditeurs (SABAM)*, 2011 E.C.R. I-11959, para. 50 (noting that implementation of a filtering system may infringe on internet users' rights under Articles 8 and 11 of the Charter).

¹⁵¹ *Id.* paras. 46–49 (noting that a fair balance must be struck between the intellectual property rights of copyright holders and the freedom to conduct business under Article 16 of the Charter).

¹⁵² Griffiths, *Constitutionalising or Harmonising?*, *supra* note 121, at 72.

¹⁵³ See Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland* (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=207024&pageIndex=0&doclang=EN>; Case C-516/17, *Spiegel Online GmbH v. Volker Beck* (July 29, 2019) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=209682&pageIndex=0&doclang=EN>; Case C-476/17, *Pelham GmbH v. Hütter* (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=208881&pageIndex=0&doclang=EN>.

¹⁵⁴ 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*, 41 EUR. INTELL. PROP. REV. 683, 690 (2019).

¹⁵⁵ Alexander Peukert, *The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 135 (Christophe Geiger ed., 2015).

levels of attention as far as the balancing of different interests are concerned. In 2008, the first such case before the CJEU involved remedies for copyright enforcement.¹⁵⁶ *Promusicae*, the Spanish copyright collecting society for the record industry, brought to court Telefónica, a Spanish internet access provider, in an attempt to disclose the identities and physical addresses of users exchanging files through the peer-to-peer file sharing platform, KaZaA.¹⁵⁷ The CJEU was particularly brief in discussing the substance of these rights and the application of the proportionality principle. The court's starting point, however, was that Member States should maintain a fair balance between the right to property, the right to privacy, and data protection in the transposition of the directives at stake.¹⁵⁸ To do that, national courts must interpret national law in line with general principles of the law, such as, proportionality.¹⁵⁹ The court, however, limited itself only to this rather brief remark and did not delve into the steps of the proportionality test. This was in line with the court's approach in *L'Oreal v. eBay*, where the court was similarly succinct in its elaboration of the proportionality test but in the context of trademark law.¹⁶⁰ The CJEU in *Promusicae* left it to the national court to expand upon its own understanding of fair balance.¹⁶¹ It seems as though Member States are presumed to be familiar with the peculiarities of the test without the necessity of any further guidance by the CJEU.

Next, the court dealt with two cases that concerned the requirement to install a filtering system to monitor user activity to prevent the presence of copyright infringing material. The copyright and fundamental rights intersection came to the limelight in the context of internet service providers' and hosting providers' liability in *Scarlet Extended*¹⁶² and *Netlog*¹⁶³ respectively. These two cases were eventually joined. While the former concerned an internet service provider and the latter a hosting provider, both eventually turned on the question of whether an intermediary is required to install a filtering system to monitor the activity of its users and prevent copyright infringing material from appearing on its services.¹⁶⁴ Various fundamental rights were at stake—namely, the copyright holders' right to intellectual property, the intermediaries' freedom to conduct business, and the users' freedom

¹⁵⁶ Case C-275/06, *Promusicae v. Telefónica de España SAU*, 2008 E.C.R. I-271.

¹⁵⁷ *Id.* para. 30.

¹⁵⁸ *Id.* para. 54.

¹⁵⁹ *Id.*

¹⁶⁰ See Case C-324/09, *L'Oreal v. eBay*, 2011 E.C.R. I-6011, paras. 143–44.

¹⁶¹ Case C-275/06, *Promusicae v. Telefónica de España SAU*, 2008 E.C.R. I-271, para. 68.

¹⁶² Case C-70/10, *Scarlet Extended SA v. SABAM*, 2011 E.C.R. I-11959.

¹⁶³ Case C-360/10, *SABAM v. Netlog NV* (Feb. 16, 2012), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=119512&pageIndex=0&doclang=EN>.

¹⁶⁴ *Id.* para. 26; Case C-70/10, *Scarlet Extended SA*, 2011 E.C.R. I-11959, para. 36.

of information and right to data protection.¹⁶⁵ The court ruled out the possibility of imposing such an obligation upon the intermediary as that would have directly clashed with Article 15(1) of the E-Commerce Directive, which explicitly bans the imposition of general monitoring obligations upon intermediaries.¹⁶⁶

Moreover, the court made an important reference to the need to fairly balance different rights. In that sense, the court eventually held that an injunction of the kind sought in the case would seriously interfere with the freedom of the intermediary to conduct business since it would impose on the intermediary an obligation to install a complicated and costly system at the intermediary's own expense.¹⁶⁷ Furthermore, the Enforcement Directive also prevented the imposition of such an injunction, as the obligation would have been unnecessarily complicated or costly.¹⁶⁸ Therefore, the court was not convinced that the proposed measure would satisfy the fair balance between the opposing fundamental rights.¹⁶⁹

In the next case in this wave, the court focused its attention on a claim brought by the film producers Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft GmbH, who targeted the website kino.to, which provided access to large amounts of copyrighted works.¹⁷⁰ The crux of the case was whether the Austrian internet service provider, UPC Telekabel, should have introduced a measure to block access to the website.¹⁷¹ At stake was a so-called "outcome prohibition," whereby the intermediary would be required to take all necessary measures to prevent a certain outcome. In its reasoning, the court reiterated the importance of balancing the various rights at stake.¹⁷² The first balancing the court carried out was between the rightsholders' right to intellectual property and the intermediaries' freedom to conduct business.¹⁷³ The second was between the right of intellectual property holders and the freedom of information of the users.¹⁷⁴

¹⁶⁵ Case C-360/10, *SABAM*, para. 1; Case C-70/10, *Scarlet Extended SA*, 2011 E.C.R. I-11959, paras. 1-4.

¹⁶⁶ Case C-360/10, *SABAM*, para. 38; Case C-70/10, *Scarlet Extended SA*, 2011 E.C.R. I-11959, para. 112.

¹⁶⁷ Case C-70/10, *Scarlet Extended SA*, 2011 E.C.R. I-11959, para. 48.

¹⁶⁸ Parliament and Council Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, art. 3(1), 2004 O.J. (L 195) 16, 20.

¹⁶⁹ Case C-360/10, *SABAM*, para. 51.

¹⁷⁰ Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH* (Mar. 27, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=149924&pageIndex=0&doclang=en>.

¹⁷¹ *Id.* para. 2.

¹⁷² *Id.* para. 46.

¹⁷³ *Id.* para. 63.

¹⁷⁴ *Id.*

Regarding the balance between the freedom to conduct business and intellectual property rights, the court held that this type of injunction “does not seem to infringe the very substance of the freedom of an internet service provider.”¹⁷⁵ In all cases, before the balancing exercise is carried out, the court must outline the actual substance of the fundamental right at stake. Freedom to conduct business was understood as the right of “any business to be able to freely use, within the limits of its liability for its own acts, the economics, technical and financial resources available to it.”¹⁷⁶ In the present case, since the intermediary had the freedom to determine the measure in order to achieve the outcome sought, the freedom to conduct business was not sacrificed.¹⁷⁷ The court, however, did not address the actual balancing required in the first context., Instead the court shifted the task to the shoulders of the intermediary by holding 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.”¹⁷⁸

Surprisingly, the intermediary itself must do the balancing as well, not only the national authorities. This is in sync with the recent legislative pushes in the EU to make intermediaries more responsible for the content they host.¹⁷⁹ Nevertheless, even though intermediaries are often the gatekeepers of information online,¹⁸⁰ it is questionable whether they are best positioned to balance the different fundamental rights at stake in the context of tackling copyright infringement online.¹⁸¹

¹⁷⁵ *Id.* paras. 50–51.

¹⁷⁶ *Id.* para. 49.

¹⁷⁷ *Id.* paras. 52–53.

¹⁷⁸ *Id.*

¹⁷⁹ *See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling Illegal Content Online—Towards an Enhanced Responsibility of Online Platforms*, COM (2017) 555 final (Sept. 28, 2017); Maria Lilla Montagnani & Alina Yordanova Trapova, *Safe Harbours in Deep Waters: A New Emerging Liability Regime for Internet Intermediaries in the Digital Single Market*, 26 INT. J.L. INFO. TECH. 294, (studying the trend of making intermediaries more responsible in the context of copyright content and audio-visual media services) (2018).

¹⁸⁰ Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J. L. TECH. 253, 253 (2006); *see also* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), *THE ROLE OF INTERNET INTERMEDIARIES IN ADVANCING PUBLIC POLICY OBJECTIVES: FORGING PARTNERSHIPS FOR ADVANCING POLICY OBJECTIVES FOR THE INTERNET ECONOMY, PART II*, DSTI/ICCP(2010)11/FINAL, at 5 (2011), <https://www.oecd.org/internet/ieconomy/48685066.pdf> [https://perma.cc/B7HS-WNRT].

¹⁸¹ *See* Christophe Geiger & Elena Izyumenko, *The Role of Human Rights in Copyright Enforcement Online: Elaborating A Legal Framework for Website Blocking*, 32 AM. U. L. REV. 44, 93 (2016).

In the balance between freedom of information of users and intellectual property rights, the CJEU was more diligent in its reference to the three steps of proportionality that the intermediary should undertake.¹⁸² As far as the legitimate aim was concerned, the court emphasized that the measure adopted by the intermediary should strictly target infringing activity without impinging on users' lawful use of the services to access information.¹⁸³ To ensure appropriateness of the measure, the measure should be "sufficiently effective to ensure genuine protection of the fundamental right at issue."¹⁸⁴ In that sense, the measure should "have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter made available to them in breach of that fundamental right."¹⁸⁵

As far as the necessity step was concerned, the court briefly mentioned that the adopted measure should not unnecessarily deprive users of the possibility to lawfully access the information available.¹⁸⁶ The actual balancing in the last stage of the proportionality test was not carried out, but the court nevertheless concluded that there was a fair balance between the freedom of information and the right to intellectual property.¹⁸⁷ Although the court's weighing of the interests remained brief, some have suggested that this was expected given the outcome prohibition at stake.¹⁸⁸

Next, in *McFadden*, the operator of an open wireless network, who sold and leased sound and lighting systems, found himself in court when Sony Music served him a formal notice because an anonymous user had downloaded infringing content via *McFadden's* Wi-Fi network.¹⁸⁹ *McFadden* operated a Wi-Fi network free-of-charge, permitting anyone to log in without registering or revealing personal data.¹⁹⁰ He insisted that he was shielded from liability due to the safe harbor exemption of Article 14 of the E-Commerce Directive.¹⁹¹ On this point, *McFadden* was successful, as the safe harbor exemption was upheld, and no

¹⁸² See Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, para. 63 (Mar. 27, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=149924&pageIndex=0&doclang=en>.

¹⁸³ *Id.* para. 56.

¹⁸⁴ *Id.* para. 62.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* para. 56.

¹⁸⁷ *Id.* paras. 63–65.

¹⁸⁸ Oliver and Stothers, *supra* note 130, at 557.

¹⁸⁹ Case C-484/14, *Tobias McFadden v. Sony Music Entertainment Germany GmbH* (Sept. 15, 2016), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=175130&pageIndex=0&doclang=EN>.

¹⁹⁰ *Id.* para. 23.

¹⁹¹ *Id.* para. 33.

damages could be awarded.¹⁹² Yet, another remedy—an injunction—was still on the table. Upon referral from the national court, three possible remedies were discussed.¹⁹³ Each was examined by the CJEU in turn, providing the first case to date where the CJEU thoroughly applied the proportionality analysis.

First, it was proposed that all information passing through the internet connection be monitored by the internet service provider.¹⁹⁴ Since this was in direct clash with Article 15 of the E-Commerce Directive that banned general monitoring activities, it was quickly dismissed. The second option was to terminate the internet access.¹⁹⁵ Since this was not at odds with the prohibition on general monitoring, the relevant rights—namely, McFadden’s freedom to conduct business and Sony Music’s right to intellectual property—were weighted.¹⁹⁶ The court held that absent the consideration of less restrictive measures, the decision to terminate the service provider’s internet connection would seriously impinge on McFadden’s freedom to conduct business.¹⁹⁷ In other words, the court ruled that, since there were less restrictive measures that had not been evaluated, termination of internet access would be improper.

The third option was password protecting the network.¹⁹⁸ Two possible clashes with fundamental rights were discussed here. On the one hand, there was a potential problem with restricting McFadden’s freedom to conduct business, while on the other hand, users’ right to freedom of information would have been affected.¹⁹⁹

Unlike *UPC Telekabel*, the court itself performed the balancing, instead of shifting the obligation to the intermediary. In the context of the freedom to conduct business, the court ruled that a fair balance was struck, as the essence of the right to conduct business was not affected.²⁰⁰ All that was required was a slight adjustment of one of the technical options available, namely to password protect the Wi-Fi network.²⁰¹ Regarding the users’ freedom of information, the court held that protecting the network with a password would not clash with the objective of the measure since such a technical restriction would not constitute an outright block to all internet access.²⁰² As for the suitability requirement, the court followed the familiar line of reasoning, whereby

¹⁹² *Id.* para. 65.

¹⁹³ *Id.* paras. 85–99.

¹⁹⁴ *Id.* para. 87.

¹⁹⁵ *Id.* para. 88.

¹⁹⁶ *Id.* paras. 88–89.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* para. 90.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* para. 94.

²⁰¹ *Id.* paras. 91–92.

²⁰² *Id.* para. 94.

the effectiveness of the chosen measure should be capable of at least making it difficult for users to infringe copyright or seriously discourage them from doing so.²⁰³ Hence, a password restriction was a suitable solution since users would have to reveal their identity and could not act anonymously to obtain the required password.²⁰⁴

From the three possible remedies, password protection was deemed a necessary measure, which made the discussion of this step rather brief. Moving onto the balancing exercise as part of the proportionality *stricto sensu* step, the court found that securing an internet connection did not appear to undermine the essence of users' right to freedom of information as long as it was limited to a password requirement.²⁰⁵

The crux of the court's analysis was preserving the essence of the fundamental rights concerned. Should the line be crossed and the essence of these rights be violated, the benefits of the pursued aim would be outweighed by the harm done to conflicting fundamental rights.²⁰⁶ Surprisingly, even though *McFadden* seems to be the most elaborate application of the proportionality test, it still failed to consider the wider picture of fundamental rights involved since the right to private life pursuant to Article 7 of the Charter and data protection under Article 8 of the Charter were entirely excluded from the analysis. Since the chosen remedy of password protection required users to reveal personal, indefinable information, users' concerns should have been taken into consideration.

Consequently, whenever copyright law and fundamental rights norms clash in the context of intermediaries, the dispute is resolved by reference to external copyright safeguards, namely the Charter, also dubbed an "explicit constitutional constraint on copyright."²⁰⁷ In these cases, unlike the category of permitted uses evaluated below, fundamental rights act as an autonomous ground to limit specific enforcement measures. What is evident, however, is that the proportionality analysis albeit invoked by the CJEU and explicitly required by the directives, is only applied superficially. Further, the test has been widely criticized by academics as inappropriate because it positions the right to property against all other rights, resting on the presumption that all fundamental rights are equal and, thereby, merely replacing one ambiguity with another without any true guidance.²⁰⁸ The

²⁰³ *Id.* para. 96.

²⁰⁴ *Id.* paras. 91-92.

²⁰⁵ *Id.* para. 92.

²⁰⁶ Teunissen, *supra* note 146, at 591.

²⁰⁷ Afori, *supra* note 133, at 911.

²⁰⁸ ROBERT BURRELL & ALLISON COLEMAN, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT 187-91 (2005); *see also* Afori, *supra* note 133, at 909; Depreeuw, Baraliuc, & Gutwirth, *supra* note 148, at 92.

structure and clarity needed to improve the test can come only through consistency in the judgments, but to date, such consistency is lacking.²⁰⁹

While the CJEU does not apply the proportionality test in its complete form in most cases, one can forgive the court for not providing full guidance, as the fair balance test is heavily fact specific. This is sometimes seen as a positive facet, allowing the courts to transform a complex, principle-based conflict into a primarily factual one that facilitates pragmatic solutions.²¹⁰ However, at the same time, the EU legislature should have been clearer and more consistent when drafting legislation fit for information society services.²¹¹ Some authors suggest that copyright always had to strike a balance between the competing interests of authors, intermediaries, and the public, which made vesting large discretion to the courts the most appropriate course.²¹²

In any case, the true problem arises when the court attempts to apply the proportionality test—as in *McFadden*—but omits some important fundamental rights from the analysis. This is how the proportionality test becomes “without further elucidation, vacuous and unhelpful.”²¹³ Other authors argue that the reason for such superficial application of the proportionality test lies in the CJEU’s very selective reference to fundamental rights in these cases, to the extent that the CJEU has been accused of referring to fundamental rights only when they support an interpretation already reached by recourse to other interpretative methods.²¹⁴

C. Exceptions and Limitations Cases

The other category of copyright cases under the fundamental rights radar pertains to exceptions and limitations, i.e. permitted uses. While in *Painer*²¹⁵ and *Deckmyn*,²¹⁶ the CJEU strictly focused on internal balancing as instructed by recital 31 of the InfoSoc Directive, three recent cases from the CJEU’s Grand Chamber question whether the balancing can take place outside the boundaries of copyright legislation.

On July 29, 2019, the CJEU delivered three much-awaited judgments bearing on the relationship between copyright law and

²⁰⁹ Oliver & Stothers, *supra* note 130, at 546.

²¹⁰ Afori, *supra* note 133, at 910.

²¹¹ See Oliver & Stothers, *supra* note 130, at 565.

²¹² See Afori, *supra* note 133, at 892.

²¹³ Griffiths, *Constitutionalising or Harmonising?*, *supra* note 121, at 74.

²¹⁴ See Mylly, *supra* note 121, at 126.

²¹⁵ Case C-145/10, *Painer v. Standard VerlagsGmbH*, 2011 E.C.R. I-12533.

²¹⁶ Case C-201/13, *Deckmyn v. Vandersteen* (Sep. 3, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152656&pageIndex=0&doclang=EN>.

fundamental rights, namely, *Funke Medien*,²¹⁷ *Spiegel Online*,²¹⁸ and *Pelham Moses*.²¹⁹ All three cases landed at the CJEU upon a referral from Germany and centered on the question of whether fundamental rights as such can justify limitations on copyright. The CJEU was asked to decide whether the balancing can take place outside of the internal mechanisms incorporated in the InfoSoc Directive—in these particular cases, outside of the framework for exceptions and limitations. The Advocate General in all three cases was Advocate General (AG) Szpunar, whose opinions have gained significant commentary from academia.²²⁰ Before delving into the analysis of the approach taken by the CJEU, a brief summary of the facts in the three cases are provided below, together with the opinion of the AG.

²¹⁷ Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland* (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=207024&pageIndex=0&doclang=EN>.

²¹⁸ Case C-516/17, *Spiegel Online GmbH v. Beck* (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216543&pageIndex=0&doclang=EN>.

²¹⁹ Case C-476/17, *Pelham GmbH v. Hütter* (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=208881&pageIndex=0&doclang=EN>.

²²⁰ See, e.g., Lionel Bently et al., *Sound Sampling, a Permitted Use Under EU Copyright Law? Opinion of the European Copyright Society in Relation to the Pending Reference Before the CJEU in Case C-476/17, Pelham GmbH v. Hütter*, 50 INT'L REV. INTELL. PROP. & COMPETITION L. 467, 468–72 (2019); Christophe Geiger & Elena Izyumenko, *The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!*, 51 INT'L REV. INTELL. PROP. & COMPETITION L. 282, 285 (2020); Christophe Geiger & Elena Izyumenko, *Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way*, 41 EUR. INTELL. PROP. REV. 131, 131–37 (2019); 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*, 20 ERA FORUM: J. ACAD. EUR. L. 35, 46–49 (2019); Bernd Justin Jütte, *Advocate General Suggests that Germany Cannot Rely on Copyright to Protect Confidential Information*, 14 J. INTELL. PROP. L. & PRAC. 83, 83–85; Bernd Justin Jütte & João Pedro Quintais, *Advocate General Turns Down the Music—Sampling Is Not a Fundamental Right Under EU Copyright Law: Pelham v. Hutter*, 41 EUR. INTELL. PROP. REV. 654, 654–57 (2019) [hereinafter Jütte & Quintais, *Advocate General Turns Down the Music*]; Jütte and Quintais, *supra* note 120; Tito Rendas, *Advocate General Szpunar in Spiegel Online (or Why We Need Fair Use in the EU)*, 14 J. INTELL. PROP. L. & PRAC. 265, 265–67; Sganga, *supra* note 154; Thom Snijders & 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*, 50 INT'L REV. INTELL. PROP. & COMPETITION L. 1176, 1184–86 (2019).

1. Funke Medien NRW GmbH v. Bundesrepublik Deutschland

Funke Medien concerned a dispute between the Federal Republic of Germany and Funke Medien, the operator of the website of a daily newspaper.²²¹ The conflict involved Funke Medien's the publication of a large portion of military status reports, known as the "Afghanistan Papers," drawn up on a weekly basis by the Federal Armed Forces pertaining to the deployments of the armed forces.²²² Funke Medien had applied for access to these reports spanning from September 1, 2001, through September 26, 2012; but for reasons of confidentiality and security-sensitive interests of the Federal Armed Forces, the request was denied.²²³ Nonetheless, the company obtained access to a large portion of these briefings and eventually published them.²²⁴

The Federal Republic of Germany brought proceedings for copyright infringement and was granted an injunction by the first instance court, which was upheld on appeal.²²⁵ The case then reached the German Federal Court of Justice, which stayed the proceedings and referred several questions to the CJEU for guidance.²²⁶ The CJEU was essentially asked: (1) whether Member States enjoy certain leeway on the implementation of exclusive rights and exceptions into national law; (2) how fundamental rights must be taken into consideration when interpreting limitations and exceptions; and (3) whether fundamental rights can justify adoption of permitted uses beyond those provided in the InfoSoc Directive.²²⁷

In this case, the AG took a step back and, before resolving the specific questions, addressed a crucial point, namely, whether a military report, being a non-fictional work, enjoys copyright protection in the first place. The AG skeptically stated that it is rather unlikely that when these reports were drafted, the authors, who were unknown, could exercise free and creative choices to express their creative abilities.²²⁸ Thus, due to the "purely informative" nature of the documents, "inevitably drafted in simple and neutral terms," these documents lacked the necessary originality to warrant copyright protection in the first place.²²⁹ Having said that, the AG went further to assess the brittle copyright and fundamental rights intersection and concluded that, in

²²¹ Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, para. 10 (Oct. 25, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=207024&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3417937> (opinion of Advocate General Szpunar).

²²² *Id.* paras. 9-10.

²²³ *Id.* para. 10.

²²⁴ *Id.*

²²⁵ *Id.* para. 11.

²²⁶ *Id.* para. 12.

²²⁷ *Id.*

²²⁸ *Id.* para. 19.

²²⁹ *Id.* para. 19.

this particular case, permitting a government to invoke fundamental protection in the form of copyright against its citizens “would be at odds with the very rationale behind fundamental rights . . . which is to protect individuals against the State, not the State against individuals.”²³⁰ The AG’s opinion has been described as a welcome reminder that copyright is not the most important thing; rather, it serves a very specific purpose—something that, amidst the ubiquity of copyright discussion in the EU copyright reform, may have been forgotten.²³¹

2. Spiegel Online GmbH v. Beck

Spiegel Online involved the dispute between the German politician, Volker Beck, and the news publisher Spiegel Online. Beck, a member of the Bundestag from 1994 to 2017, had written a piece on criminal policy relating to sexual offenses committed against minors.²³² The piece was published anonymously as part of a book compilation in 1988. When the compilation was put together, the publisher changed the title of Beck’s contribution and shortened one of its sentences.²³³ Over the years, the author tried to actively distance himself from the work that was published.²³⁴ In 2013, when Beck was running as a candidate in the parliamentary elections in Germany, the manuscript of the work emerged from the archives.²³⁵ In an attempt to demonstrate that his work had been amended by the publisher, Beck provided various newspaper editors with his original manuscript and the amended version.²³⁶ Importantly, however, he did not authorize the publication of the two documents. Instead, on his personal page, he provided versions of the two documents and accompanied them with the qualification, “I dissociate myself from this contribution,” and also added a note to the article published in the book stating that the publisher had distorted the text.²³⁷

The defendant news site, Spiegel Online, published an article claiming that Beck had been misleading the public for years since the content of his manuscript had essentially not been distorted by the

²³⁰ *Id.* para. 53.

²³¹ See Jütte, *supra* note 220, at 85.

²³² Case C-516/17, *Spiegel Online GmbH v. Beck*, para. 12 (Jan. 10, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=209682&pageIndex=0&doclang=EN> (opinion of Advocate General Szpunar).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* para. 13.

²³⁶ *Id.*

²³⁷ Case C-516/17, *Spiegel Online GmbH v. Beck*, para. 11 (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216543&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3418785>.

publisher in the original 1988 publication.²³⁸ In the article, Spiegel Online also made the original versions of the manuscript and the article as published in the book available for download via hyperlinks.²³⁹ The two versions provided by Spiegel Online did not contain the disclaimers made by Beck in order to allow the public to make their own unprejudiced assessment.²⁴⁰ Beck requested that Spiegel Online replace the files with actual hyperlinks to his personal website, where the two documents contained the disclaimers. Since Spiegel Online refused to do so, Beck claimed copyright infringement on the basis that his article had been made available on Spiegel Online's website without his authorization.²⁴¹

The news portal based its defense on the exception to copyright infringement for the purpose of reporting current events and quotation. It argued that, when evaluated in the context of the fundamental right to information and the press, the two provisions exempted their actions from copyright infringement. The first and the second instance courts in Germany ruled in favor of Beck and upheld the copyright infringement claim.²⁴² Eventually, when the case reached the German Federal Court of Justice, the court stayed the proceedings and referred several questions to the CJEU for guidance, many of which overlapped with those in the *Funke Medien* case.²⁴³

The discourse essentially turned on the delicate interaction between copyright-exclusive rights, exceptions, and limitations, and fundamental rights. Among other things, the CJEU was asked to determine how fundamental rights from the Charter must be taken into account when determining the scope of copyright exceptions and limitations²⁴⁴—in particular, whether fundamental rights of freedom and information or freedom of the press justify permitted uses beyond those explicitly provided in the InfoSoc Directive.²⁴⁵ AG Szpunar stressed the exhaustive nature of the exceptions and limitations in the InfoSoc Directive.²⁴⁶ Accordingly, Member States cannot adopt permitted uses unless the uses are present in the Article 5 catalogue.

In the present case, the AG found that none of the permitted uses applied to the activities of Spiegel Online.²⁴⁷ In response to the question on whether fundamental rights concerns can justify going beyond the

²³⁸ Case C-516/17, *Spiegel Online GmbH v. Beck*, para. 14 (Jan. 10, 2019) (opinion of Advocate General Szpunar).

²³⁹ *Id.*

²⁴⁰ *See id.* paras. 40, 72.

²⁴¹ *Id.* para. 15.

²⁴² *Id.* para. 15.

²⁴³ *See id.* para. 16.

²⁴⁴ *Id.* para. 16(2).

²⁴⁵ *Id.* para. 16(3).

²⁴⁶ *See id.* para. 20.

²⁴⁷ *Id.* para. 82.

closed list of exceptions and limitations, the AG firmly rejected this as a possible option.²⁴⁸ According to him, copyright law itself already contained internal mechanisms like the specific exceptions and limitations aimed at reconciling the exclusive rights of authors with fundamental rights such as the freedom of expression.²⁴⁹ In other words, the court cannot overstep its powers and become a legislature by bringing in a “fair use clause” into the EU copyright framework.²⁵⁰ Nonetheless, the public’s interest in allowing Spiegel Online’s use and the lack of economic prejudice to Beck prompted some academics to describe the case as a “paradigmatic case of a fair use.”²⁵¹

3. Pelham GmbH v. Hütter

The third case in this famous triad,²⁵² *Pelham GmbH*, concerned a dispute between the German band Kraftwerk and the producer company Pelham GmbH.²⁵³ The facts of the case center on the issue of digital sound sampling—a technique of electronically copying a portion, or sample, of a sound recording for the purpose of reusing it in a new sound recording. When incorporated into a new sound recording, the samples are often mixed, modified, and looped.²⁵⁴ The dispute revolved around the song “Metall auf Metall” published by Kraftwerk in 1977.²⁵⁵ Pelham sampled approximately two seconds of a rhythm sequence from the song and incorporated it into a continuous loop in the song “Nur mir” produced by Pelham and performed by the singer Sabrina Setlur.²⁵⁶ Kraftwerk claimed that such use infringed its related right as a producer and brought a copyright infringement lawsuit in the German courts.²⁵⁷ The case passed through various levels of the German judiciary. Kraftwerk was successful at all levels apart from the German Constitutional Court, which held that requiring the samplers to secure permission from the copyright holders would constitute an unjustified infringement of the right to artistic freedom provided in German Basic Law—i.e., the German Constitution.²⁵⁸

Thereafter, the dispute, once again, ended up at the German Federal Court that stayed the proceedings and referred several

²⁴⁸ *Id.* para. 81.

²⁴⁹ *Id.* para. 62.

²⁵⁰ *Id.* para. 63.

²⁵¹ *See Rendas, supra* note 220, at 267.

²⁵² Sganga, *supra* note 154.

²⁵³ Case C-476/17, *Pelham GmbH v. Hütter* (Dec. 12, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=208881&pageIndex=0&doclang=EN> (opinion of Advocate General Szpunar).

²⁵⁴ *Id.* para. 1.

²⁵⁵ *Id.* para. 12.

²⁵⁶ *Id.* paras. 13–14.

²⁵⁷ *Id.* para. 15.

²⁵⁸ *Id.* paras. 86–88.

questions for interpretation to the CJEU.²⁵⁹ Various issues were at stake in this case, such as, the scope of exclusive rights and permitted uses, the validity of open norms, and flexibilities when implementing exceptions.²⁶⁰ Nonetheless, for the purpose of the present discussion, once again, the copyright-fundamental-rights intersection was crucial. Accordingly, the CJEU was asked to elaborate upon the manner in which fundamental rights set out in the Charter were to be taken into account when evaluating the scope of exclusive rights, exceptions, and limitations.²⁶¹

The AG examined the potential clash between Article 13 of the Charter—the freedom of the arts—and the exclusive right of reproduction of the producers and stated that such conflict is somewhat paradoxical.²⁶² The main objective of copyright and related rights is to promote the development of the arts by ensuring that artists receive revenue from their work so that they are not dependent on patrons and are free to pursue their creative activity.²⁶³ This freedom is not restricted by the requirement of obtaining a license for sampling, which is seen as a normal market constraint.²⁶⁴ An important warning message from the AG was that, while the protection granted to record producers may seem excessive as it is equal to that of authors, it is not for the CJEU to make this judgment.²⁶⁵

It cannot be ruled out that, in the future, the EU legislature may introduce a specific exception addressing sampling situations such as the one at stake in *Pelham*, but that falls within the competencies of the legislature, not of the CJEU. In the meantime, the role of fundamental rights in the discourse of copyright law is that of *ultima ratio*—that the CJEU cannot depart “from the wording of the relevant copyright provisions except in cases of gross violation[s] of the essence of a fundamental right.”²⁶⁶ In the present discourse on the freedom of the arts, it was the AG’s opinion that such violations had not occurred. Following his opinion, academics have called for a more flexible interpretation of the relevant copyright provisions in light of the fundamental rights involved, and, as such, the AG’s opinion has been viewed as too restrictive.²⁶⁷

The facts of the three cases differ and some academics, as well as the Advocate General Szpunar himself, have agreed that only the *Pelham* case was indeed a true copyright case, while the other two

²⁵⁹ *Id.* para. 16.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* para. 83.

²⁶³ *Id.*

²⁶⁴ *Id.* para. 96.

²⁶⁵ *Id.* para. 98.

²⁶⁶ *Id.*

²⁶⁷ Jütte & Quintais, *Advocate General Turns Down the Music*, *supra* note 220, at 657.

pertained to military reports and the issue of a politician distancing himself from his own previous statements.²⁶⁸ Nonetheless, there is a thread that ties the three cases together: they all analyzed the issue of where to locate the balancing exercise. The CJEU faced the question whether the EU copyright system itself can accommodate the tension between various fundamental rights. Particularly, the court had to evaluate whether, apart from the mechanisms already enshrined in the InfoSoc Directive, fundamental rights can be an autonomous external ground for balancing and, in these cases, limiting copyright.²⁶⁹

Through these judgments, the CJEU has once more reaffirmed that the list of copyright exceptions in the EU is a closed one.²⁷⁰ Furthermore, the InfoSoc Directive safeguards a fair balance between the interests of rightsholders, users, and the public.²⁷¹ Another common holding is that exceptions and limitations are specifically aimed at favoring fundamental rights, such as, the freedom of expression and the freedom of the press, whereby a fair balance has to be struck through the internal mechanisms of the InfoSoc Directive.²⁷² The CJEU, following the AG's tone, has been very clear in its stance that allowing Member States to deviate from the closed list of exceptions provided in the InfoSoc Directive would conflict with the legislative powers of the EU. In other words, expanding the exhaustive list of exceptions is not a task for the court. Nonetheless, the CJEU has also underscored that should a Member State decide to introduce any of the optional exceptions in Article 5, both the transposition as well as the interpretation of that

²⁶⁸ Such comment was made by Advocate General Szpunar and Tito Rendas at the conference entitled, *Owning Expression and Propertizing Speech—Freedom of Expression v. Copyright Before the European Courts*, held at the University of Luxembourg on November 7, 2019. More information on the conference is available at: <https://www.eventbrite.fr/e/owning-expression-and-propertizing-speech-freedom-of-expression-v-copyright-before-the-european-registration-73792670865?ref=ebtn#> [<https://perma.cc/VGB8-BNTQ>] (last visited Apr. 4, 2020).

²⁶⁹ Snijders & van Deursen, *supra* note 220, at 1177.

²⁷⁰ See Case C-516/17, *Spiegel Online GmbH v. Beck*, para. 41 (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=209682&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3418452>; Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, para. 56 (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=207024&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3417937%20> (opinion of Advocate General Szpunar); Case C-476/17, *Pelham GmbH v. Hütter*, para. 58 (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=208881&pageIndex=0&doclang=EN>.

²⁷¹ See Case C-476/17, *Pelham GmbH*, para. 59; Case C-516/17, *Spiegel Online GmbH*, para. 42; Case C-469/17, *Funke Medien NRW GmbH*, para. 57.

²⁷² See Case C-469/17, *Funke Medien NRW GmbH*, para. 60; Case C-516/17, *Spiegel Online GmbH*, para. 45.

exception must take place in full adherence to the fundamental rights enshrined in the Charter.²⁷³

*D. Fundamental Rights as an Autonomous External Ground for Balancing?*²

The outcome of these CJEU cases is not entirely surprising.²⁷⁴ The CJEU could not have gone beyond what the copyright provisions expressly state. This is to be differentiated from the field of intermediaries' liability—an area of the *acquis* that, until the recent EU copyright reform, was only roughly sketched in legislation.²⁷⁵ In that respect, one gets the feeling that when secondary legislation does not deal directly with the issue, as in the intermediaries' liability cases, the court resorts to the Charter's proportionality assessment to maintain the fair balance of interests.²⁷⁶ On the contrary, whenever the relevant secondary legislation deals explicitly with a certain issue, as in the exceptions and limitations cases, the assessment must remain within the internal balancing field. In these circumstances, the court is strongly driven by the fact that certain features of copyright law have indeed been harmonized in the InfoSoc Directive.

In addition, when focusing on the internal balancing mechanism, the court has affirmed that many features of the InfoSoc Directive reflect the copyright-fundamental-rights equilibrium. Indeed, it is not a novel idea that, nowadays, secondary legislation actually sets fundamental right standards—something that Professor Muir refers to as the “functional” power to regulate fundamental rights.²⁷⁷ In fact, the EU institutions have regularly reflected fundamental rights standards in the preambles of the directives.²⁷⁸ The EU Commission has even committed itself to pay closer attention to the fundamental rights landscape as part of the legislative process itself.²⁷⁹ What is not that clear, however, is whether the provisions of the InfoSoc Directive sufficiently reflect the fundamental rights standards.

Although the CJEU has proclaimed that the permitted uses in Article 5 are not to be considered mere exceptions, but as positive users'

²⁷³ Case C-516/17, *Spiegel Online GmbH*, para. 59; Case C-469/17, *Funke Medien NRW GmbH*, para. 76.

²⁷⁴ Snijders & van Deursen, *supra* note 220, at 1184.

²⁷⁵ Griffiths, *Constitutionalising or Harmonising?*, *supra* note 121, at 72.

²⁷⁶ Griffiths, *supra* note 117, at 149.

²⁷⁷ Elise Muir, *The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges*, 51 COMMON MKT. L. REV. 219, 226 (2014).

²⁷⁸ *See id.* at 227 (“[EU] institutions have for several years already inserted standard formulae in the preamble to legislation in order to assert that the text complies with fundamental rights.”).

²⁷⁹ *Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union*, at 6, COM (2010) 573 final (Oct. 19, 2010).

rights²⁸⁰ and must be interpreted by fully adhering to the fundamental rights of the Charter,²⁸¹ the overall picture still bears some serious shortcomings. In particular, doubts still exist as to whether the closed list of exceptions and limitations legitimately caters to all possible fundamental rights conflicts, even though fundamental rights concerns fuel some of these permitted uses.²⁸² In other words, allowing a politician—on the basis of a copyright claim—to prevent the circulation of material that is in the interest of the general public or permitting a Member State to enforce a fundamental right against individuals seems rather counterintuitive.

In 2018, Professor Griffiths suggested that, when the situation at stake is not covered by the exceptions and limitations, one can go straight to the Charter.²⁸³ Additionally, the enhanced status of the Charter has shifted the balance of power from the legislature to the judiciary.²⁸⁴ Despite this newfound ability to resort to external balancing, the three 2019 CJEU judgments have entirely shut the door to such balancing of copyrights with fundamental rights.

V. FINAL REMARKS: ARE THE UNITED STATES AND THE EU MOVING IN SYNC?

This paper explored the approaches taken by U.S. and EU courts in striking a balance between copyright and fundamental rights. This final part assesses when it is that the two jurisdictions dance in harmony and when instead they swirl away from one another.

So far, the essence of internal and external balancing has been analyzed. Within copyright law, this occurs through internal mechanisms capable of accommodating the use of copyrighted material by users who are not rightsholders, including uses grounded on fundamental values, such as, free speech in the United States or the fundamental rights protected under the Charter of Fundamental Rights in the EU. This internal balancing has a double nature: it can be mechanical—namely, through the permitted uses and the idea-

²⁸⁰ See Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, para. 70 (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216545&pageIndex=0&doclang=EN>; Case C-516/17, *Spiegel Online GmbH v. Beck*, para. 54 (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216543&pageIndex=0&doclang=EN>.

²⁸¹ See Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, para. 76; Case C-516/17, *Spiegel Online GmbH v. Beck*, para. 59.

²⁸² See Geiger & Izyumenko, *supra* note 220, at 29; Snijders & van Deursen, *supra* note 220, at 1184.

²⁸³ Griffiths, *supra* note 118, at 161.

²⁸⁴ *Id.* at 174.

expression dichotomy—or substantive, resting upon the premise that both copyright and free speech share the same goal.²⁸⁵ In light of society's broad interest in having public access to the fruits of authors' efforts, copyright and human rights are deemed to point to the same fundamental equilibrium.²⁸⁶ While the mechanical internal balancing tools are common to all copyright systems, the substantive internal balancing mechanisms are typical of the United States.²⁸⁷ When these internal balancing mechanisms are no longer apt to internalize conflicts deriving from fundamental rights, a real conflict between copyright and human rights manifests and, in principle, calls for a balancing exercise to take place outside the copyright realm in both jurisdictions.²⁸⁸

The paper then moved from the theory to practice and traced the case law of the U.S. Supreme Court, the most influential U.S. Courts of Appeals, and that of the CJEU, in pursuit of ascertaining how the judiciary in each jurisdiction implements the above mechanisms. The cases demonstrate that even though, in theory, the same general setting is in place, in practice, the approaches followed in the United States and the EU differ on several elements.

First, when copyright and human rights clash, the United States places a stricter reliance on the internal safeguards, while the EU turns to the Charter—an external safeguard—as the main tool to relieve the tension. Second, regarding the substance of the internal safeguards, while it is true that the idea-expression dichotomy is equally respected in the EU and the United States, strong differences clearly surface when it comes to the second internal safeguard—the permitted uses. While in the EU, a closed catalogue of permitted uses applies, in the United States, the fair use doctrine plays that respective role.²⁸⁹ At this point, the two jurisdictions swirl away from each other but still gently hold hands. Third, while the CJEU tends to balance the interests of copyright holders against a range of diverse fundamental rights protected under the EU Charter, U.S. courts only refer to the right to free speech as enshrined in the First Amendment.

The reason for this divergence between United States and EU case law is multifold. Starting with the difference in emphasis as to internal

²⁸⁵ Birnhack, *supra* note 107, at 49.

²⁸⁶ Paul Torremans, *Copyright (and Other Intellectual Property Rights) as a Human Right*, in *INTELLECTUAL PROPERTY AND HUMAN RIGHTS* 221, 223 (Paul Torremans ed., 2015).

²⁸⁷ Birnhack, *supra* note 107, at 61.

²⁸⁸ *Id.* at 52.

²⁸⁹ See Wittem Group, *European Copyright Code*, 33 *EUR. INTELL. PROP. REV.* 76, 81 (2011); see also Griffiths, *supra* note 26; Bernd P. Hugenholtz, *Flexible Copyright: Can EU Authors' Right Accommodate Fair Use*, in *NEW DEVELOPMENTS IN INTERNATIONAL AND EU COPYRIGHT LAW* 417 (Irimi Stamatoudi ed., 2016); Rendas, *supra* note 26; Paul Torremans, *The Perspective of the Introduction of a European Fair Use Clause*, in *CODIFICATION OF EUROPEAN COPYRIGHT LAW—CHALLENGES AND PERSPECTIVES* 319 (Fatiana Eleni Synodinou ed., 2012).

or external safeguards, the incongruence can be traced back to the jurisdictions' differing approaches towards the conflict between copyright and human rights. In the first wave of case law on intermediaries' liability,²⁹⁰ the CJEU expressly recognized the existence of a conflict between copyright and other fundamental rights and resorted to a proportionality assessment to solve it. Conversely, U.S. courts tended—and still tend—to neglect the presence of a conflict in the first place and eventually rely on the internal safeguards to resolve the dispute.²⁹¹ In other words, while in the United States the conflict is “internalized,” in the EU, at least in the category of intermediaries' liability, it has been addressed externally.

This, in turn, mirrors the different roots of copyright law in civil and common law jurisdictions. In the United States, copyright protects private interests with the ultimate goal of fostering progress, but it does not have the status of a fundamental right. On the contrary, in the EU, copyright is afforded such status. Therefore, even though the EU legislature may try to take fundamental rights into account as part of the legislative process, fundamental values cannot be adequately crafted *ex ante* in a way that equally respects values such as freedom of expression but also data protection, right to privacy, the freedom to conduct business, and intellectual property rights. Consequently, like the cases on intermediaries' liability demonstrate,²⁹² these values ought to be weighed against each other any time a possible conflict arises—that is, on a case-by-case basis.

Moving to the difference in the use of internal balancing instruments—namely, permitted uses—a closed list of exceptions leads to an approach completely different from that under a general and open standard like fair use, which, due to its flexibility, accommodates new circumstances arising from societal and technological developments. As a result, fair use is deemed to keep the mechanism of resolving conflicts with the copyright system up to date. The same, however, cannot be said of Article 5 of the InfoSoc Directive, which in itself “does not constitute full harmonisation of the scope of the exceptions and limitations which it contains.”²⁹³ Moreover, over the years, apart from some outlier cases,²⁹⁴

²⁹⁰ See *supra* Section IV.B.

²⁹¹ See Michael Birnhack, *The Copyright Law and Free Speech Affair: Making-Up and Breaking-Up*, 43 IDEA 233, 235–36 (2003).

²⁹² See *supra* Section IV.B.

²⁹³ Case C-516/17, *Spiegel Online GmbH v. Beck*, para. 27 (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216543&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3459469>; Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, para. 42 (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216545&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3459825>.

²⁹⁴ See generally Christophe Geiger et al., *Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union—Opinion of the European Copyright Society on the Judgment of the CJEU in Case C-201/13 Deckmyn*,

we have witnessed a growing tightening of the system of European exceptions as a result of the increasing importance of economic rights.²⁹⁵ This has led a majority of cases to interpret the exhaustive list of exceptions provided by EU law in a manner incompatible with the changing technological times, which, in turn, has moved the resolution of conflicts related to intermediaries' liability outside the copyright system.²⁹⁶

It should also be noted that, as the balancing occurs through different tools—the proportionality test in the EU and internal safeguards in the United States—the steps followed do not coincide. While both the proportionality test and the fair use doctrine are particularly fact-sensitive, the elements of the former are much more connected to one another than the four factors of fair use. As far as the proportionality test is concerned, the legitimate purpose of the proposed measure, assessed in light of the pursued objective, coupled with the requirement of establishing necessity in the given circumstances, are the first three elements, which seem to flow naturally and logically to eventually culminate in the final step—the actual balancing of the benefits gained by the proposed measure and the harm caused to the fundamental right. As a result, balancing takes place only as part of the last step of the proportionality test. On the other hand, the four factors of the fair use doctrine are assessed separately, and the eventual balancing occurs among all of them together. Moreover, additional factors can be considered. Depending on the circumstances, the market, and the use in question, some of the four factors would weigh more than the others, which is certainly not the case with the proportionality test where none of the four steps takes precedence.

The minuet between U.S. and EU jurisprudence on the intersection between copyright and human rights does not end with the partners separated from one another. As already pointed out, the difference in the approaches lies more in the formal recognition of a conflict between copyright and human rights than in the adoption of a balancing practice between copyright and other interests. However framed, in both jurisdictions, a balancing of copyright protection against values protected by fundamental rights does seem to be—even when implied—a necessary step in the decision-making process.

46 INT'L REV. INTELL. PROP. & COMPETITION L. 93 (2015) (welcoming the CJEU's departure from the doctrine of strict interpretation of exceptions and limitations in cases in which fundamental rights such as freedom of expression are involved).

²⁹⁵ COPYRIGHT RECONSTRUCTED: RETHINKING COPYRIGHT'S ECONOMIC RIGHTS IN A TIME OF HIGHLY DYNAMIC TECHNOLOGICAL AND ECONOMIC CHANGE (P. Bernt Hugenholtz ed., 2018).

²⁹⁶ See Georgios I. Zekos, *Copyrights and Trademarks in Cyberspace: A Legal and Economic Analysis*, 15 CHI.-KENT J. INTELL. PROP. 313, 342-44 (2016) (discussing the shortcomings of the EU exceptions regarding recent technological developments).

Regardless of the conceptualization of the balancing performed by U.S. and EU courts as internal or external—and regardless of the instruments entailed—in both cases, a balancing does take place whenever a conflict between different interests occurs. Thus, in both jurisdictions, the judiciary employs a certain degree of flexibility. While this may not be new in the United States—as the fair use doctrine has often enabled copyright to adjust to social and technological developments²⁹⁷—it is indeed novel in the EU, where the call for a more flexible copyright—particularly, in relation to the exception and limitation regimes—has been made for years.²⁹⁸ In a way, then, the proportionality test as employed by the CJEU, as well as by many national courts, provides a degree of flexibility that the fair use doctrine has always provided in the United States.²⁹⁹ Interestingly, this has also been the case in several European Member States where courts, in dealing with artistic expression, have come to the point of introducing a sort of “fair use” approach through the application of fundamental rights as external limitations to copyright law.³⁰⁰

More recently, however, the CJEU has hinted at a slight change of direction in three cases where a clash between copyright and fundamental rights—namely, freedom of information,³⁰¹ freedom of the press,³⁰² and artistic freedom³⁰³—appeared before the court. In all of them, the court has preferred to rely on permitted uses instead of recurring to external balancing. In the court’s opinion, the three fundamental rights in question “are not capable of justifying, *beyond the exceptions and limitations . . .* a derogation from the author’s exclusive rights of reproduction and of communication to the public.”³⁰⁴

This strong assertion may suggest that, in the context of exceptions and limitations, the CJEU “has closed the door on the application of

²⁹⁷ Sag, *supra* note 28.

²⁹⁸ P. Bernt Hugenholtz & Martin Senftleben, *Fair Use in Europe: In Search of Flexibilities*, SSRN ELECTRONIC J. (Nov. 15, 2011), <https://papers.ssrn.com/abstract=1959554> [<https://papers.ssrn.com/abstract=1959554>].

²⁹⁹ Christophe Geiger, “Fair Use” Through Fundamental Rights: When Freedom of Artistic Expression Allows Creative Appropriations and Opens up Statutory Copyright Limitations, in *COMPARATIVE ASPECTS OF LIMITATIONS AND EXCEPTIONS IN COPYRIGHT LAW* (Wee Loon ed., 2019) (analyzing French and German cases in which copyright was juxtaposed with freedom of artistic expression).

³⁰⁰ *Id.*

³⁰¹ Case C-469/17, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland* (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216545&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3463672>.

³⁰² Case C-516/17, *Spiegel Online GmbH v. Beck* (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216543&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3465797>.

³⁰³ Case C-476/17, *Pelham GmbH v. Hütter* (July 29, 2019), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=216552&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3466043>.

³⁰⁴ Case C-516/17, *Spiegel Online GmbH*, para. 96(2) (emphasis added).

fundamental rights as an external limitation to copyright.”³⁰⁵ It must, nonetheless, be highlighted that when the court actually strikes the balance between exclusive rights of rightsholders and exceptions and limitations safeguarding the interests of users, it states that provisions must be interpreted in full adherence to the fundamental rights enshrined in the Charter.³⁰⁶ In a way, the CJEU seems to bring inside copyright the balancing practice that had so far—at least in the intermediaries’ liability line of cases—taken place outside of it.

This twist brings our two dancers, the United States and the EU, closer. The court’s strong emphasis on the fact that exceptions and limitations actually confer rights on the users³⁰⁷ by bringing the balancing exercise within the parameters of the copyright system echoes the approach that U.S. courts have followed from *Eldred* onward. Both jurisdictions now stand on the same ground and seem to confirm the self-sufficiency of the copyright framework in handling the equilibrium. It remains to be seen whether the mechanics of the proportionality test and the balancing exercise entailed will result in further divergences between the two jurisdictions or whether they will eventually mutually influence each other. In their next dance, will the EU and the United States dance off to their own music or will they move in sync?

³⁰⁵ Tatiana Eleni Synodinou, *Reflections on the CJEU’s Judgment in Spiegel Online: Is There a Golden Intersection Between Freedom of Expression and EU copyright Law? Part I*, KLUWER COPYRIGHT BLOG (Sept. 23, 2019), <http://copyrightblog.kluweriplaw.com/2019/09/23/reflections-on-the-cjeus-judgment-in-spiegel-online-is-there-a-golden-intersection-between-freedom-of-expression-and-eu-copyright-law-part-i/> [https://perma.cc/8SYN-FDU7].

³⁰⁶ See Case C-516/17, *Spiegel Online GmbH*, para. 59; Case C-469/17, *Funke Medien NRW GmbH*, para. 76.

³⁰⁷ See Case C-516/17, *Spiegel Online GmbH*, para. 54; Case C-469/17, *Funke Medien NRW GmbH*, para. 70.

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