Creating EU Copyright Law
Striking a Fair Balance

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Helsinki 2019
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Key words: Balancing; Copyright; European Union; Fair Balance; Fundamental Rights; Harmonization; Proportionality

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Hanken School of Economics
ISBN 978-952-232-399-6 (PDF)
ISSN-L 0424-7256
ISSN 0424-7256 (printed)
ISSN 2242-699X (PDF)

Hansaprint Oy, Turenki 2019
ACKNOWLEDGEMENTS

“In der Beschränkung zeigt sich erst der Meister,
Und das Gesetz nur kann uns Freiheit geben.”

Johann Wolfgang von Goethe, Natur und Kunst, around 1800

In keeping with the idea that “mastery is revealed in limitation”, I originally intended for this book to be considerably shorter, even if many doctoral dissertations in the legal domain are manifold longer than this one. However, with every revision, the text only got longer, never shorter. In that respect, I have yet a lot to learn.

This book is the result of five years of thinking about judicial norm-making in EU copyright law. It would not have seen daylight, if not for the support of many people.

First of all, I want to thank my degree supervisor professor Niklas Bruun as well as professor Nari Lee, who very much took on the role of informal supervisor, for their inspired guidance. I am also very grateful to professors Jonathan Griffiths and Tuomas Mylly, the pre-examiners of this dissertation, for their valuable comments, suggestions and valid but constructive criticism. I also want to thank professor Griffiths for agreeing to come all the way to Helsinki in the middle of Finnish winter to act as opponent during the public defence of this dissertation.

A word of thanks also to all my friends and to my colleagues at Hanken, both former and current, for their consistent encouragements. In particular I thank Mikko Antikainen, with whom I have travelled around the world to find inspiration for our research. I am also very grateful to Barbara Cavonius for helping me getting this book ready for print.

I must also thank the Finnish Cultural Foundation, the Hanken Support Foundation and Hanken School of Economics for their financial support of my research.

Finally, my deepest gratitude goes to my parents, to whom I dedicate this book, and to my fiancée Heidi, who has been my greatest cheerleader throughout this entire journey. Their support has been invaluable and unconditional. Without them, I would have not been able to see this project through to the end. Heidi, I will do my best to be the same rock you have been for me as you continue towards the completion of your own doctoral research.
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<th>Description</th>
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<tr>
<td>AG</td>
<td>Advocate General</td>
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<tr>
<td>ALAI</td>
<td>Association Littéraire et Artistique Internationale</td>
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<tr>
<td>1988 Green Paper</td>
<td>Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action (Brussels, 7 June 1988, COM (88) 172 final)</td>
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<td>Berne Convention</td>
<td>The Berne Convention for the Protection of Literary and Artistic Works (as amended on 28 September 1979)</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>Directive</td>
<td>Description</td>
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<td>ECHR</td>
<td>European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, and supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16</td>
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<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EEC</td>
<td>Treaty establishing the European Economic Community</td>
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<td>EIPR</td>
<td>European Intellectual Property Review</td>
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<tr>
<td>Reference</td>
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<tr>
<td>GRUR</td>
<td>Gewerblicher Rechtsschutz und Urheberrecht</td>
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<td>GRUR Int.</td>
<td>Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entry into force 23 March 1976</td>
</tr>
<tr>
<td>IIC</td>
<td>International Review of Intellectual Property and Competition Law</td>
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<td>Topic</td>
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<tr>
<td>RIDA</td>
<td>Revue Internationale du droit d’auteur</td>
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<td>Rome Convention</td>
<td>International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 26 October 1961</td>
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<td>Abbreviation</td>
<td>Description</td>
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<td>TEU</td>
<td>Consolidated version of the Treaty on European Union, OJ C 326, 26 October 2012, p. 13–390</td>
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<tr>
<td>TFEU</td>
<td>Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26 October 2012, p. 47–390</td>
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<td>TPMs</td>
<td>Technological Proection Measures</td>
</tr>
<tr>
<td>WCT</td>
<td>WIPO Copyright Treaty, Geneva, 20 December 1996</td>
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<td>WIPO Copyright Treaties</td>
<td>The WCT and WPPT</td>
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1 INTRODUCTION

1.1 Introduction to the research theme

1. **Open questions.** Should an Internet user be freely permitted to provide hyperlinks to protected works available elsewhere online? Should those same users be allowed to freely watch television series and movies online, even if they have been made available by third parties without consent of the holder of the copyright? May a musician copy two seconds from a musical recording made by another artist and incorporate that fragment into their own musical creation? The answer to these kinds of questions is now largely, if not entirely, governed by harmonized EU copyright law. In essence, such questions concern the reconciliation (or: “balancing”) of the interests of authors and those of users, and the public in general. They can be traced back to more general questions, such as: How far should the control by authors over the cultural artefacts they create extend? Conversely, which acts should users be permitted to freely exercise? In which instances should exclusivity be replaced by a mere right to remuneration?

2. **A search for balance.** The question about how copyright (ought to) balance(s) the interests of authors and of others has always been at the nucleus of copyright policy. It is a perennial debate whether copyright ought to offer strong protection to the author and their work as a matter of justice or narrower protection to facilitate greater dissemination of literary and artistic creations to the public. The overdrawn distinction made in this regard between civil law and common law jurisdictions is well-known: civil law jurisdictions are said to view copyright as a codification of natural rights of the author while common law jurisdictions are said to view it instead as a simple incentive to spur on creation in the public interest. Accordingly, early continental copyright laws are often thought to have been preoccupied with safeguarding the position of authors as custodians of their intellectual creations. Famous, in this regard, are the statements by Le Chapelier and Lakanal, the respective rapporteurs for the first French copyright laws enacted in 1791 and 1793. Le Chapelier declared that the author’s work is “[t]he most sacred, the most legitimate, the most unassailable, and, if I may say so, the most personal of all properties.”¹ In turn, Lakanal stated that the property of “the works of genius” is “of all properties, the least susceptible to criticism, whose increase can harm neither republican equality, nor be an affront to liberty”.² Some commentators have seen in these statements a reflection of the desire at the time to give the author the absolute

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¹ Le Chapelier 1791.
² Lakanal 1793.
dominion over their work. Others, however, have pointed out that continental legislatures, certainly early on, ultimately showed great deference to the general interest. For instance, early 20th century German copyright acts included rather broad exceptions to authors’ rights, in France some judge-made exceptions arose, and the argument for a perpetual protection of the author’s economic interest in their work lost out to arguments stressing the public interest. Conversely, even if one conceptualizes copyright protection primarily as a way to incentivize creation and stimulate dissemination, this is achieved by protecting the authorial interest in having some form of control over the exploitation of their work. Depending on one’s ideas on economic efficiency, this may result in broad protection bordering on “absolute dominion” or narrow protection providing a strict incentive for creation, or somewhere in between. Therefore, whatever conception one has of copyright, it is always a matter of “balance”. The contentious issue is where this balance is struck.

3. **EU harmonization.** As copyright protection slowly expanded over the centuries, largely to account for new ways in which literary and artistic works could be exploited as a consequence of technological and societal change, the borders between authorial control and user freedom have been continually redrawn. In EU Member States, those borders are now largely dictated by EU law, which started the ongoing process of harmonization of copyright law in the late 1980s. As a result of this process of harmonization of copyright law, the questions posed at the beginning of this introduction have to be readdressed, meaning that the answers previously given

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3 Cf. Recht 1969, p. 48: “On a voulu donner à l’auteur la maîtrise totale et exclusive sur son œuvre, le droit le plus absolu qu’un individu puisse posséder sur une chose et on ne pouvait, à cette époque, trouver de terme exprimant mieux cette maîtrise que celui de « propriété »”.

4 Cf. Geiger 2004a, p. 76 and Ginsburg 1990, p. 1005 et seq., who points out that “[i]ncore disseminated, Le Chapelier went on to assert, the manuscript is ‘given over to the public . . . by the nature of things, everything is finished for the author and the publisher when the public has in this way through publication acquired the work.’” (p. 1007). In regard to the report by Lakanal she considered that his rhetoric “displays a looking-over-the-shoulder quality inconsistent with a firm conviction of the centrality of authors’ personal claims” (p. 1009). A similar interpretation of the reports of Lakanal and Le Chapelier can be found in Geiger 2004a, p. 74-76. Lucas 2008, p. 82 is critical of this assertion. He remarks that the reservations made by Le Chapelier should not be interpreted as intended to place any restriction on the rights of the author, but as the simple statement that once published the author cannot restrict access to his work by the public.

5 The Gesetz betreffend das Urheberrecht an Werken der Literatur und der Tonkunst vom. 19. Juni 1901 (LUG) and the Gesetz betreffend das Urheberrecht an Werken der bildende Künste und der Photographie vom 9. Januar 1907 (KUG), respectively. See, for instance, § 15(2) LUG and § 18 KUG, including general exceptions for personal use and § 22a, which allowed the public performance of works incorporated into a phonogram manufactured with permission of the author, excluding by radio broadcast (although restrictively interpreted by German Federal Supreme Court (First Civil Senate), 6 November 1953, I ZR 97/52 – Öffentliche Schallplattenübertragung, published in GRUR 1954, p. 216).

6 See Galopin 2012, p. 3-4 for some examples. He notes that exceptions were in an “embryonic state” and received little attention from legal commentators.

to such questions in the individual Member States might be subject to change. The Court of Justice of the European Union plays a leading role in defining the boundaries between the rights and obligations of authors and of users. In facts, all three of the concrete questions with which this introduction started have in the past referred to the CJEU\textsuperscript{8} by national courts because the EU \textit{acquis communautaire} did not provide an unambiguous answer. Consequently, the CJEU is given the opportunity to (at least partially) determine which uses are free and which can be controlled by authors and other right holders.

4. \textbf{A potential constitutional conflict.} While the EU started and continued the process of harmonization of copyright law, the ongoing Third Industrial (or: Digital) Revolution led to a great proliferation of the spread of and of access to information. However, some of this “information”, such as books, movies and music, may be the subject of exclusive control by their creators. At the same time, users have claimed it is their fundamental right to freely access information. Thus, the question whether, for instance, Internet users should be permitted to view “illegal” online streaming video may touch on their right to freedom of information. Similarly, the artist wanting to build on another artist’s work may feel their right to artistic freedom is limited if they can be prevented from doing so by that second artist invoking their copyright. The scope of the rights of authors is therefore not merely a question of policy, but also a question of realization of fundamental rights and, therefore, a legal question. After all, it is in principle the task of courts to police the boundaries of what fundamental rights demand. The CJEU therefore not only has the power to impact the scope of copyright protection through the interpretation of the harmonizing copyright directives as such, but also through the interpretation of the Charter of Fundamental Rights of the European Union, since the adoption of the Treaty of Lisbon the highest fundamental rights document of the EU.

1.2 Context of and motivation for the research

1.2.1 EU harmonization and the move towards constitutionalization

5. \textbf{Two developments.} This dissertation studies the confluence of two developments in EU copyright law: (i) the growing role of the CJEU in the process of the shaping of copyright in the EU and (ii) the constitutionalization of copyright. In particular, I look at what role fundamental rights play in the process of norm creation by the CJEU as well as on the ultimate resolution of conflicts between right holders and users. In this section, I briefly discuss both developments.

\textsuperscript{8} Hereinafter I consistently use the initialism “CJEU”, also when referring to the predecessor courts, such as the European Court of Justice.
6. **EU harmonization and the CJEU.** The process of harmonization of copyright law by the EU has led to a redefinition of the balance of rights and interests between authors and others. This process started in earnest with the 1988 Green Paper on Copyright and the Challenge of Technology by the Commission of the European Communities, the predecessor of the EU Commission. The Green Paper identified a number of main areas of concern, central among which was the risk of fragmentation of the internal market created by differences in the scope of protection.\(^9\) Arguably, the desire to remove obstacles to the functioning of the internal market has been the prime motive for the subsequent harmonization efforts. The first endeavor in this regard was the 1991 Software Directive, which required Member States to grant computer programs copyright protection as literary works.\(^10\) Since then, twelve more directives directly concerning copyright have followed (not counting amending and codifying directives), as well as two regulations.\(^11\) Most recently, on 17 April 2019, the CJEU adopted the latest two additions to this collection of legislative instruments: the DSM Directive, which has been the subject of extensive public debate, and the Online Broadcasting and Retransmission Directive. The most notable harmonizing effort by the EU is arguably still the 2001 InfoSoc Directive, which effected a “horizontal” harmonization of the – arguably – most important exclusive rights granted to authors and related rights holders for all categories of works and which provided an exhaustive catalogue of largely optional limitations and exceptions to those rights. The result of these legislative efforts is that the balance of rights and interests is in the first place struck by the EU legislature, which has provided a unitary basis for most rights granted to authors and to holders of related rights and for the limitations and exceptions to those rights.

Admittedly, prior to start of the process of EU harmonization, the copyright laws of the individual Member States had already been aligned to a considerable degree through several multilateral conventions, such as the Berne and Rome Conventions. However, due to the large margin of appreciation left by such conventions and in the absence of a single judicial body overseeing the interpretation of the rights guaranteed by them – the subjection to the jurisdiction of the International Court of Justice

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\(^9\) 1988 Green Paper, para 1.3.2.  
\(^10\) This directive was repealed in 2009 and replaced with the new Software Directive.  
cannot count as such – signatory states are to a considerable extent free to determine
the precise scope of protection.\(^{12}\) This is different in the EU, in large part due to the
control exercised by the CJEU.

Although of course dependent on the cases brought before it, the CJEU has the
authority to further define the scope of the rights and the limitations and exceptions
thereto laid down in EU law, as it has the responsibility to interpret EU law.

Accordingly, typical copyright concepts, like “work”, “reproduction (in part)”,
“public”, “quotation” and “parody”, which all have been developed and fleshed out in
the various Member States over many decades, and sometimes centuries, are now
subject to interpretation by the CJEU. This often means that the CJEU reconstructs
these concepts from the ground up, giving them an entirely new, European
interpretation. In doing so, the CJEU is often faced with hard questions, meaning it
has a considerable margin of discretion. For instance, does an Internet user who
places a hyperlink to a webpage that includes a copyright protected work themselves
make a “communication” to a “public” of that work? Does taking a two-second sample
from a phonogram constitute a “reproduction in part” when used in a new musical
work? Is the making of temporary copies in the random-access memory of a computer
when streaming media from illegal websites a “lawful use” within the meaning of the
mandatory exception provided for in article 5(1) of the InfoSoc Directive, which aims
to exclude certain temporary copies from the scope of the exclusive reproduction
right? The largely open nature of this discretion of the CJEU means it is to a similar
large degree free to find a balanced interpretation that does most justice to all rights
and interests involved. As a result, the relation between authors, other right holders,
intermediary parties, and users is newly established.

7. **The constitutionalization of copyright law.** The second development
at the centre of this dissertation is the increased emphasis placed on the constitutional
dimension of copyright law. Although few would deny that the (enforcement of)
copyright has the potential to constrain the exercise of fundamental rights, it is
traditionally thought that any incursions into such rights is both justified in order to
attain the objectives pursued (such as protection of the author, or as a means to
provide an incentive), and sufficiently alleviated by the limitations and exceptions
intrinsic to copyright law. Accordingly, numerous (highest) national courts have held

\(^{12}\) Compliance with the TRIPS Agreement, and by operation of article 9(1) of the TRIPS
Agreement also the Berne Convention, can be the subject of adjudication by the WTO’s Dispute
Settlement Body. In practice, this fact has arguably not had a substantial impact on the degree
of harmonization effected by these international instruments. So far, only one panel report on
a matter of copyright law has been adopted (Dispute DS160, United States – Section 110(5) of
the US Copyright Act, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/
ds160_e.htm, last accessed 30 June 2019).
in the past that there is in principle no need to ascertain whether copyright disproportionately infringes upon fundamental rights. Similarly, in legal systems belonging the civil law droit d’auteur / author’s right tradition such as France and Germany, copyright law itself is traditionally interpreted in favorem auctoris – to the benefit of the author, implying inter alia a strict interpretation of limitations and exceptions. Only relatively recently has there been a certain paradigm shift towards the explicit recognition that limitations and exceptions may need to construed more broadly in order to properly safeguard the exercise of certain fundamental rights or the public interest. The paradigm defining example in this regard is without a doubt the Germania 3 decision by the German Federal Constitutional Court from 2000, in which it prescribed a broad interpretation of the quotation exception to enable the artistic engagement with a prior literary work in furtherance of the (German constitutional right to) freedom of art. Around the same time, at the turn of the millennium, the potential “conflict” between copyright and fundamental rights started to receive significantly more attention in legal literature. Many contributions focused on the (re)conceptualization of copyright within the framework provided by fundamental rights. Others focused more concretely on specific potential conflicts between the exclusive rights guaranteed to authors and other right holders and states’ fundamental rights obligations. This has led to the general, if not unanimous, acceptance that fundamental rights ought to play a role in both the construction of copyright law itself, as well as an external “safety valve” to protect against overbroad copyright protection.

This paradigm shift has also reached Europe’s highest courts. In two 2013 landmark decisions, the ECtHR held that copyright (strictly speaking: the conviction for copyright infringement) interferes with the right to freedom of expression guaranteed by article 10 ECHR and that such an interference must be “necessary in a democratic society”, as required by article 10(2) ECHR. The CJEU, in turn, has on several

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13 This is discussed in § 180.
14 Cf., regarding France, Galopin 2012, p. 290-291, including further references (see also the critical appraisal of some more liberal judgements Pollaud-Dulian 2014, p. 78) and, regarding Germany, Melichar 2010, paras 18-22 (p. 942-944).
15 German Federal Constitutional Court (First Senate), 29 July 2000, 1 BvR 825/98 – Germania 3, English Translation published in EIPR 2013, p. 646.
16 The potentially complicated nature of the relationship between copyright and fundamental rights certainly was certainly not ignored prior to the 21st century. See for two early European contributions, e.g., Cohen Jehoram 1983 and Löffler 1980, and for two American contributions, e.g., Goldstein 1970 and Nimmer 1970.
17 For an overview, see the next section.
18 Decision of the European Court of Human Rights (Fifth Section), in the case of Ashby Donald and Others v. France, Appl. No. 36769/08, of 10 January 2013 and Decision of the European Court of Human Rights (Fifth Section), in the case of Neij and Sunde Kolmisoppi v. Sweden, Appl. No. 40397/12, of 19 February 2013, discussed in Section 4.2.2.
occasions taken account of fundamental rights in the interpretation of substantive copyright norms, emphasizing that both the interpretation and the application of specific norms of copyright law must strike a “fair balance” between the rights and interests of right holders and those of users.\(^\text{19}\) In three seminal decisions of 29 July 2019 the CJEU further elaborated on the relationship between copyright and fundamental rights in a series of references by the German Federal Supreme Court. Although it concluded that fundamental rights cannot justify limitations and exceptions beyond those provided for in the aforementioned InfoSoc Directive, it emphasized throughout those decisions that the harmonization effected by that directive intends to strike a fair balance between the “interests of holders of copyright and related rights” and the interests and fundamental rights of users, and that any interpretation therefore must take account of the fundamental rights affected by it. At the same time, the Court showed a willingness to both construe exclusive rights narrowly and limitations and exceptions broadly in order to “strike a fair balance” and accommodate the enjoyment of fundamental rights of users.\(^\text{20}\) Fundamental rights are thus used as a tool to define the scope of the rights and obligations of right holders and of users.

1.2.2 Previous research

8. An overview. The relation between copyright and fundamental rights in general, as well as the role of the CJEU in the harmonization process and the way it takes account of fundamental rights has been extensively discussed, in particular during the past two decades. As alluded to in the previous section, many authors have contemplated the metaphysics of copyright in light of fundamental rights demands. In general, this research has clarified the tension that exists between, on the one hand, granting exclusive control to creators over certain literary and artistic subject-matter and, on the other hand, fundamental rights such as the right to free access to information and freedom of expression, and the importance of copyright laws taking account of that tension.\(^\text{21}\) In the international context, specific topic of discussion has

\(^{19}\) See, e.g., Case C-145/10 *Painer* ECLI:EU:C:2011:798; Case C-201/13 *Deckmyn and Vrijheidsfonds* ECLI:EU:C:2014:2132 and Case C-161/17 *Renckhoff* ECLI:EU:C:2018:634. An exhaustive overview of CJEU case law to this effect follows in Section 4.3.2.3.

\(^{20}\) Case C-469/17 *Funke Medien NRW (Afghanistan Papers)* ECLI:EU:C:2019:623; Case C-476/17 *Pelham and Others (Metall auf Metall)* ECLI:EU:C:2019:624 and Case C-516/17 *Spiegel Online* ECLI:EU:C:2019:625.

been the potentially conflicting multilateral obligations arising from agreements such as the Berne Convention and the TRIPS Agreement on the one hand, and human rights documents such as the UDHR and the ICESCR on the other hand. In the European context, much attention has been given the potential conflict between national copyright norms and national constitutional rights or supranational fundamental rights norms, in particular those in the ECHR. At the same time, others have examined the human rights nature of copyright itself, in particular of the rights of authors, as a basis for (a particular level of) copyright protection. As the ECtHR and the CJEU started to render judgements on the interface between copyright and fundamental rights, those judgements of course have become the subject of discussion. Several contributions have provided a general overview of ECtHR and/or CJEU case law up until a certain point in time. Some commentators have sharply criticized in particular the CJEU’s (lack of a) methodology when dealing with conflicts between the rights and interests of right holders and the fundamental rights of others, suggesting the use of fundamental rights arguments in copyright adjudication is mainly a strategic tool to further EU-wide integration of copyright.

Other notable research concerning the developments identified in the previous section has covered, for instance, the relationship between “Intellectual Property and European Economic Constitutional Law”, the proportionality of enforcement measures against intermediaries, the “harmonization by interpretation” of the concept of originality by the CJEU, the normative basis of European copyright law, and the influence of technological change on copyright’s balance. Note should also be made of numerous collections of essays concerning the relationship between

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25 See the recent discussions by Jütte 2016 and van Deursen & Snijders 2018. For a recent general overview of the intellectual property case law of the ECtHR see Geiger & Izyumenko 2018. For a recent general overview of CJEU case law concerning “intellectual property under the Charter” see Oliver & Stothers 2017. For recent comparative perspectives see Ginsburg & Lucas 2016 & Rigamonti 2017.
27 Mylly 2009.
29 Rosati 2013.
30 E.g. Ramalho 2016.
31 E.g. Efroni 2011 and Hua 2014.
copyright and fundamental rights. Finally, specific mention should be made of the 2019 monograph by Eleonora Rosati on “Copyright and the Court of Justice of the European Union”, which was released shortly before the conclusion of this study. Rosati extensively discusses the contribution made by the CJEU to the construction of a harmonized EU copyright and gives an exhaustive overview of the different interpretative arguments used by the CJEU in its copyright decisions.

The literature cited in this section, as well as many other contributions, is discussed further, where relevant, throughout this dissertation.

1.3 Research Question

9. Focus of the study. This dissertation builds on this earlier research in two principal ways. Firstly, it offers a comprehensive and critical analysis of how the use of fundamental rights balancing impacts the (re)shaping of the scope of protection in a harmonized EU copyright law, by describing and evaluating on the basis of which principles the CJEU determines the scope of exclusive rights and of limitations and exceptions, and how the concept of (fair) balance, and more generally proportionality analysis, influences copyright adjudication between right holders and users. Secondly, in order to overcome perceived shortcomings, it proposes a more general and coherent framework for the use of fundamental rights arguments in the process of determining the scope of protection offered by copyright law.

The question guiding this research is therefore as follows:

What is and ought to be the role of fundamental rights in determining the scope of protection in EU copyright law?

The three following preliminary questions are addressed separately:

1) How large is the discretion of the CJEU in regard to the creation of norms of copyright law and how does it exercise this discretion?

2) How must balancing of normative arguments, such as rights, be conceptualized?

3) What is the meaning and use of the concept of “fair balance”, as referred to by the CJEU?

The term “scope of protection” is herein used to the protection offered to authors and related rights holders by economic rights granted to them, as attenuated by


33 Rosati 2019.
limitations and exceptions, and to the extent that they can be enforced in a court against users. It does not refer to other elements which may in practice affect that scope, such as the ability to obtain injunctions against intermediary parties or the use of contracts of technological protection measures. Some limitations of this study are further addressed in the following section.

1.4 Limitations of the study

10. **Contracts and TPMs.** It is important to be clear about the limitations of this study. Its main focus is on the impact of fundamental rights on the interpretation and application of the rights of authors and related rights holders and of the limitations and exceptions thereto, and how the relationship between right holders and users is shaped as a result of this process. This relationship is also impacted by other factors, importantly by contractual relationships between right holders and users and through the use of technological protection measures (TPMs). The use of contracts and TPMs may have (and often will) impact the fundamental freedoms of users. Nevertheless, this issue is excluded from the scope of this study, primarily because the restrictions that result from such use are primarily caused by right holder action, whereas this study focuses on the restrictions caused by copyright law itself.

11. **Intermediaries.** In today’s networked environment, intermediaries such as internet service providers play an important role in enabling the effective enforcement of copyright. Measures to this effect taken by intermediaries may have an adverse impact on the enjoyment and exercise of fundamental rights, such as the right to freedom of expression and of information and the right to privacy. The CJEU has had to grapple on several occasions with the question whether an intermediary could be obligated to take certain measures to protect copyright in light of these fundamental rights concerns. Although these judgements are discussed and to a certain extent evaluated, their value is for present purposes mostly of a comparative nature. That is, how did the CJEU use fundamental rights arguments in these cases? The question to which extent EU law permits or prohibits the grant of injunctions against intermediaries forcing them facilitate the enforcement of copyright is not further addressed.

12. **The sui generis database right.** The *sui generis* database right, introduced in 1996 by the Database Directive, shares many similarities with authors’ rights and related or neighbouring rights. However, as it is rooted in its own particular

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34 See, e.g., the study by Mazziotti 2008.
35 See, specifically, Section 4.3.2.3(iii).
rationale, and is subject to an entirely separate system of rights and exceptions, this right is excluded from the scope of this dissertation.

13. **Moral rights.** The exercise of moral rights may limit the fundamental rights of others and accordingly the delimitation of their scope may require a balancing exercise.\(^{36}\) However, in general, moral rights have not been harmonized by EU law. Some directives explicitly exclude the exercise of moral rights from their scope.\(^ {37}\) Others as a rule simply do not affect their exercise. Moral rights are therefore not included within the scope of this study.

14. **Fairness.** Although the concept of “fair balance” is very much at the centre of this study, this dissertation focuses primarily on the procedural aspects of balancing. While question of fairness may impact a balancing decision, I do not propose to suggest which moral arguments should be guiding or even decisive. In other words, this dissertation is not about the appropriate scope of copyright law, but rather about how courts should approach the question of balance, in particular in view of potential limitations of fundamental rights.

15. **Language limitations.** This study focuses on EU law. Insofar as judicial decisions from Member State courts are used, this is mainly for illustrative purposes. Due to language limitations these are principally from Dutch, English, French and German speaking countries. Similarly, only literature in those languages is cited.

16. **Limitation in time.** The text of this dissertation was finalized on 10 December 2019. Consequently, no judgements, legislation, policy papers, literature or other materials published after that date have been taken into account.

1.5 **Structure of the study**

17. **Approach and methodology.** The research questions will be approached in the following manner. Part I discusses, in Chapter 2, the competence of the CJEU to create norms of copyright law, its discretion in that regard, and how it exercises that competence and discretion (first sub-question). It comprises a systematic legal dogmatic analysis of the case law of the CJEU concerning the scope of protection afforded by copyright law, in order to expose “the principles, rules and concepts” that – currently – govern the scope of protection in EU copyright law.\(^{38}\) To that end, Chapter 2 contains a comprehensive overview of CJEU decisions, comprising

\(^{36}\) See, e.g., Lucas-Schloetter 2001.


\(^{38}\) Cf., on this characteristic of the so-called “doctrinal method”, Smits 2015, p. 5.
practically all decisions affecting that scope of protection. The analysis identifies the particular methods of interpretation and legal argumentation used by the Court and critically assesses to what extent it does so consistently. Accordingly, the first part of this dissertation is predominantly descriptive and analytical in nature, in that it describes the existing scope of protection and subjects the CJEU method to conceptual and systematic analysis.\textsuperscript{39} I conclude in Part I that it appears that the CJEU often implicitly or explicitly conducts a balancing exercise, but that it hardly ever makes the premises of that balancing explicit.

Part II builds on this conclusion by shifting the focus to the use of proportionality analysis and fundamental rights reasoning in legal argumentation, specifically in the context of copyright. It starts, in Chapter 3, with the discussion of a model of “balancing” (or: proportionality analysis) as it has been developed in legal and constitutional rights theory (second sub-question). This is appropriate because, although the relation between copyright and fundamental rights has been the subject of extensive prior examination, as noted in Section 1.2.2, I believe our understanding of the issue can still benefit from a more comprehensive discussion in light its legal theoretical underpinnings. I suggest that this model can explain how balancing and proportionality analysis can be used both as a methodology to review the constitutionality of legislation and as a tool to guide courts in judicial norm-making. It is strongly inspired by the work of well-known scholars such as Robert Alexy, Aharon Barak, Julian Rivers and Jan Sieckmann. As such, the model is open to familiar objections, which – not entirely surprisingly – can also be heard in regard to balancing in the context of copyright. These objections are considered and ultimately considered (largely) unconvincing. The analytical framework provided by this model is used in Chapter 4 to analyse and evaluate the use of balancing, specifically the concept of “fair balance”, by both the European Court of Human Rights and the European Court of Justice, in general as well as more extensively with regard to copyright matters. This analysis illuminates how balancing discourse has so far been used in relation to copyright and unveils the shortcomings of that use (third sub-question). As a whole, Part II therefore combines a legal theoretical approach, concerned with the character of fundamental rights norms, their relation to secondary legislation and the relationship between court and legislature, and a more conventional descriptive and systematic analysis of the use of proportionality analysis by the EChHR and the CJEU, in order to both explain and criticize certain practices.

\textsuperscript{39} Cf. Alexy 1989, p. 251, who suggests that “legal science, in the narrower and proper sense, is a mixture of at least three activities: (1) that of describing the law in force, (2) that of subjecting it to conceptual and systematic analysis, and (3) that of working out proposals about the proper solutions to legal problems.”.
Part III is forward looking and explores more specifically the potential role fundamental rights arguments can (and sometimes should) play in the determination of the scope of protection in EU copyright law. To this end, Chapter 5 attempts to identify the core set of objectives underlying EU copyright law. This is important, because without clarity about which rights and interests copyright aims to protect any meaningful talk of balancing of “rights and interests” is impossible. Chapter 6 discusses how proportionality analysis and in particular balancing can influence the interpretation and application of substantive copyright norms and consequently shape the rights and obligations of right holders and users, while Chapter 7 discusses the question to what extent fundamental rights can act as additional, external constraints on the enforcement of copyright. Part III thus expands on the analysis of Part II but is instead prescriptive in nature. Building on the model of balancing outlined in Chapter 3, this part attempts to overcome the shortcomings of the prevailing approach identified in Chapter 4 by developing a more coherent and transparent approach to finding appropriate solutions that fit the existing system of norms.

Finally, Part IV summarizes the findings and offers some concluding observations.
PART I – EU COPYRIGHT AND THE SEARCH FOR BALANCE

In the introduction it was observed that the harmonization of copyright law by the European Union has led to a redefinition of the balance between the rights and interests of right holders and users. This has occurred in the first place by the creation of a harmonized legislative basis for the most important exclusive rights and the limitations and exceptions to those rights. In the second place, the redefinition occurs through the interpretation and application of ambiguous concepts in those norms, most importantly by the Court of Justice of the European Union. In Chapter 2 I discuss the competence of the CJEU in regard to matters of copyright law and how it has made use of that competence. In particular, I explore the use of judicial discretion by the CJEU in determining the scope of copyright protection. I conclude that the decision-making by the CJEU has at times been erratic, but that it generally has attempted to construct EU copyright law in a balanced manner, ensuring that right holders receive an appropriate reward for their creative efforts while competing rights and interests are observed.
2 THE CREATION OF COPYRIGHT LAW BY THE CJEU

2.1 Introduction

18. Introduction. The copyright harmonization process has led to the situation where most rights traditionally granted by copyright to authors and to holders of related rights, as well as limitations and exceptions to those rights, now have a basis in EU law. For instance, the exclusive rights of reproduction, communication to the public and distribution are in essence fully harmonized for both authors and holders of related rights. The same is for a large extent true for the possible limitations and exceptions to those rights. As a result, the interpretation of these all-important rights is now subject to the authority of the CJEU. It exercises this authority mainly through the system of preliminary references, whose use increased from just a handful of references in the entire decade prior to the adoption of the 2001 InfoSoc Directive, which effected a “horizontal” harmonization of the main exclusive rights as well as the limitations and exceptions thereto,1 to on average over five per year since.

There can be little doubt that the CJEU often creates legal norms when it interprets the scope of exclusive right or of limitations and exceptions. This was recently illustrated by the questions referred in the Cofemel case, in which the referring court asks not about the interpretation of a particular provision of EU law, but whether “the interpretation by the Court of Justice of the European Union of Article 2(a)” of the InfoSoc Directive itself precludes certain national legislation.2 In other words, the CJEU is asked to clarify a rule it has itself developed. This highlights the fact that the CJEU itself acts as norm-maker, giving shape to the rights and obligations of rights holders and users. This raises the legitimate question as to how the CJEU goes about this process of norm-creation, and the extent of its discretion in this regard.

This chapter details how the CJEU creates norms of copyright law and why it has, or: claims to have, the authority to do so. It clarifies and emphasizes the power of the CJEU to (re)define the boundaries between uses that are subject to right holder control (or remuneration) and uses that are free. It concludes that the CJEU often appears to look for a fair (or balanced) outcome but that it does not always do so in a principled and consistent manner.

19. Structure. Section 2.2 discusses why the CJEU has discretion to create legal norms in the first place and gives a general overview of the most important elements of judicial discretion in EU copyright law. Next, Section 2.3 looks at the alleged harmonizing agenda of the CJEU with respect to copyright law, in light of its

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1 See also, supra, § 6.
2 Case C-683/17 Cofemel ECLI:EU:C:2019:721.
discretion to determine the level of harmonization. Section 2.4 contains the meat of this chapter. It analyses how the CJEU actually interprets provisions of the acquis containing rights and limitations and exceptions, emphasizing in particular the Court’s teleological approach, which is aimed at guaranteeing the ability of right holders to obtain an appropriate reward. Finally, in Section 2.5 I make some concluding observations with regard to the (inconsistent) approach of the CJEU.

2.2 Hard cases and discretion in EU copyright law

20. Hard cases. The creation of legal norms by the CJEU predominantly occurs through the system of preliminary references, which enables (and sometimes obliges) national courts to request the CJEU to interpret EU law if the European norm impacts the resolution of the proceedings before the national court.3 For instance, the question whether the retransmission of a television broadcast containing cinematographic works in hotel rooms constitutes a communication to the public and is therefore subject to right holder authorization, required the interpretation of article 3(1) of the InfoSoc Directive, which obliges Member States to provide authors with the exclusive right of communication to the public of their works.4 The CJEU concluded that such a retransmission is indeed a communication to the public, because it entailed communicating copyright protected works to what it termed a “new public”, a concept theretofore foreign to the copyright laws of the Member States.5 In doing so, the CJEU (re-)defined the relationship between hotels and authors in the EU, by recognizing an obligation for the former to obtain authorization for that retransmission from the latter.

Preliminary references to the CJEU will often concern hard cases, to use terminology made popular by Ronald Dworkin, for the reason that they will normally concern questions that are neither clair nor éclairé.6 Of course, what precisely is a hard case, is itself a difficult question. Dworkin himself referred to hard cases as cases in which “the result is not clearly dictated by statute or precedent”,7 and “in which reasonable lawyers will disagree about rights, and neither will have available any argument that must necessarily convince the other”.8 More pragmatically, a hard case could be

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3 See art. 267 TFEU
4 Case C-306/05 SGAE v Rafael Hoteles ECLI:EU:C:2006:764.
5 See further, infra, Section 2.4.2.3.
6 If the rule of EU law is clear and not in need of interpretation (acte clair) or has been previously clarified by the CJEU (acte éclairé), national courts have no reason to submit a preliminary reference, nor are national courts “against whose decisions there is no judicial remedy under national law” (Article 267 TFEU), which as a general rule must submit preliminary references on the correct interpretation of EU law, obligated to submit such a reference.
7 Dworkin 1975, p. 1057.
8 Dworkin 1977, p. xiv.
defined as a problematic case, in which a problem as to interpretation has been raised which has not been summarily dismissed by the judge. In the legal positivist tradition of H.L.A. Hart, who only used the term in his reply to Dworkin, a hard case is defined as a case in which, due to the vagueness of language and open texture of law generally, there exists no answer. This ties hardness to the indeterminacy of law. It is in these cases that the judge will typically have a certain measure of discretion. Dworkin, of course, famously objected to the notion of indeterminacy in law, maintaining instead that each hard case has a single right answer. Principally, Dworkin based his familiar claim on the assertion that even if no clear (all-or-nothing) rule applies the answer can be determined by recourse to legal principles, which instead have a dimension of weight and to which judges are equally bound. The incorrectness of his single right answer thesis need not be set out in detail here. In brief, in any hard case several principles may be applicable and a judge may have to choose between them. Moreover, principles themselves may be open textured, meaning they may equally be indeterminate, nor will the law necessarily dictate which weight must be given to them. Ultimately, Dworkin appeared to overshoot his mark in incorrectly ascribing to legal positivism, the target of his criticism, the view that discretion means the judge is not bound by any standards.

Hard cases, which have no clear answer in law, provide courts with a variable scope of judicial discretion, depending on the level of indeterminacy of the law and the extent to which courts may (need to) resort to principled reasoning. In EU copyright law there are several factors which lead to an increased level of judicial discretion, in particular for the CJEU. Notably, the EU norms which now provide a basis for exclusive rights and the limitations and exceptions thereto often have little to no settled meaning, nor is there often a clear legislative intention to guide the Court. This is discussed further.

21. **Lack of settled meaning.** Simply put, the discretion of the CJEU to “create law” is limited where the applicability of the rule follows from the (wording of the) rule itself, without the need for any substantial further interpretation. This is the case if the facts can be subsumed under the *prima facie* meaning of the rule. In the well-

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11 See, principally, Dworkin 1977, Ch. 2.
12 It is not generally accepted in legal theory. See, e.g., Klatt 2007, p. 512, including further references.
17 Cf. Huysmans 2015, p. 3.
known words of Hart: the case falls within the “core of settled meaning”. Principally, this meaning will be provided by the wording of the rule. This is reflected in the settled case law of the CJEU that it will follow the wording of a provision of EU law if that wording is clear and precise. Thus, in Usedsoft, the CJEU concluded that the downloading of a copy of a computer program, accompanied by the conclusion of a licensing agreement for an unlimited period, constitutes a sale within the meaning of article 4(2) Software Directive because it meets the “commonly accepted definition” of the concept of sale. The “core of settled meaning” may be further informed by the application history of the norm itself and of similar norms. For instance, in Reha Training the CJEU ultimately considered that the concept of “communication to the public” must be given the same meaning in article 8(2) of the Rental and Lending Rights Directive as in article 3(1) of the InfoSoc Directive.

However, it is precisely the lack of a “core of settled meaning” of many central copyright concepts, now concepts of EU law, which creates room for the CJEU to shape the rights and duties of authors and users in copyright law. EU copyright norms are almost all characterized by a large degree open texture (or at least they were at the time of their introduction), despite the fact that almost all of these norms already have some “settled meaning” in the Member States. The primary reason for this is the fact that most concepts, such as “reproduction”, “communication to the public”, “quotation” and “parody” are all intended to cover a wide variety of uses, to some of which these concepts will be clearly applicable. Other uses will fall within the “penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out”. Moreover, given the relative recency of the harmonization efforts in the area of copyright law, there will be little to no application history to speak of. The “core of settled meaning” of a concept such as “communication to the public” is not necessarily informed by the meaning given to that concept in the Member States prior to harmonization, even if it may have a settled meaning on the Member State

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18 Hart 1958, p. 607.
19 E.g. Case C-528/08 Commission v United Kingdom ECLI:EU:C:2010:429.
20 Case C-128/11 Usedsoft ECLI:EU:C:2012:407, paras 42-48. One could very well argue that the applicability of the concept of sale to an online transaction such as at issue in Usedsoft was far from clear, which was, of course, precisely what the Claimant argued.
21 Cf. Huysmans 2015, p. 3.
22 Case C-117/15 Reha Training v GEMA ECLI:EU:C:2016:379, para 33. See, however, the earlier decisions Case C-135/10 SCF v Marco Del Corso ECLI:EU:C:2012:140, para 74-76 and Case C-162/10 Phonographic Performance (Ireland) ECLI:EU:C:2012:141, para 29, in which the Court maintains that because art. 8(2) provides for a remuneration right as opposed to an exclusive right it must receive “an individual interpretation”.
23 Cf., infra, Section 2.3.
level. This creates room for the CJEU to redefine those concepts from an EU perspective, which it has extensively done, as will be detailed in this chapter.

On a final note, one could argue that, within the context of EU harmonization, the more the laws of the Member States converged on a specific point prior to harmonization, the weightier must be reasons for a diverging interpretation of an EU norm that was not specifically intended to deviate from that common understanding. The CJEU has not given much explicit consideration to the question how a certain concept was interpreted prior to harmonization, even if it might have helped it avoid some less fortunate interpretations. Nevertheless, as the EU has grown to 28 Member States (and is about to shrink back to 27), far-reaching convergence has become less likely anyway, meaning this type of comparative legal analysis may hold relatively little normative value.

22. Democratic legitimacy and legislative intention. Arguably, the discretion of the CJEU must be further limited by the idea that the law should as much as possible be created by democratically elected legislatures, which obliges the Court to take account of the intention of the European legislature, even though courts often also have discretion in determining that intention itself. The clearer the intention of the legislature, the weightier must be the countervailing reasons for the CJEU to depart from this intention. However, for a variety of reasons, addressed throughout the remainder of this chapter, the legislative intention of the EU legislature in respect of the concepts that feature in the many copyright directives is often difficult to pinpoint. Given the plurality of actors in the EU legislative process it is frequently all but impossible to distil a single legislative intention. Moreover, the determination of

25 Cf. Lenaerts 2003, p. 874 et seq, who suggest that comparative legal analysis is mostly conducted behind the scenes and that “[a]lthough the Court of Justice and the [Court of First Instance] – anxious to present Community law as a ‘unitary’ and autonomous set of rules – might erase in their judgments the too visible signs of a reasoning based on the comparison of different legal rules, the comparative approach nevertheless permeates the daily activities of the Community judge in many ways” (p. 876).


27 While the manuscript for this dissertation was being finalized, the UK was scheduled to leave the EU no later than 31 January 2020.

the meaning and scope of other concepts may simply not have been contemplated, or simply intentionally left to the discretion of the courts. And finally, even given a relatively clear (subjective) legislative intention, this intention must be construed against the objective purpose and the legal values of the legal system of which the norm forms part.⁵⁻²⁹ Depending on the weight attached to it, the court may conclude that this objective purpose outweighs the subjective purpose.

23. Exercise of discretion. For the above reasons, systemic and teleological arguments often play a relatively important role compared to textual arguments or arguments from intention, leading to principle-led decision-making by the CJEU which is characterized by a broad discretion. For instance, in Usedsoft the CJEU was also faced with the question of whether exhaustion of the distribution right only applied to copies of computer programs sold on tangible media, or also to intangible copies. The CJEU concluded exhaustion occurs in both cases. In support of this conclusion it noted it was apparent from the context that the legislator had not intended to distinguish between tangible and intangible copies and that distinguishing between the two forms of distribution would offend the principle of equality as well as free movement of goods. The Court also held that the buyer of the “second-hand” software could, as a “lawful acquirer”, rely on article 5(2) Software Directive to make a reproduction thereof, because the second acquirer should be considered a “lawful acquirer” for the purpose of that provision. Limiting the applicability of that provision to the first acquirer would “render ineffective the exhaustion of the distribution right”.³⁰

Decisions like Usedsoft take place within the discretion of the Court. It is down to the Court to evaluate the different reasons for the possible interpretations and determine their relative strength. In a case like Usedsoft this also entailed determining the applicable principles, give them specific meaning and determine their (relative) weights.³¹ That the Court could have reached the opposite conclusion by emphasizing different principles is illustrated by the Opinion of AG Bot. The AG, who like the CJEU concluded that the distribution right was exhausted, answered the question of whether the buyer could rely on article 5(2) in the negative, considering that “the purpose of that provision is confined to enabling a person who already possesses a

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³⁰ Case C-128/11 Usedsoft ECLI:EU:C:2012:407, para 83.
³¹ It should be noted that, to maintain a difference between what they refer to as structural and normative epistemic discretion (on this, see § 63-66), both Alexy and Klatt argue that some cases are epistemically clear, implying there can be no doubt about the principles at stake and their relative weight, meaning there is no (epistemic) discretion for courts. See Alexy 2002, p. 420-422 and Klatt 2007, p. 524-526.
copy ... to make a reproduction”.\footnote{Opinion of AG Bot in Case C-128/11 Usedsoft ECLI:EU:C:2012:234, para 98.} Significantly, he considered that allowing the second acquirer to rely on article 5(2) would in effect extend the exhaustion to the reproduction right. Although he considered this justifiable in order to protect the effectiveness of the exhaustion rule as well as the free movement of goods and services, he concluded that those principles were outweighed by the principle of legal certainty.\footnote{Ibid., para 99.} The foregoing, of course, hardly means that courts may operate arbitrarily within their area of discretion. In general, a judge’s decision will have to be rational. But rationality may only rule out some decisions. It will not always prescribe the correct one.\footnote{Cf. Hart 2012, p. 273, Klatt 2007, p. 510 and Raz 1972, p. 843.} One could argue, that when the applicable principles have been determined, their meaning settled, and weight assigned, there can no longer be any discretion as to the outcome, as a certain (set of) principle(s) will outweigh the other(s). Such a view runs the risk of having a too restrictive view of judicial discretion. Even if the outcome may at one point be determined by the balance of arguments, this is a result of a discretionary evaluative process.\footnote{Cf. Hart 2012, p. 274-275, who points out that when a judge cites a legal principle in favour of a certain decision the “moment for judicial law-making” is not eliminated, but merely “deferred”, since the judge will often not rely “on any already established order of priorities prescribed for him by law”.} This is illustrated by the evaluative process in Usedsoft, which ultimately led the CJEU to a different outcome than its Advocate-General.

24. **Discretion in copyright.** Arguably, the CJEU has far-reaching discretion in determining the scope of protection, now that central rights as well as, to an important extent, limitations and exceptions have been the subject of harmonization.\footnote{While the catalogue of limitations and exceptions in the InfoSoc Directive is optional, Member States have, at best, limited competence to tailor their scope. See further Sections 2.4.3 and 6.5.1.} The level of harmonization itself is also subject to interpretation. In this regard the CJEU also has discretion insofar as the directives do not (clearly) specify this level. How the CJEU has made use of this discretion is the subject of discussion in Section 2.3.

The CJEU is thus in a position of manifest importance, since it has been given the opportunity – one might say duty – to reconstitute the meaning of many core concepts of copyright. While doing so, it has great discretion due to their often ambiguous meaning, the (initial) lack of an existing interpretative framework on which it can build, and the often obscure intention of the legislature. As a consequence, it is now
for a large part the Court of Justice that determines exactly which uses are subject to right holder authorization and which uses are free.

25. **CJEU vs. national courts.** Finally, it should be pointed out that judicial discretion in the EU exists on two levels. On the first level, the CJEU may have discretion when exercising its task to interpret EU law. However, the CJEU may devolve this power “to say what the law is” upon national courts, in which case discretion may exist on the second, national, level. It will then be up to the national court to determine the ultimate content of the norm applicable to the concrete case. This discretion left to national courts by the CJEU may be greater or smaller, generally depending on two circumstances.

First, discretion may decrease the greater the interference with a particular (substantive) fundamental right. In *Promusicae* the CJEU held that the applicable EU directives did not require Member States to lay down an obligation for an internet access provider to communicate personal data of its users to ensure the effective protection of copyright, but added that Member States, including its national courts, must rely on an interpretation of the directives and the measures transposing those directives that strikes a fair balance between fundamental rights protected by the EU legal order. How to strike the balance was thus left to the discretion of national authorities. By contrast, in *Scarlet Extended* and in *Netlog* the CJEU concluded that a particular injunction requested by a copyright holder “would result in a serious infringement of the freedom of the ISP concerned to conduct a business”. It left no room for discretion on the part of the national court by concluding that the requested injunction would not respect the requirement that a fair balance be struck.

Second, and similarly, the formal principle of integration of the internal market may lead the CJEU to reduce the discretion left to national courts. The greater the impact of potential diverging national approaches may have on the functioning of the internal market, the less discretion the CJEU may be willing to leave to national courts in their application of EU law. In practice, this means it may give highly detailed answers to national courts prescribing a certain outcome in certain cases, while granting more leeway in others. For example, in cases concerning the right of communication to the

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37 Cf. the famous ruling in *Marbury v. Madison*, 5 U.S. 137 (1803): “It is emphatically the duty of the Judicial Department to say what the law is.”
39 Case C-275/06 *Promusicae* ECLI:EU:C:2008:54.
40 Case C-70/10 *Scarlet Extended v SABAM* ECLI:EU:C:2011:771, para 48 and Case C-360/10 *SABAM v Netlog* ECLI:EU:C:2012:85, para 46.
41 On this “double horizontal effect” of EU fundamental rights, see Colombi Ciacchi 2014, p. 122-123.
public the CJEU typically does the former, while it left the determination whether a particular parody strikes a fair balance to the national courts.

2.3 The CJEU’s (alleged) harmonization agenda

26. Judicial activism? Before discussing how the CJEU determines the meaning of open-textured concepts and the associated scope of rights and of limitations and exceptions, I briefly discuss the issue whether this is something that falls within the competence of the CJEU in the first place. That is to say, one might argue that the precise meaning of those provisions is not a matter of EU law, but is instead left to the discretion of the individual Member States. Starting with its 2009 Infopaq ruling the CJEU has been said “to pursue an activist agenda of harmonization by interpretation”. The gist of this allegation is that the CJEU has gone out of its way to fill in gaps left in the acquis by the legislature to promote EU integration of copyright law, using a number of different techniques. First, the CJEU has been said to (over)zealously label concepts found in the directives on copyright as autonomous concepts of EU law that must be given a uniform interpretation, at times against the wishes of the EU legislature. Second, it is suggested the CJEU rephrases questions in order to be able to construe a more uniform EU copyright law. Third, it has been argued that the Court’s fundamental rights reasoning may serve harmonizing purposes. Fourth, the CJEU has stretched the boundaries of the right of communication to the public into the unharmonized traditional territory of indirect liability.

27. Autonomous concepts. It is the established position of the CJEU that “the need for uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union”. As the directives that deal with copyright matters typically make little to no reference to that effect, this has transformed many key concepts of copyright law into concepts of EU law. The CJEU has already explicitly held as much with regard to – in

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42 See Section 2.4.2.3.
43 See, infra, § 106.
45 See the cases cited in n 46 through 54.
chronological order – the concept of “equitable remuneration”,46 “public”,47 “reproduction in part”,48 “fair compensation”49, “remuneration”,50 “by means of its own facilities”,51 “sale”,52 “parody”,53 “work”54 and “in connection with the reporting of current events”55. Arguably, the same is true for other central concepts such as “author”, “performer”, “private use”, “quotation”56 et cetera. The competence of the Member States to determine the meaning of those concepts is thus limited and transferred to the Court itself.57 Initially, in SENA,58 the CJEU had held that despite the concept of “equitable remuneration” being an autonomous concept of (at the time) Community law, there were no “objective reasons to justify the laying down by the Community judicature of specific methods for determining what constitutes uniform equitable remuneration”. However, it abandoned such restraint in subsequent cases, giving specific definitions which leave little room for appreciation by national courts.59

The CJEU has drawn sharp criticism for its use of the autonomous concept doctrine in its copyright judgements, in particular in Infopaq and in SGAE. In Infopaq the Court, considering that the reproduction right is intended to apply to “works”, made a start with defining an EU wide originality standard by holding that copyright (in so

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50 Art. 6(1) Rental and Lending Rights Directive (previously art. 5(1)). See Case C-271/10 VEWA ECLI:EU:C:2011:442, paras 25-26.
51 Art. 5(2)(d) InfoSoc Directive. See Case C-510/10 DR and TV2 Danmark ECLI:EU:C:2012:244, paras 33-34.
54 Art. 2-4 InfoSoc Directive. See Case C: 310/17 Levola Hengelo ECLI:EU:C:2018:899, para 33. It should be noted that already in Infopaq the CJEU had started with defining the autonomous meaning of the concept of work. See n 48.
56 Although it did not explicitly designate the concept of quotation within the meaning of art. 5(3)(d) InfoSoc Directivie as an autonomous concept, it nevertheless appeared to have given that concept a uniform interpretation in Case C-476/17 Pelham and Others (Metall auf Metall) ECLI:EU:C:2019:624, paras 70-71 and Case C-516/17 Spiegel Online ECLI:EU:C:2019:625, paras 77-79.
57 Cf. Carre 2012, p. 20 et seq.
58 Supra n 46.
59 Carre 2012, p. 22-23.
far as governed by the general InfoSoc Directive) only attaches to works that are the “author’s own intellectual creation”. It concluded this based on its reading of the Berne convention and the fact that the same standard has been explicitly laid down for software, photographs and databases. The primary critique levelled against the Court’s assumption that the concept of work requires a uniform interpretation is that it goes directly against the intention of the EU legislature. In other words, the Court is accused of acting *ultra vires* by defining a concept which was to be left outside of EU competence. In this view, giving a uniform interpretation “facilitates the court taking control over the bureaucracy’s EU legislation and thereby prising IP rights from national legal tradition”. A similar criticism can be heard in relation to the Court’s judgement in *SGAE*, in which it designated the concept of “public” an autonomous concept, thereby ignoring the alleged intention of the EU legislature to leave the definition of the concept of “public” to the Member States. The Court is thus criticized for ignoring legislative intention, relying instead on other methods of interpretation.

It may be that the harmonizing approach taken in *Infopaq* and *SGAE* is merely an indication of the Court’s hesitation to rely on the hard-to-discern subjective intention of a legislature consisting of three institutions, which moreover each individually consist of separate actors. It is therefore not completely incomprehensible that the Court instead appears to prefer a more objective approach when it relies on recitals and context to construe the intention and purpose underlying a particular legislative act. In this case, one could infer from the general intention to create a harmonized framework to prevent “significant legal differences and uncertainties in protection” the specific objective intention to harmonize also the meaning and scope of the central concepts at issue. Moreover, it is questionable that in either *Infopaq* or *SGAE* the Court would have been able to discern an unequivocal and explicit (subjective) intention of the EU legislator to the effect that Member States remained free to give to define what constitutes a “work” or “public”. On the other hand, one may

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61 For a discussion of the criticism levelled against *InfoPaq*, see Van Eechoud 2012.
63 Vousden 2010, p. 204.
64 *Supra* n 47. Cf. Vousden 2010, p. 204.
66 Cf. Lenaerts & Gutiérrez-Fons 2013, p. 22.
67 On subjective versus objective conceptions of legislative intention see *supra* n 29 and accompanying text. See also MacCormick & Summers 1991, p. 522-525.
68 As regards the concept of “work”, it is said (Derclaye 2014, p. 719, Leistner 2014, p. 563 and Van Eechoud 2012, para 100) that this intention follows from the 1995 Green Paper (specifically, page 27), which ultimately forms the genesis of the InfoSoc Directive, but I have trouble identifying such an intention.
legitimately wonder whether it is prudent for the CJEU to take it upon itself to define concepts which have typically been the subject of statutory definition by the individual Member States, such as the concept of “author” or “performer”. In those cases, the absence of an explicit harmonizing intention should count for something.

28. **Rephrasing of questions.** A second tool the Court is said to use to further harmonize copyright is the rewording of questions referred to it by national courts.69 Exhibits A and B have generally been the **BSA**70 and **Painer**71 decisions. In **BSA** the Court was asked whether “the phrase ‘the expression in any form of a computer program’ [in article 1(2) of the 1991 Software Directive] also includes the graphic user interface of the computer programme or part thereof”.72 The CJEU understood the national court as asking whether “the graphic user interface of a computer program is a form of expression of that program within the meaning of Article 1(2) of [the 1991

As regards the concept of “public”, the Austrian Government referred to an Explanatory Note (10.17) to the Basic Proposal for the WCT (available at www.wipo.int/edocs/mdocs/diplconf/en/cnrr_dc/cnrr_dc_4.doc, accessed 6 February 2018), which notes that “[i]t is a matter for national legislation and case-law to define what is ‘public’. Of course, an expressed intention concerning a (proposal for a) multilateral convention like the WCT can hardly be said to constitute a clear expression of the intention of the EU legislature, even if the EU is a party to that convention. Moreover, one can in principle agree with the argument of AG Sharpston that “[i]n the context of the WCT, to which the Community is a signatory, the ‘national legislation’ is the Copyright Directive (rather than the national legislations of the various Member States) and the ‘case-law’ is that of this Court” (Opinion of AG Sharpston in Case C-306/05 **SGAE v Rafael Hoteles** ECLI:EU:C:2006:479, para 44). Finally, it has been pointed out that in a 2004 Working Paper the Commission expressed the belief that neither the standard of originality, nor the concept of work had been harmonized by the InfoSoc Directive (Commission Staff working paper on the review of the EC legal framework in the field of copyright and related rights (19 July 2004, SEC(2004) 995), p. 14-15). Of course, an ex post facto declaration in the form of a working paper by one branch of the legislature can hardly be a convincing representation of the intention of the legislature in adopting the prior legislative act, certainly not by itself. Again, in the words of AG Sharpston in **SGAE** (para 45): “[T]he Commission’s own view of the effect of Community legislation, while it will be of interest and may have some weight, is clearly not binding on the Court.” Surprisingly, the Austrian Government made no reference to the Explanatory Memorandum to the Proposal for a directive on the harmonization of certain aspects of copyright and related rights in the information society, Brussels, 10 December 1997, COM (97) 628 final, p. 25, which notes that: “The notion of ‘communication to the public’ has been used as in the **acquis communautaire** and the relevant international provisions, such of the Berne Convention and the WCT. As in the **acquis communautaire**, it is a matter for the national law to define ‘public’.” Although this does indicate that the Commission meant to leave the definition of the concept of “public” to the Member States, the Commission’s suggestion was based on the its belief that the existing provisions of the **acquis** dealing with the communication right (art. 2 SatCab Directive and art. 5 Database Directive) equally left it up to national law to provide a definition. The Commission’s belief in regard of course is not dispositive. In that respect the words of AG Sharpston with regard to the 2004 Commission Staff working paper quoted above apply also here. Either way, the Explanatory Memorandum does not reveal an unequivocal intention of all the actors involved.

69 Dercleye 2014, p. 721 and Van Eechoud 2012, para 84 et seq.
70 Case C-393/09 **BSA** ECLI:EU:C:2010:816.
71 Case C-145/10 **Painer** ECLI:EU:C:2011:798.
72 Case C-393/09 **BSA** ECLI:EU:C:2010:816, para 21.
Software Directive\] and is thus protected by copyright as a computer program under that directive”.\footnote{Ibid., para 28.} Having answered that question in the negative, this allowed the Court to further develop its general conception of “work”, as introduced in Infopaq, by pointing out that a graphical user interface “can be protected by the ordinary law of copyright by virtue of [the InfoSoc Directive]”.\footnote{Ibid., para 44.} In Painer the Court was asked whether the limited formative freedom of the author of a photograph, in particular of a portrait photograph, meant that the author received little or no protection at all against adaptations. The Court instead answered the question whether portrait photographs can be protected by copyright at all and, if so, whether they receive inferior protection than other works. This, again, allowed the Court to expand on the content of the EU standard of originality. Mireille van Eechoud has suggested that this rephrasing of questions allowed the Court “to arrive at an interpretation of directives that creates a more ‘coherent’ system of European copyright law”.\footnote{Van Eechoud 2012, para 88.} The question is whether this really reveals a harmonization agenda of the Court, or whether the Court’s motives are more innocuous. While the Court may want to maintain some sense of coherency in its construction of copyright law, it is more likely that its primary goal is to provide the national court with the most helpful answer.\footnote{Cf. Derclaye 2014, p. 722.} If the Court is of the opinion that EU law must be interpreted in a manner that will impact the outcome of the case, it does not seem particularly inappropriate that it informs the national court of that interpretation, even if no questions have been raised to that effect by the national court.

29. \textbf{Fundamental rights.} A third alleged symptom of a harmonizing agenda with regard to copyright law is the Court’s reliance on fundamental rights arguments when interpreting the acquis. Jonathan Griffiths, in an article from 2013, pointed to Scarlet\footnote{Case C-70/10 Scarlet Extended v SABAM ECLI:EU:C:2011:771.} and Luksan\footnote{Case C-277/10 Luksan ECLI:EU:C:2012:65.} as the prime manifestations hereof.\footnote{Griffiths 2013a.} He suggests the use of the EU Charter is mere “window-dressing” and “rhetorical”, used to bolster an underlying harmonization agenda.\footnote{Ibid., p. 74 & 77, respectively.} It must be admitted that the Court’s fundamental rights argumentation in both cases is minimal to say the least. Neither judgement contains a comprehensive analysis as to why the measures at issue did not stand up to fundamental rights scrutiny. Instead, the Court directly presented its conclusion in both cases. Nevertheless, the question is again whether those references to fundamental rights were really rhetorical or just inadvertently minimal, for
instance based on an unpronounced analysis. Since the CJEU’s reliance on fundamental right arguments has only increased since 2013, the question as to the nature of the Court’s use of those arguments has become ever more pressing. The Court’s use of fundamental rights arguments, one of the developments at the centre of this dissertation, is more closely scrutinized in the following chapters.81

30. **Indirect liability.** Finally, the CJEU has ventured into territory traditionally covered by indirect liability, giving an interpretation to the right of communication to the public that takes account of the knowledge of the user.82 Conventional, whether the user knows or not that they perform an act covered by an exclusive right does not affect the infringement analysis. Indirect liability regimes, on the other hand, often do take account of the knowledge of the user, offering a flexible recourse against certain parasitic users. The lack of harmonization of indirect liability for use of copyrighted works may have been one reason for the CJEU to expand the scope of the communication right by incorporating a knowledge element. In doing so, the Court was able to avoid the situation where a particular use would lead to indirect liability in one Member State while being permitted in another. This approach can be said to amount “to a judge-made harmonization of indirect copyright liability through the application of the rules of primary liability”.83

31. **Agenda or bias?** It is difficult to assess whether the Court really has a harmonization agenda, or more of a harmonization “bias”, as has been suggested by Estelle Derclaye. She rightfully points out that the copyright acquis is conceptually vague in many places due to political compromise. The resulting uncertainties have led to substantial delegated power for the CJEU.84 It is true that the directives on copyright contain a lot of norms (reproduction (in part), communication to the public, parody etc.) that do not lend themselves to direct application, but that need further concretization. This begs the question: who is competent to further concretize such

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81 For a description of Scarlet and Luksan, see Sections 4.3.2.3(iii) and 5.2.1.2, respectively.
82 See further, Section 2.4.2.3.
83 Angelopoulos 2017a.
84 Derclaye 2014, p. 722. Cf. Beck 2012, p. 317 who suggests that “[t]he nature of the EU treaties as traité-cadres and the attendant high degree of legal uncertainty in the primary legal materials due to vagueness, norm conflict and precedent effectively mean that the Member States in effect entrusted the ECJ with finding acceptable judicial answers to many of the questions associated with the precise degree of European integration and distribution of power between EU and its Member States on which the treaties often remain silent or vague.” To this can be added that the CJEU, given the chance to do so, has not consistently opted to limit the competence of the Member States and extend the competence of the EU. See, for instance, Case C-293/98 Egeda ECLI:EU:C:2000:66; Case C-283/10 Circul Globus Bucureşti ECLI:EU:C:2011:772; Case C-145/10 Painer ECLI:EU:C:2011:798, and to a certain extent Case C-279/13 C More Entertainment ECLI:EU:C:2015:199; Case C-41/14 Christie’s France ECLI:EU:C:2015:119; Case C-469/17 Funke Medien NRW (Afghanistan Papers) ECLI:EU:C:2019:623 and Case C-516/17 Spiegel Online ECLI:EU:C:2019:625.
norms. This itself is a question of interpretation, the answer to which also falls within the competence of the CJEU. In that regard, the CJEU can be said to have a certain degree of Kompetenz-Kompetenz. Lacking a clear declaration by the EU legislature as to the competence to further define certain notions, it is not surprising that the Court constructed the objective intention to achieve a more far-reaching, rather than a more limited, harmonization of copyright.85 Had the Member States (and the Parliament) wanted to avoid such an interpretation, they could have reserved the competence to interpret those notions in an unequivocal manner.

2.4 Interpretation of the copyright acquis

2.4.1 General observations

32. **Introduction.** In prior sections I discussed the important role the CJEU has (some might say: created for itself) with regard to (re)defining the scope of protection through the interpretation of the EU provisions containing the rights granted to the various categories of right holders and the limitations and exceptions thereto. This section contains a rough sketch of how the CJEU has gone about interpreting these copyright norms. It aims to highlight how the CJEU has constructed its own understanding of (the goals pursued by) copyright law to fill in perceived gaps in the acquis communautaire. It illustrates the extent to which a particular kind of purposive argument, that is to ensure an appropriate reward for the author, has guided the court and aims to show that the Court’s reasoning is inconsistent and not always principled. Before discussing the interpretation of exclusive rights, including the related topic of protected subject-matter, and the interpretation of limitations and exceptions to those rights in Section 2.4.2 and Section 2.4.3, respectively, I make a few remarks about the general methods of interpretation used by the CJEU.

33. **Particularities of the CJEU method of interpretation.** Typically, the canon of interpretation of courts consists of textual, systemic and teleological arguments.86 This is no different in respect of the CJEU. A study from 2012 by Gunnar Beck on the methods of interpretation used by the CJEU confirms this conformity to traditional legal methods. In particular, he found that the Court uses what can be

85 Empirical research into the interpretation of copyright norms by the CJEU revealed a certain prevalence of teleological arguments in the case law of the CJEU, which could be seen as an indication of an “activist, upwardly harmonizing agenda” (Favale, Kretschmer & Torremans 2016, p. 69-70). However, the researchers point out that “this finding is tempered by the presence of complex patterns of accumulation (e.g., cumulative use of several approaches without a hierarchical order)” and that “[t]his points rather to a more complex explanation, supported by the finding that the outcomes of the judgments do not (systematically) expand copyright protection” (ibid., p. 69).

called a “cumulative approach”: the Court typically combines arguments of all three types.87 In the words of the (settled case law of) the Court: “in interpreting a provision of Community law it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part”.88 Beck argues that, as a result, the Court gives comparatively less weight to literal arguments than other highest courts and greater weight to systemic and teleological arguments, although the former “still [enjoy an] undeniable degree of rebuttable primacy”.89 The following sub-sections serve to illustrate that this general observation also appears true with regard to copyright.

Note should also be made of a number of interpretative particularities with which the CJEU is confronted due to the specific nature of the EU legal order. This nature brings with it a particular set of interpretative difficulties. Three characteristic features of interpretation by the CJEU, all of which are also to some extent be found in the Court’s copyright case law, are addressed here.90

First, the fact that the EU has 24 official languages produces particular interpretative problems. Legislative enactments are to be translated and published into all of these languages.91 All language versions are equally authentic. Nevertheless, linguistic differences between the different translations may arise. Although the CJEU maintains that the wording of a provision should prevail when it is clear and precise,92 relying on a textual interpretation is not possible when the different language versions diverge. In those cases, systemic and teleological arguments will have to show the way.93 In the context of copyright, this was illustrated by the ruling in DR and TV2 Danmark. The question was whether a broadcasting organization which uses the services of a third party can rely on the exemption provided by article 5(2)(d) of the InfoSoc Directive only if that third party act “on behalf of” and “under the responsibility of” that broadcasting organization, or if those conditions are alternative.94 In some language versions the conditions were alternative (“or”), while in others cumulative (“and”). The CJEU held that because each condition is

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88 In the copyright context, e.g., Case C-306/05 SGAE v Rafael Hoteles ECLI:EU:C:2006:764, para 34.
89 Beck 2012, p. 317.
90 See, more extensively, Lenaerts & Gutiérrez-Fons 2013.
91 Regulation No 1 determining the languages to be used by the European Economic Community, [1958] OJ L 17/385.
92 E.g. Case C-220/03 ECB v Germany ECLI:EU:C:2005:748, para 31.
93 Lenaerts & Gutiérrez-Fons 2013, p. 10-11.
94 See art. 5(2)(d) of the InfoSoc Directive in conjunction with recital 41 in the preamble to the same.
independently capable of fulfilling the underlying purpose, the conditions should be understood as conditional. 95

A second characteristic feature of the CJEU’s approach to interpretation is that, unlike many national courts, the Court has not consistently made use of legislative history. A first reason for this has been the lack of public availability of travaux préparatoires, notably of the founding Treaties. 96 A second reason is that it may be hard to discern a uniform legislative intention behind an act that is the result of the cooperation between three separate entities: Commission, Council and Parliament. 97 Nonetheless, the CJEU has started to make increased use of travaux préparatoires as they are now often publicly available. 98 In cases concerning copyright directives the CJEU has found support for its interpretation in preparatory documentation on several occasions. 99 On other occasions the CJEU openly preferred a more objective approach to the construction of the law’s purpose, either explicitly or implicitly rejecting the interpretation proposed in the travaux. 100 The non-use of the travaux has evoked some harsh criticism, alleging that the CJEU ignored the legislature’s intention in the pursuit of its harmonizing “agenda”. This was discussed in the previous section. 101

Finally, mention must be made of the role of the principle of consistent interpretation. In the first place, EU measures should be interpreted as far as possible in a manner consistent with the international obligations of the EU. The CJEU frequently refers to

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95 Case C-510/10 DR and TV2 Danmark ECLI:EU:C:2012:244, paras 51-55, the purpose of those conditions being that third parties cannot independently benefit from the provision’s protection.
96 Cf. Lenaerts & Gutiérrez-Fons 2013, p. 21.
98 Lenaerts and Gutiérrez-Fons suggest “they may well become increasingly important in the years to come” (ibid., p. 22).
100 See Case C-393/09 BSA ECLI:EU:C:2010:816, paras 29-38, in which the CJEU decided to refrain from relying on the guidance provided by the Commission about what constitutes a “computer program” within the meaning of the Software Directive (as suggested by AG Bot in his Opinion in Case C-393/09 BSA ECLI:EU:C:2010:611, paras 47-50), instead referring to the TRIPS Agreement and the preamble to the Directive to determine the meaning and scope of that concept. See also Case C-174/15 Vereniging Openbare Bibliotheeken ECLI:EU:C:2016:856, paras 41-43.
101 See also, in particular, n 68.
the Berne Convention, the TRIPS Agreement and the WIPO Copyright Treaties in the process of the interpretation of EU copyright law. The EU is itself a party to the two latter treaties, which in turn require their signatories to comply with (most of) the substantive provisions of the Berne Convention. Important to note is that the CJEU has not shied away from relying on conventions to which it is itself not bound, but which do bind the Member States. In addition to pursuing a consistent interpretation with the international obligations of the EU or its Member States, the CJEU also takes account of existing Member State practices when interpreting EU Law. For instance, upon comparative analysis, it might adopt a solution that is common to all the Member States or recognise a common principle that underlies the various solutions in the Member States and take that principle as a basis for a

102 Case C-306/05 SGAE v Rafael Hoteles ECLI:EU:C:2006:764, para 40; Case C-5/08 Infopaq International ECLI:EU:C:2009:465, para 34; Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others ECLI:EU:C:2011:631, para 192; Case C-145/10 Painer ECLI:EU:C:2011:798, paras 127-128; Case C-510/10 DR and TV2 Danmark ECLI:EU:C:2012:244, para 48; Case C-301/15 Soulier and Doke ECLI:EU:C:2016:878, para 50; Case C-138/16 AKM v Zürs.net ECLI:EU:C:2017:218, paras 19-30; Case C-310/17 Levola Hengelo ECLI:EU:C:2018:899, paras 38-40 and Case C-683/17 Cofemel ECLI:EU:C:2019:721, paras 41-42. See also, Case C-277/10 Luksen ECLI:EU:C:2012:65, paras 54-64 and Case C-456/12 Svensson and Others ECLI:EU:C:2014:76, paras 38-39, in which the CJEU referred to the Berne Convention the context of delineating the competence of Member States to make use of flexibilities offered by the Berne Convention where the EU has decided to exercise its legislative competence.

103 Case C-200/96 Metronome Musik v Music Point Hokamp ECLI:EU:C:1998:172, para 25; Case C-393/09 BSA ECLI:EU:C:2010:816, para 33; Case C-135/10 SCF v Marco Del Corso ECLI:EU:C:2012:140, para 71; Case C-406/10 SAS ECLI:EU:C:2012:259, paras 33-34; Case C-604/10 Football Dataco and Others ECLI:EU:C:2012:115, para 31 and Case C-310/17 Levola Hengelo ECLI:EU:C:2018:899, para 39.

104 Case C-479/04 Laserdisken ECLI:EU:C:2006:549, paras 39-42; Case C-306/05 SGAE v Rafael Hoteles ECLI:EU:C:2006:764, para 45; Case C-456/06 Peek & Cloppenburg ECLI:EU:C:2008:222, paras 30-36; Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others ECLI:EU:C:2011:631, para 191; Case C-135/10 SCF v Marco Del Corso ECLI:EU:C:2012:140, para 71; Case C-162/10 Phonographic Performance (Ireland) ECLI:EU:C:2012:141, para 59; Case C-406/10 SAS ECLI:EU:C:2012:259, para 33; Case C-604/10 Football Dataco and Others ECLI:EU:C:2012:115, para 31; Case C-5/11 Donner ECLI:EU:C:2012:370, paras 23-24; Case C-128/11 Usedsoft ECLI:EU:C:2012:407, paras 52 & 60; Case C-419/13 Art & Allposters International v Pictoright ECLI:EU:C:2015:27, paras 38-40; Case C-174/15 Vereniging Openbare Bibliotheken ECLI:EU:C:2016:856, paras 31-39 and Case C-310/17 Levola Hengelo ECLI:EU:C:2018:899, para 39.

105 Art. 9(1) TRIPS Agreement requires Member States of the WTO to “comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto” although “Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.” Art. 1(4) WCT requires the same without making any reservation in respect of article 6bis.

106 In Case C-135/10 SCF v Marco Del Corso ECLI:EU:C:2012:140, para 50 the CJEU also referred to the Rome Convention as having “indirect effects within the European Union”, due to article 1(1) WPPT, which requires the EU “not to stand in the way of the obligations of the Member States under that Convention”. Regarding the Rome Convention, see also Case C-641/15 Verwertungsgesellschaft Rundfunk ECLI:EU:C:2017:131, paras 21-23. In Case C-476/17 Pelham and Others (Metall auf Metall) ECLI:EU:C:2019:624, paras 49-53 the CJEU relies on the Geneva Convention, even though it is not part of the EU legal order either.
European solution.\textsuperscript{107} This judicial dialogue can increase the effectiveness of EU law by increasing its legitimacy.\textsuperscript{108} There is little that points to the use of this kind of consistent interpretation when it comes to copyright, although the CJEU’s delineation of permissible limitations on the free movement of goods, that is of the specific subject-matter of copyright, can be viewed as the distillation of the core objectives pursued by national copyright laws.\textsuperscript{109}

The following two sections discuss, more specifically, the CJEU’s approach to the interpretation of exclusive rights and of limitations and exceptions.

\textbf{2.4.2 Economic rights and protected subject-matter}

\textbf{2.4.2.1 Protected subject-matter}

\textbf{34. Originality.} The originality requirement acts as the gateway to copyright protection for authors. As such it can be viewed as one element that dictates the balance between author and public.\textsuperscript{110} The standard of originality has been explicitly harmonized for computer programs, databases and photographs.\textsuperscript{111} As was discussed in the Section 2.3, starting with its \textit{Infopaq} decision, the CJEU has taken it upon itself to lay down an EU standard of originality that applies to all types of works. In that ruling it held that copyright attaches only to subject-matter which is the author’s own intellectual creation, the same standard that applies to computer programs, databases and photographs. It further clarified this standard in \textit{Painer}, holding that “an intellectual creation is an author’s own if it reflects the author’s personality”\textsuperscript{112} and that this is the case “if the author was able to express his creative abilities in the production of the work by making free and creative choices”.\textsuperscript{113}

The CJEU has identified a number of limitations to what can be considered the author’s own intellectual creation. First, the mere use of significant skill and labour

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\textsuperscript{107} See, for an overview, Lenaerts 2003, who points out that the larger the convergence between the Member States, the more the CJEU will be willing to adopt the common solution (p. 885-886)

\textsuperscript{108} \textit{Ibid.}, p. 880 and Lenaerts & Gutiérrez-Fons 2013, p. 37.

\textsuperscript{109} Cf. \textit{infra}, Chapter 4, n 145 and accompanying text.

\textsuperscript{110} It is widely recognized as such. See, e.g., Benabou 2008, p. 234, Carre 2012, p. 392, Dreier and Specht 2012, p. 433, Ohly, 2010, p. 511, Ohly 2018a, p. 97 and Westkamp 2007, p. 240. Cf., however, the well-known argument by Drassinower 2009 against the standard of originality as a balancing tool (see also Section 6.3).

\textsuperscript{111} See, respectively, art. 1(3) Software Directive, art. 3 Database Directive and art. 6 Term Directive.

\textsuperscript{112} Case C-145/10 \textit{Painer} ECLI:EU:C:2011:798, para 88, referring to recital 17 in the preamble to the Term Directive.

\textsuperscript{113} \textit{Ibid.}, para 89.
cannot justify protection by copyright, because such use does not necessarily imply that free and creative choices are made.\textsuperscript{114}

Moreover, in \textit{BSA} the Court clarified that the originality requirement cannot be fulfilled by elements that are dictated by technological functionality. It substantiated this conclusion by pointing out that in such cases idea and expression merge.\textsuperscript{115} In \textit{SAS} it clarified this (teleological) interpretation by considering that allowing the protection of functionality, specifically of a computer program, by copyright would be “to the detriment of technological progress and industrial development”.\textsuperscript{116} It found additional support for that conclusion in the explanatory memorandum to the proposal for the Software Directive, which noted that “the main advantage of protecting computer programs by copyright is that” only their expression will be protected, allowing others to create similar or identical programs based on the same ideas.\textsuperscript{117}

It tied these considerations together in its \textit{Afghanistan Papers} ruling, in which it considered that military status reports drawn up by government employees are not protected by copyright unless they are an intellectual creation reflecting the author’s personality. This Court noted that this will not be the case with “purely informative documents” whose content “is essentially determined by the information which they contain” meaning information and expression become “indissociable”. In that case, the expression of those documents is “characterised by their technical function”.\textsuperscript{118}

Finally, in \textit{Levola Hengelo} the CJEU limited the scope of the concept of work more generally. The Court held, principally based on the principle of legal certainty, that “the subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form”.\textsuperscript{119} It concluded that the taste of food therefore cannot be classified as a work.\textsuperscript{120}

\textsuperscript{114} Case C-604/10 \textit{Football Dataco and Others} ECLI:EU:C:2012:115, paras 37-39 & 42.
\textsuperscript{115} Case C-393/09 \textit{BSA} ECLI:EU:C:2010:816, para 48-49.
\textsuperscript{116} Case C-406/10 \textit{SAS} ECLI:EU:C:2012:259, para 40, referring to the Opinion of AG Bot in the same case (ECLI:EU:C:2011:787). See, to the same effect, the Opinion of AG Bot in Case C-393/09 \textit{BSA} ECLI:EU:C:2010:611, para 76.
\textsuperscript{118} Case C-469/17 \textit{Funke Medien NRW (Afghanistan Papers)} ECLI:EU:C:2019:623, paras 22-25.
\textsuperscript{119} Case C- 310/17 \textit{Levola Hengelo} ECLI:EU:C:2018:899, para 40.
\textsuperscript{120} See also Case C-683/17 \textit{Cofemel} ECLI:EU:C:2019:721, in which the CJEU held that a design of a work of applied art cannot receive copyright protection based on meeting a subjective standard that the design creates its own visual and distinctive effect from an aesthetic point of view.
2.4.2.2 The reproduction right

35. **Harmonization.** Reproduction rights grant right holders the exclusive right to authorize or prohibit the reproduction of their works or subject-matter protected by related rights. The reproduction right is harmonized for all categories of works by the InfoSoc Directive in a very broad manner: it applies to “direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part”\(^\text{121}\). Specific harmonization of the reproduction has occurred for computer programs and databases.\(^\text{122}\) So far, the CJEU has only been asked to interpret the “general” reproduction right in the InfoSoc Directive, which the Court has held constitutes a measure of full harmonization.\(^\text{123}\) Besides giving the Court a chance to elaborate on the question what is the threshold of protection, as detailed in the precious sub-section, this has allowed the Court to clarify what exactly constitutes a (partial) reproduction.

36. **Broad interpretation.** Starting with *Infopaq*, concerning the reproduction right granted to authors specifically, the CJEU has emphasized the purpose of enabling the author to receive an appropriate reward.\(^\text{124}\) Partially on this basis the Court concluded that the reproduction right must be given a broad interpretation.\(^\text{125}\) This principle (or: dogma) of broad interpretation has substantially guided the Court, as will be illustrated in this and the following sections.

Based on the belief that the reproduction right must be construed broadly, the CJEU held in *Infopaq* that the reproduction right covers partial reproductions if the parts reproduced share in the originality of the work as a whole. That is, an extract from a work constitutes a reproduction in part if that extract “contains an element of the work which, as such, expresses the author’s own intellectual creation”.\(^\text{126}\) Contentious has been whether this means that the part reproduced itself needs to qualify as the author’s own intellectual creation, that is be original.\(^\text{127}\) The Court appears to have clarified this in *SAS*. In that judgement the Court specified that the reproduction right applies to parts of a work “provided that they contain some of the elements which are

\(^{121}\) Art. 2 InfoSoc Directive.

\(^{122}\) Art. 4(1)(a) Software Directive and art. 5(a) Database Directive, respectively.

\(^{123}\) Case C-469/17 Funke Medien NRW (Afghanistan Papers) ECLI:EU:C:2019:623, paras 35-38 and Case C-476/17 Pelham and Others (Metall auf Metall) ECLI:EU:C:2019:624, paras 83-85. It has held so explicitly only with regard to art. 2(a) and 2(c), but it stands to reason the same is true for art. 2(b), (d) and (e).

\(^{124}\) Case C-5/08 Infopaq International ECLI:EU:C:2009:465, para 40.

\(^{125}\) The Court also referred to recital 21 in the preamble to the InfoSoc Directive and to the broad definition of the act of reproduction in article 2 of the same (see paras 41-42).

\(^{126}\) Ibid., para 48.

the expression of the intellectual creation of the author of the work”.\textsuperscript{128} The Court thus laid down a qualitative rather than a quantitative test: one should focus on what has been copied, rather than on how much.

Similarly, in Premier League a technical understanding of the reproduction right led to broad control for the author. The Court was asked about the applicability of the reproduction right to temporary copies of a television broadcast in the memory of a satellite decoder and on a television screen. Specifically, the referring court asked whether “all of the fragments of each work as a whole, or only the limited number of fragments which exist at any point in time” should be considered. Although the national court was likely more interested in the standard applicable to the reproduction of related rights,\textsuperscript{129} the CJEU framed the question in terms of the reproduction of authorial works. The Court applied the same standard as the one it had formulated for partial copying in Infopaq: “the unit composed of the fragments reproduced simultaneously – and therefore existing at a given moment – should be examined in order to determine whether it contains [elements which are the expression of the intellectual creation of the author of the work]”, but added that “it is not relevant whether a work is reproduced by means of linear fragments which may have an ephemeral existence because they are immediately effaced in the course of a technical process”.\textsuperscript{130} Van Eechoud has suggested that the latter addition may imply that the Court “embraces a highly technical interpretation of copying, which basically means that any communication that involves digital equipment triggers the reproduction right”.\textsuperscript{131} Such a broad interpretation necessarily relies on the mandatory exception for transient and incidental temporary copies in article 5(5) of the InfoSoc Directive to redress the risk of overbroad protection.

Finally, in Painer the Court once more emphasized the need for a broad interpretation when asked whether a portrait photograph receives “weaker” copyright protection against adaptations than other works due to its comparatively limited degree of formative freedom. The Court answered in the negative, adding that nothing in the acquis supports the conclusion that the extent of protection should depend on the degree of formative freedom.\textsuperscript{132}

\textsuperscript{128} Case C-406/10 SAS ECLI:EU:C:2012:259, para 65 (emphasis added).

\textsuperscript{129} The case concerned the broadcast and reception of football matches, and particularly those elements in the broadcast that were protected by related rights. See Van Eechoud 2012, paras 36-40.

\textsuperscript{130} Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others ECLI:EU:C:2011:631, paras 156-157.

\textsuperscript{131} Van Eechoud 2012, para 44.

\textsuperscript{132} Case C-145/10 Painer ECLI:EU:C:2011:798, paras 95-98. It should be noted that the Court formulated both the question and conclusion in general terms, referring to the protection conferred by the reproduction right in general. The national court was likely interested
37. **Inherent limitations?** The foregoing illustrated that the interests of the right holder have been emphasized strongly and their rights interpreted broadly. Importantly, copying *some* of the original elements of the work is covered. This seems to imply that any copying of any of the work’s creative elements infringes the reproduction right, since the Court has given no indication whatsoever that the elements reproduced should meet any test of substantiality. In that case, preventing a scope of protection that is *too* broad depends on the interpretation and application of limitations and exceptions.

Nevertheless, there may be some inherent limitations to the reproduction right. In *Metall auf Metall* the CJEU was asked whether the copying of a very short (two-second) sound sample from a phonogram in order to use that sample in another phonogram constitutes a reproduction within the meaning of article 2(c) of the InfoSoc Directive. The CJEU commenced by adopting a similar broad understanding of the reproduction right of phonogram producers in respect of their phonograms, holding that it is clear from the wording of that provision that also the copying of very short samples will constitute a reproduction “in part”. It considered that this interpretation was *inter alia* borne out by the objective to protect a phonogram producer’s investment. However, it limited this broad interpretation with reference to the fundamental rights of the user, noting that a fair balance must be struck between these rights and the right to protection of intellectual property in article 17(2) of the EU Charter. The Court considered that the taking of a sample in order to create a new work constitutes a form of artistic expression, protected by both article 11 and 13 of the EU Charter. The Court concluded that right holders ought not be able to prevent this form of “sampling” by invoking their reproduction right if the sample taken was no longer “recognizable” in the new work. This would, according to the CJEU “run counter to the meaning of [‘reproduction’] in everyday language” and not specifically in the answer to the question when an adaptation constitutes a so-called “free use”, that is to say is a new, independent work, and whether the degree of originality matters in that respect. In order to provide a helpful answer in that regard the CJEU might have needed to address the questions (i) whether the harmonized reproduction right also covers adaptations and, if so, (ii) what is the dividing line between an adaptation subject to authorization and a free creative use. One could very well argue, contrary to the general conclusion of the Court, that it follows from the Court’s consideration that a reproduction in part occurs if the part reproduced contains elements of the author’s own intellectual creation that the degree of originality does influence the level of protection against adaptations, assuming those are covered by art. 2 of the InfoSoc Directive. After all, if the degree of originality of a work is relatively small, a reworking thereof is less likely to copy original elements, whereas if the works includes a great number of creative choices an adaptation must keep a greater distance from the original in order to qualify as a free use. Cf. Van Eechoud 2012, paras 52 *et seq*. See also Leistner 2014, p. 566, who points that the development of an EU doctrine of free use is inevitable.

133 Cf. Griffiths 2013b, p. 787.
strike the aforementioned fair balance. It added that a decision otherwise would permit right holders to prevent new artistic creations even if those did not “interfere with the opportunity which the producer has of realising satisfactory return on his or her investment”. The Court must likely be understood as meaning that the reproduction right is neither infringed by the new work in which the sample is no longer recognizable, nor by any reproductions which may be made along the way. If this were not the case, the exercise of the freedom of art, which the CJEU sought to safeguard, could be frustrated through the prevention of such intermediary copies.

A pertinent question is whether the reproduction right of authors is not infringed either if the reproduced elements are no longer “recognizable” in the creation of a new work. This opens the door for the construction of a European “free use” doctrine. Several Member States permit the use of existing works if the result is a new and independent work. For instance, § 24(1) of the German Copyright Act permits the publication and exploitation of an “independent work created in the free use” of another work without the authorization of the author of the latter work. In Metall auf Metall the CJEU emphasized that Member States may not provide limitations or exceptions to article 2 of the InfoSoc Directive other than those provided for in article 5 of the same. At first sight, this appears to limit the application of such Member State Doctrines to cases covered by the limitations and exceptions enumerated in article 5. Nevertheless, if the CJEU is willing to extend the “recognizability” standard to partial reproductions of works, it may approximate these Member State doctrines. For instance, according to the German Federal Supreme Court a so-called free use exists primarily if the original characteristics of the underlying work “fade away”, which, as a rule, is the case if the new work does not use the old work to any relevant extent. Acknowledging such inherent limitations to the reproduction right creates room for creative re-uses, as the CJEU itself admitted in Metall auf Metall.

135 Ibid., paras 31-39.
136 This assumes that the reproduction right harmonized by art. 2 InfoSoc Directive also applies to adaptations. See for an argument to that effect, e.g., Jongsma 2017, p. 666-670. See also, supra, n 132.
137 E.g. German Federal Supreme Court (First Civil Senate), 11 March 1993, I ZR 263/91 – Alcolix, para 19. In Germany, parodies are traditionally permitted also as “free use”. However, not because the original characteristics of the work fade away, but because the parody creates a sufficient “inner distance”. After the CJEU judgement in Case C-201/13 Deckmyn and Vrijheidsfonds ECLI:EU:C:2014:2132 the German Federal Supreme Court has explicitly aligned the scope of permitted parodies under the free use doctrine with that of the provision permitting a limitation or exception for use for the purpose of parody in art. 5(3)(k) InfoSoc Directive, as interpreted by the CJEU in Deckmyn. See German Federal Supreme Court (First Civil Senate), 28 July 2016, I ZR 9/15 – auf fett getrimmt.
2.4.2.3 The right of communication to the public

38. **Harmonization.** The second right traditionally granted to authors and related rights holders is the exclusive right to public performance. Public performance rights typically encapsulate both the performance in front of a live audience and the communication to the public by wire or wireless means. As a rule, EU harmonization only concerns the latter. For authors, the right of communication to the public has been fully harmonized by the InfoSoc Directive. Earlier, the SatCab Directive had already introduced a right for authors to authorize the communication to the public by satellite. In *Circul Globus* the CJEU confirmed that the harmonization effected by the InfoSoc Directive does not cover the public performance in front of a live audience. The CJEU added in *Svensson* that Member States may not give wider protection to authors than the harmonized level, since allowing Member States to do so would undermine the objective pursued by that Directive by inevitably adversely affecting the functioning of the internal market and creating legal uncertainty.

For right holders of related rights, the InfoSoc Directive only harmonized the right of making available “on-demand”, not the overarching communication right. Before the adoption of the InfoSoc Directive in 2001, the communication right had been already partially harmonized by the Rental and Lending Rights Directive, granting an exclusive right to performers and broadcasting organizations for certain cases and a remuneration right to performers and phonogram producers for the communication to the public of a (reproduction of a) phonogram published for commercial purposes. Unlike in respect of the right granted to authors, Member States are likely allowed to grant holders of related rights more extensive protection.

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138 Art. 3(1) InfoSoc Directive. Art. 5(d) Database Directive provides a *lex specialis* for databases, which technically covers all public performances of databases.
139 Art. 2 SatCab Directive. See also the recent addition in art. 17 DSM Directive, which lays down the rule that “an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users”.
140 Case C-283/10 *Circul Globus București* ECLI:EU:C:2011:772.
141 Case C-466/12 *Svensson and Others* ECLI:EU:C:2014:76, para 33 et seq. See also Case C-469/17 *Funke Medien NRW (Afghanistan Papers)* ECLI:EU:C:2019:623, paras 35-38, confirming that art. 3(1) InfoSoc Directive constitutes a measure of full harmonization.
142 Art. 3(2) InfoSoc Directive.
143 Art. 8 Rental and Lending Rights Directive. Art. 8(1) provides performers with an exclusive right of communication to the public “except where the performance is itself already a broadcast performance or is made from a fixation”. Art. 8(3) limits the right granted to broadcasting organizations to communications to the public “made in places accessible to the public against payment of an entrance fee”. The latter provision was interpreted in Case C-641/15 *Verwertungsgesellschaft Rundfunk* ECLI:EU:C:2017:131, which will not be discussed in the remainder of this section.
144 Art. 8(2) Rental and Lending Rights Directive.
Entertainment, the CJEU considered as much with regard to rights granted to broadcasting organizations, pointing out that the InfoSoc Directive did not aim at harmonizing the overarching communication right for related right holders and that the Rental and Lending Rights Directive explicitly left open the possibility for Member States to provide more far-reaching protection for related right holders.145

39. Guiding principle. Questions concerning the interpretation of the right of communication to the public have led to a plethora of preliminary rulings by the CJEU, over twenty at the time of writing. The guiding principle was established in SGAE, the Court’s first decision on the author’s right of communication to the public.146 Like in relation to the reproduction right, the CJEU held that the communication right must be interpreted broadly in order to attain the purpose of enabling the author to obtain an appropriate reward.147 However, the CJEU has introduced several elements of flexibility in an apparent attempt to tailor the scope of the right in a balanced manner. This has led to an intricate web of rules and criteria which determine whether a certain act constitutes an act of communication to the public. These rules and criteria cannot be said to have been developed in an entirely coherent or transparent manner.

40. Two elements. In its case law the CJEU distinguishes between two elements, which are usually independently analysed, although they are “complementary” and “interdependent”.148 There must be (i) a “communication” to (ii) a “public”. The Court’s analysis of both of these elements is characterized by inconsistencies.

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146 Not counting Case C-293/98 Egeda ECLI:EU:C:2000:66, which essentially concerned the scope of harmonization effected by the SatCab Directive, and in which the CJEU concluded that “the question whether the reception by a hotel establishment of satellite or terrestrial television signals and their distribution by cable to the various rooms of that hotel is an ‘act of communication to the public’ or ‘reception by the public’ is not governed by the [SatCab] Directive, and must consequently be decided in accordance with national law” (para 29).
147 See Case C-306/05 SGAE v Rafael Hoteles ECLI:EU:C:2006:764, para 36. See also, Case C-393/09 BSA ECLI:EU:C:2010:816, para 54; Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others ECLI:EU:C:2011:631, para 186; Case C-607/11 JTV Broadcasting and Others v TVCatchup ECLI:EU:C:2013:147, para 20; Case C-466/12 Svensson and Others ECLI:EU:C:2014:76, para 17; Case C-351/12 OSA ECLI:EU:C:2014:110, para 23; Case C-160/15 GS Media ECLI:EU:C:2016:644, para 30; Case C-527/15 Stichting Brein v Wullens (Filmspeler) ECLI:EU:C:2017:300, para 27; Case C-610/15 Stichting Brein v Ziggo and XS4ALL ECLI:EU:C:2017:456, para 22 and Case C-161/17 Renckhoff ECLI:EU:C:2018:634, para 18. See the ninth recital in the preamble to the InfoSoc Directive. See, similarly, the fifth recital in the preamble to the Rental and Lending Rights Directive. The enumeration in this footnote excludes cases such as Case C-135/10 SCF v Marco Del Corso ECLI:EU:C:2012:140 in which the CJEU refers to (one of) these recitals as part of the legal context, but does not refer to it when answering the questions referred to it.
148 E.g. Case C-135/10 SCF v Marco Del Corso ECLI:EU:C:2012:140, para 79.
41. “Communication”. The Court does not use a single definition of what exactly is an act of “communication”. In fact, its definition appears to change almost on a case-to-case basis. Generally, there must be an intervention which provides access to the work. Typically, the Court has stressed that the intervention by the user must be “indispensable”, meaning that without it the public would not be able to enjoy the work. On that basis the Court concluded, for instance, that the clientele of hotels, pubs, spa establishments and rehabilitation centres would not be able to enjoy works broadcast over the air without those establishments providing its clientele with television or radio sets. However, the requirement that the intervention be indispensable has been relaxed in cases concerning hyperlinking. Thus, in *Svensson*, relying on the tenet that the right must be construed broadly, the Court deemed providing a link to a work that was otherwise freely available online, i.e. without access restrictions, a communication because it made the work “available to a public in such a way that the persons forming that public may access it”. The Court appeared to stretch the concept of communication even further in *Filmspeler* and in *Ziggo*. In *Filmspeler* the Court held that the offering for sale of a multimedia player that contains links to websites containing unauthorized works itself is a communication, because this offering for sale enables “a direct link to be established between websites broadcasting counterfeit works and purchasers of the multimedia player, without which the purchasers would find it difficult to benefit from those protected works” and thus “offers its users direct access”. In *Ziggo*, which concerned a platform that indexes works shared on a peer-to-peer basis between users, allowing those users to locate those works, the Court formulated the rule that “any act by which a user, with full knowledge of the relevant facts, provides its client with access to protected works is liable to constitute an ‘act of communication’.” The platform’s role was considered to be “essential”, because without it “works would not be shared by the

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150 Case C-135/10 SCF v Marco Del Corso ECLI:EU:C:2012:140, para 82; Case C-162/10 Phonographic Performance (Ireland) ECLI:EU:C:2012:141, para 31; Case C-117/15 Reha Training v GEMA ECLI:EU:C:2016:379, para 46; Case C-160/15 GS Media ECLI:EU:C:2016:644, para 35 and Case C-610/15 Stichting Brein v Ziggo and XS4ALL ECLI:EU:C:2017:456, para 26.
151 See also Case C-306/05 SGAE v Rafael Hoteles ECLI:EU:C:2006:764, para 42; Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others ECLI:EU:C:2011:631, paras 195, Airfield, para 79 and Case C-351/12 OSA ECLI:EU:C:2014:110, para 32.
153 Case C-466/12 Svensson and Others ECLI:EU:C:2014:76, paras 17-20.
154 Case C-527/15 Stichting Brein v Wullems (Filmspeler) ECLI:EU:C:2017:300, paras 41-42.
155 Case C-610/15 Stichting Brein v Ziggo and XS4ALL ECLI:EU:C:2017:456, para 34.
users or, at the very least, sharing them on the internet would prove to be more complex”. The emphasis thus appeared to have been moved to the “essential”, one could say facilitating, role played by the user, an arguably weaker standard than that of indispensability.

The Court has also emphasized the intentional nature of the intervention. That is to say, the user must intervene “in full knowledge of the consequences of his action, to give access to the work”. This element of subjective knowledge on the part of the user provided the CJEU with a lifeline in GS Media, saving it from an interpretation leading to a potential crippling of the Internet. Concerning the question whether a user who places a hyperlink on the Internet to a work made available without authorization, the CJEU held that the poster of such a link “does not, as a general rule, intervene in full knowledge of the consequences of his conduct in order to give customers access to a work illegally posted on the internet”, unless they “knew or ought to have known” of the illegal nature of the initial communication. Lack of knowledge meant no communication was made. Ostensibly to provide a counterbalance in the interest of the protection of authors, the Court held that such knowledge should be presumed if the user is acting for-profit. Its reasoning is a creative way of ensuring the functioning of an open Internet, but the focus on subjective knowledge is not free from criticism. It can be said to distort the traditional understanding of copyright as a property right and the protection afforded by the InfoSoc Directive as well as Berne and the WIPO Treaties, which indeed do not (explicitly) refer to the state of mind of the user. One can even argue the “copyright seems to have been downgraded to a mere unfair competition claim in hyperlinking cases concerning illegal content”. Unsurprisingly, therefore that the Court has –

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156 Ibid., para 36-37.
157 Cf. Frosio 2017, p. 37-38 and Quintais 2018, p. 5-6. In Case C-610/15 Stichting Brein v Ziggo and XS4ALL ECLI:EU:C:2017:456, the CJEU did emphasize, in its summary of previous case law, the “indispensable role played by the user”, but noted that a user makes an act of communication when “he intervenes ... where, in the absence of that intervention, those customers would not be able to enjoy the broadcast, or would be able to do so only with difficulty” (para 26).
158 Case C-160/15 GS Media ECLI:EU:C:2016:644, paras 48-49.
159 Senftleben 2016, p. 132.
once more – been criticized for acting *ultra vires* by going beyond what the InfoSoc Directive permits.\(^{162}\)

Criticism did not deter the CJEU, however, from continuing to attach importance to the subjective knowledge of the user. In *Ziggo*, already mentioned, the works were not made available on the platform servers itself, but were shared by way of peer-to-peer file sharing. The platform merely indexed the metadata of the files shared and made them easier to find. However, the fact that the platform knew about the widespread sharing of unlawful content on its platform may have played an essential role in the ultimate finding that the platform itself made a communication to the public.\(^{163}\) The scope of the right was thus expanded even further in an effort to guarantee control over, arguably, exploitative uses of its works by intermediaries.\(^{164}\)

#### 42. “Public”

To be covered by the right of communication to the public the communication must be directed at a “public”. In *Mediakabel*, the Court had already held that the term public within the meaning of the Television without Frontiers Directive\(^{165}\) refers to an “indeterminate number” of people.\(^{166}\) In its copyright case law, the Court simply adopted that definition and added that the term public implies “a fairly large number of persons”.\(^{167}\) This interpretation may be intended to approach the everyday meaning of the term public. However, in doing so the Court deviated from the more common understanding of “public” in the copyright context, that is as

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\(^{163}\) Cf. Case C-610/15 *Stichting Brein v Ziggo and XS4ALL* ECLI:EU:C:2017:456, para 45, although the Court discussed the knowledge of the platform in this respect in the context of the “new public” requirement, discussed below. However, this consideration as to the awareness of the platform arguably fits in better with the consideration that the platform acted “with full knowledge of the consequences of their conduct” (para 36). Although it is true that the Court has often linked the new public requirement with the notion of a deliberate intervention on the part of the user (e.g. Case C-306/05 *SGAE v Rafael Hoteles* ECLI:EU:C:2006:764, para 42; Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* ECLI:EU:C:2011:631, para 198; Case C-162/10 *Phonographic Performance (Ireland)* ECLI:EU:C:2012:141, para 40; Case C-607/11 *ITV Broadcasting and Others v TVCatchup* ECLI:EU:C:2013:147, para 38 and Case C-117/15 *Reha Training v GEMA* ECLI:EU:C:2016:379, para 46), the assessment whether that requirement is fulfilled has typically only looked at which public had been taken into account by the author (according the CJEU) when authorizing the original communication. The new public requirement is maligned enough as it is without adding a further element concerning the subjective knowledge or intention of the user.

\(^{164}\) As noted in Section 2.3, the CJEU may have also wanted to avoid diverging solutions to cases such as *GS Media* and *Ziggo* under unharmonized indirect liability rules.


\(^{166}\) Case C-89/04 *Mediakabel* ECLI:EU:C:2005:348, para 30.

opposed to (strictly) “private”. The Court has been criticized for its “dangerously restrictive” interpretation, which notably led it to exclude from the scope of the communication right the broadcasting of radio programmes in a dental practice, because the patients of that practice constitute a “determinate circle of potential recipients”.

In cases concerning the retransmission of an initial broadcast, which make up a large part of the cases concerning the right of communication to the public that are referred to Luxembourg, the CJEU has added two requirements to help determine whether the retransmission itself is a communication to the public. The retransmission must either be directed at a “new public”, or use a “specific technical means”, different from those used by the original communication.

The new public requirement was developed early on, in SGAE. Faced with the question whether the transmission by a hotel of a broadcasting signal to hotel rooms constitutes a communication to the public, the Court noted that such a communication must be made to a “new public”, that is “a public different from the public at which the original act of communication of the work is directed”. It led to Court to conclude that, for instance, both the transmission of a broadcast work by a hotel and by a pub to their respective clientele reaches a public that was not considered by the right holder when it authorized the initial broadcast. On the other hand, in Svensson the Court concluded that hyperlinks to works freely available online, while an act of communication, did not reach a new public. That is so, according to the Court, because the initial communication, that is the page to which the hyperlink leads, is already addressed to all internet users, which must consequently “be deemed ... as being part of the public taken into account by the copyright holders when they authorized the initial communication”. Therefore, the link itself did not increase the size of the public addressed. In GS Media, which concerned hyperlinking to works made available without authorization, the CJEU implied that such hyperlinks, by contrast, will reach a new public, even though strictly speaking those hyperlinks do not increase the size of the public addressed by the initial communication either. To avoid categorical application of the

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168 Cf. WIPO, Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms (WIPO 2004), p. 68.
169 Sirinelli, Benazeraf & Bensamoun 2016, p. 36, commenting on Case C-135/10 SCF v Marco Del Corso ECLI:EU:C:2012:140, para 95.
170 Case C-306/05 SGAE v Rafael Hoteles ECLI:EU:C:2006:764, para 40.
171 See in regard to hotels ibid., paras 41-42 and in regard to pubs Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others ECLI:EU:C:2011:631, para 197-199.
172 Case C-466/12 Svensson and Others ECLI:EU:C:2014:76, paras 25-28.
173 Case C-160/15 GS Media ECLI:EU:C:2016:644, paras 41-43.
communication right to such hyperlinks the CJEU introduced a knowledge based test, as already discussed in the previous paragraph.

The new public requirement has been widely criticized. One commentator has even gone so far as to suggest that national courts should ignore the “new public” criterion. The three major objections have been summarized by Bernt Hugenholtz and Sam van Velze. First, the requirement of a new public is arguably based on a wrong interpretation of the Berne Convention, which makes no reference to such a requirement. Criticism has specifically focused on the Court’s reliance on the 1978 Guide to the Berne Convention, which has been characterized as an “awareness-rising instrument” and not an “authentic interpretation”. Second, asking which public the right holder took into account when authorizing the primary act of communication introduces a subjective element into the delimitation of the right, creating legal uncertainty. Third, consistently applied the “new public” criterion implies the right holder can no longer invoke their rights against further communications on the internet, whether by hyperlink or otherwise, once they made their work freely available on the Internet. The CJEU was offered the chance to settle this last issue in Renckhoff. The question was whether the right of communication to the public covers “the posting on one website of a photograph which has been previously published without restriction and with the consent of the copyright holder on another website”. The Court concluded that such a posting does reach a new public. It pointed out that the communication right would be robbed of its effectiveness if right holders could no longer control the initial communication and thus deprive the right holder of the opportunity to claim an appropriate reward for the use of their work. Allowing such a posting would therefore also fail to strike a fair balance between the “interests” of copyright holders and of users, guaranteed in particular by the right to (intellectual) property and the right to freedom of expression and of information.

174 Rosén 2015.
175 Hugenholtz & Van Velze 2016, p. 808 et seq.
177 In as far as this result could only have been avoided by restricting access to the website containing the protected work, it arguably would have led to a conflict with the Berne prohibition on formalities. See ALAI 2014 (supra, n 176), p. 22-23.
178 Case C-161/17 Renckhoff ECLI:EU:C:2018:634, para 13.
179 Ibid., paras 28-34.
180 Ibid., para 41.
The CJEU discovered a further complication of the new public requirement in ITV, leading the Court to formulate an alternative requirement to that of a new public. The Court was asked whether the online retransmission of a free-to-air terrestrial broadcast, being made available online only to those within the catchment area of the original terrestrial broadcast, constituted a communication to the public. Applying the “new public” requirement arguably would have led to an answer in the negative. The Court, however, held that this requirement was not applicable, concluding that the contested act constituted a communication to the public because it was made using a different “technical means”.\textsuperscript{181} The Court thus devised an alternative requirement to that of a new public in order to bring the online retransmission within the scope of the communication right.

In subsequent cases the new public requirement and the different technical means requirement have typically been presented as alternative requirements when determining whether there is a communication to a “public”.\textsuperscript{182} However, in some later cases the CJEU has presented the different technical means requirement instead solely as a factor in determining whether there is an act of communication. In AKM v Zürs.net and SBS Belgium this led the Court to conclude that even though the respective communications were made using a different technical means, there nonetheless was no communication to the public in either case because that communication was not directed at a new public.\textsuperscript{183} The same approach was followed in Reha Training, but there it did not affect the outcome.\textsuperscript{184} In VCAST and Renckhoff, the two most recent decisions on the matter, the Court again approached the different technical means requirement as an alternative to the new public requirement.\textsuperscript{185}

43. Search for balance. Arguably, the Court has tried to create a balanced framework of rules, leading to what it deems a just outcome in each individual case.\textsuperscript{186} This has resulted in a case-by-case approach, in which new rules are added when

\textsuperscript{181} Case C-607/11 ITV Broadcasting and Others v TVCatchup ECLI:EU:C:2013:147, para 39.
\textsuperscript{182} They were later also presented as alternatives in Case C-466/12 Svensson and Others ECLI:EU:C:2014:76, para 24; Case C-348/13 BestWater International ECLI:EU:C:2014:2315, para 14; Case C-160/15 GS Media ECLI:EU:C:2016:644, para 37; Case C-527/15 Stichting Brein v Wullems (Filmspeler) ECLI:EU:C:2017:300, para 33 and Case C-610/15 Stichting Brein v Ziggo and XS4ALL ECLI:EU:C:2017:456, para 28.
\textsuperscript{183} Case C-138/16 AKM v Zürs.net ECLI:EU:C:2017:218, para 26-27 and Case C-325/14 SBS Belgium ECLI:EU:C:2015:764, paras 17-27
\textsuperscript{184} Case C-117/15 Reha Training v GEMA ECLI:EU:C:2016:379, paras 38-39.
\textsuperscript{185} Case C-265/16 VCAST v RTI ECLI:EU:C:2017:913, paras 48-50 and Case C-161/17 Renckhoff ECLI:EU:C:2018:634, para 24.
\textsuperscript{186} This conclusion is reinforced by a speech given by Judge Malenovský in January of 2016. See Favale, Marcella, ‘The Quest for Balance in CJEU Copyright Jurisprudence, as explained by Judge Malenovský’, retrieved from <http://www.create.ac.uk/blog/2016/01/18/the-quest-for-balance-in-cjeu-copyright-jurisprudence-as-explained-by-judge-malenovsky/> accessed on 13 March 2018.
application of the existing rules does not lead to a satisfactory outcome. This approach has come at an obvious cost. It has led to a web of rules and criteria that is not always easy to apply, which is illustrated by the Court’s own inconsistent application of those rules and criteria.\(^{187}\) It is also oftentimes unclear based on which (interpretative) principles the Court constructs its individual rules. The Court appears to proceed rather freely in elaborating new criteria in a purposive manner. The Court seems to aim, first and foremost, at an interpretation that brings as many acts as possible within the initial scope of the right. Accordingly, the Court often stresses the need for a broad interpretation of the act of communication,\(^ {188}\) or of the right in general.\(^ {189}\) As suggested, other rules and criteria are added in order to achieve what the Court believes to be a balanced outcome, alluded to explicitly by the Court in \textit{GS Media} and \textit{Renckhoff}.\(^ {190}\)

Still, it remains difficult to discern a guiding (set of) principle(s) that explains the Court’s case law. Perhaps one explanation can be found in an intention to extend protection to (at least) all forms of economic exploitation, allowing the author to obtain an appropriate reward. This could explain why the Court generally considers that whether a user acts for profit is not irrelevant. In \textit{SGAE} and \textit{FAPL}, for instance, the fact that the use made by the user of the communication was of a “profit-making nature” reinforced the conclusion of the Court that the user made a communication to the public.\(^ {191}\) By contrast, in \textit{SCF} the lack of profit motives was in part the reason for the Court to conclude that there was \textit{no} communication to the public.\(^ {192}\) Even the much-criticized new public requirement can perhaps be seen as an (ill-suited)

\(^{187}\) Cf. Rosati 2017a, p. 1233 et seq. and, supra, n 182.

\(^{188}\) Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others ECLI:EU:C:2011:631, para 193 and Case C-466/12 Svensson and Others ECLI:EU:C:2014:76, para 17.

\(^{189}\) Case C-306/05 \textit{SGAE v Rafael Hoteles} ECLI:EU:C:2006:764, para 36; Case C-607/11 ITV Broadcasting and Others v TVCatchup ECLI:EU:C:2013:147, para 20; Case C-325/14 SRS Belgium ECLI:EU:C:2015:764, para 14; Case C-117/15 Reha Training v GEMA ECLI:EU:C:2016:379, para 36; Case C-160/15 GS Media ECLI:EU:C:2016:644, para 30; Case C-527/15 Stichting Brein v Wullems (Filmspeler) ECLI:EU:C:2017:300, para 27 and Case C-610/15 Stichting Brein v Ziggo and XS4ALL ECLI:EU:C:2017:456, para 22.

\(^{190}\) Cf. also Favale, Kretschmer & Torremans 2016, p. 60.

\(^{191}\) Case C-306/05 \textit{SGAE v Rafael Hoteles} ECLI:EU:C:2006:764, para 44 and Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others ECLI:EU:C:2011:631, paras 204-206. See also Joined Cases C-431/09 and C-432/09 Airfield and Canal Digitaal ECLI:EU:C:2011:648, para 80; Case C-162/10 Phonographic Performance (Ireland) ECLI:EU:C:2012:141, paras 43-45 and Case C-527/15 Stichting Brein v Wullems (Filmspeler) ECLI:EU:C:2017:300, para 51. In Case C-117/15 Reha Training v GEMA ECLI:EU:C:2016:379, para 63 the CJEU suggests the profit-making motive should instead be taken into account in order to determine the amount of remuneration due.

\(^{192}\) Case C-135/10 \textit{SCF v Marco Del Corso} ECLI:EU:C:2012:140, paras 97-100. Taking the (non-)profit making nature of the communication into account has been lambasted for being “fundamentally at odds” with the governing international conventions. See ALAI 2014 (supra, n 176), p. 11-12.
proxy\textsuperscript{193} for determining whether there is an independent exploitation.\textsuperscript{194} Still, this would not explain all decisions. At least the judgements in Bestwater, concerning framing,\textsuperscript{195} and in SBS Belgium, concerning the transmission by a broadcaster of its signal exclusively to signal distributors,\textsuperscript{196} are arguably at odds with an intention to extend the communication right to independent acts of exploitation.

In brief, while the Court appears driven by the intention to develop the law in a balanced manner, it has not done so in an entirely consistent and dogmatically clear manner. This has hurt the predictive capabilities of the Court’s case law as well as its persuasive character.

2.4.2.4 The distribution right

44. **Harmonization.** The third exclusive right traditionally granted to authors, viewed in some countries such as France as the natural corollary of the reproduction right, is to distribute (copies of) works and other protected subject-matter to the public. Like the communication right, the distribution right has been harmonized for authors by the InfoSoc Directive.\textsuperscript{197} Almost a decade earlier, the Rental and Lending Rights Directive had already done so for related right holders.\textsuperscript{198}

45. **Broad interpretation.** Like in relation to the reproduction and communication rights, the Court has stressed the need for an interpretation that establishes a high level of protection that allows, inter alia, authors to obtain an appropriate reward.\textsuperscript{199} Notably, however, in Peek & Cloppenburg, the Court refused to extend the scope of the distribution right to the display of copies of a work in a store, based on an interpretation consistent with the WCT and a textual interpretation, despite the recognized purpose of the Directive to provide right holders with a high level of protection. The Court noted that a decision to the contrary

\textsuperscript{193} Hugenholtz & Van Velze 2016, p. 812. Cf. also Depreeuw 2014, para 654.

\textsuperscript{194} Cf. the Opinion of AG La Pergola in Case C-293/98 Egeda ECLI:EU:C:1999:403, whose analysis led to the eventual adoption of the new public requirement by the CJEU in Case C-306/05 SGAE v Rafael Hoteles ECLI:EU:C:2006:764, and who had proceeded from “the principle that the author must authorise all secondary use of the broadcast work if this gives rise to independent economic exploitation for financial profit” (para 24, emphasis in original).


\textsuperscript{198} Art. 10 Rental and Lending Rights Directive.

\textsuperscript{199} Case C-456/06 Peek & Cloppenburg ECLI:EU:C:2008:232, para 37; Case C-419/13 Art & Allposters International v Pictoright ECLI:EU:C:2015:27, para 47 and Case C-516/13 Dimensione Direct Sales and Labianca ECLI:EU:C:2015:315, para 34.
would “create ... new rights which have not been provided for by [the InfoSoc Directive]”.200

By contrast, in other decisions purposive arguments appeared to again play a major role in determining the outcome. In Donner,201 Blomqvist202 and Dimensione Direct Sales203 the Court steadily extended the scope of the distribution right in situations of cross-border sales. In the latter of those decisions the Court ultimately concluded that the distribution right also covers offers for sale or targeted advertisements, even if no sale followed. Like with respect to the existence of acts of communication, the Court seems intent on construing the existence of an act of distribution broadly, in particular in order to guarantee the author a reward by way of exploitation. In Dimensione the Court admitted as much, considering that its conclusion was borne out by the objective of the InfoSoc Directive to provide a high level of protection and to ensure that authors receive an “appropriate reward”.204

Similarly, in Art & Allposters the Court’s conclusion was firmly built on teleological arguments. The Court held that exhaustion of the distribution right does not occur when the copy of the work that has been marketed with the right holder’s consent has undergone an alteration of its medium. Specifically, the defendant had transferred the copyright-protected image from a lawfully distributed poster to a canvas and then sold that canvas. The Court reasoned that if the author were unable to control the sale of such canvases, they would be deprived of the possibility “of requiring appropriate reward for the commercial exploitation of their works”.205

Finally, in Usedsoft, a range of different interpretative arguments played a part in the Court’s holding that the downloading of a computer program combined with the conclusion of a license agreement for an unlimited period of time qualifies as a sale that is subject to exhaustion.206 Interestingly, the argument that exhaustion should be restricted to copies sold on a material medium appeared to be rejected for going further than necessary for copyright to attain its purpose, that is to allow the author to obtain an “appropriate remuneration” for the sale of an individual copy.207

200 Case C-456/06 Peek & Cloppenburg ECLI:EU:C:2008:232, para 38.
201 Case C-5/11 Donner ECLI:EU:C:2012:370.
203 Case C-516/13 Dimensione Direct Sales and Labianca ECLI:EU:C:2015:315.
204 Ibid., para 34. Cf. also Case C-5/11 Donner ECLI:EU:C:2012:370, para 36, where the CJEU considered, in the context of art. 34 and 36 TFEU, that the acts under consideration came within the scope of the distribution right because this was necessary to the specific subject-matter of copyright as the “exclusive right of exploitation”.
206 Case C-128/11 Usedsoft ECLI:EU:C:2012:407. Arguments included those of a textual (e.g. para 42: “commonly accepted definition”), systemic (cf. paras 61-63) and intention-related nature (cf. paras 57-58).
207 Ibid., para 63.
contrast, in *Ranks and Vasilevičs*, the Court refused to extend the application of the exhaustion doctrine to back-up copies of lawfully acquired copies, principally because the exception that allows the making of such a back-up copy should be “interpreted strictly”, meaning the back-up may not be used for the purpose of resale.208

46.  **Limits to the scope of protection.** In *Metall auf Metall* the CJEU was asked about the scope of the distribution right granted to phonogram producers in particular. Specifically, the Court was asked whether the sale of a phonogram that contains a short sample from another phonogram constitutes an act of distribution of the latter phonogram, that is whether the later phonogram can be considered a “copy” of the earlier phonogram. Once more relying on the teleology of the provision, the Court concluded it did not. It noted that the distribution right is granted to protect against piracy, in order to permit phonogram producers to recoup their investments. This objective is not harmed unless the whole or a substantial part of a phonogram is reproduced. It found support for this conclusion in the Geneva Convention, to which the EU is not a party but which is one of the conventions “on which the copyright and related rights laws of many Member States are based”.209 Interestingly, the CJEU also held that, by contrast, such a phonogram does constitute a “reproduction” within the meaning of the exclusive reproduction right, despite its own admission that the exploitation of that phonogram does not interfere with the original producer’s ability to recoup their investment.210

2.4.2.5  **The lending right**

47.  **Harmonization.** The fourth and final category of rights that has been the subject of harmonization is that of rental and lending rights. It is the subject of its own directive. The Rental and Lending Rights Directive guarantees an exclusive right to authorize or prohibit the rental and lending to authors and related right holders. The scope of this right has been the subject of one decision.

48.  **E-lending.** In *VOB* the Court was confronted with the question whether the lending over the internet of a digital copy of a book (e-lending) was covered by the concept of lending and, notably, whether such use could be covered by the derogation for public lending of article 6(1) of the Rental and Lending Rights Directive. Only the Court’s consideration vis-à-vis the first part of that question (is e-lending covered by the concept of lending) is discussed here.

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208 Case C-166/15 *Ranks and Vasilevičs* ECLI:EU:C:2016:762, para 41-42.
209 Case C-476/17 *Pelham and Others (Metall auf Metall)* ECLI:EU:C:2019:624, paras 40-55.
210 See, supra, § 37.
The Court first considered that there were no good reasons to support a conclusion that the concept of lending should be limited to physical copies and exclude digital copies and other intangible objects. The Court pointed out that an agreed statement annexed to the WCT that laid down a limitation to that effect only concerned the rental right, not the lending right, and that no unequivocal intention of the legislature could be discerned, other than the (objectively construed) intention that rental and lending do not necessarily concern the same subject-matter.211

Importantly, the Court then went on to stress the need for copyright to adapt “to new economic developments such as new forms of exploitation” as well as the “general principle requiring a for a high level of protection for authors”.212 Interestingly, the Court noted that this principle, which cannot be explicitly found in the (preamble to the) Rental and Lending Rights Directive, is emphasized as being of a general nature in the preamble to the InfoSoc Directive and must therefore be taken into account during the interpretation of all directives that harmonize “the various aspects of copyright while having a more limited aim than that of [the InfoSoc Directive]”.213

For these reasons, the Court concluded that the concept of lending within the meaning of the Rental and Lending Rights Directive should be understood as also covering e-lending.

2.4.2.6 The sui generis database right

49. Sui generis database protection. Finally, although not included within the scope of this study,214 a comparison can be made with the approach to the interpretation of the provisions concerning the sui generis protection granted to certain databases by the 1996 Database Directive. The Database Directive provides for the protection of databases which required a substantial investment in either the obtaining, verification or presentation of the contents. The sui generis right is first and foremost an investment protection mechanism.215 The underlying purpose is therefore different from that typically ascribed to copyright, certainly insofar as one is concerned with authorial protection.216 Nevertheless, it is interesting to note that similar interpretative arguments have guided the delimitation of the scope of the sui

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211 Case C-174/15 Vereniging Openbare Bibliotheeken (VOB) ECLI:EU:C:2016:856, paras 31-44.
212 Ibid., paras 45-46.
213 Ibid., paras 47-48.
214 See, supra, § 11.
216 One could submit that a similar justification supports the grant of rights to producers of phonograms and of first fixations of films and to broadcasting organizations. In relation to the former, cf. Case C-476/17 Pelham and Others (Metall auf Metall) ECLI:EU:C:2019:624, paras 30 & 44.
For instance, in *William Hill* the CJEU emphasized that the concepts of “extraction” and “re-utilisation”, broadly analogous to the concepts of reproduction and communication to the public, respectively, must be construed broadly in order to guarantee the maker of the database a return on investment.217

2.4.3 Limitations and exceptions

50. (Non-)harmonization. This sub-section focuses on the (interpretation of) the EU system of limitations and exceptions to exclusive rights. Limitations and exceptions, hereinafter also collectively referred to as exemptions, are the quintessential balancing elements of any copyright system. They circumscribe the scope of the rights of authors and other right holders in the interest of individual users and the public in general.

In the EU, exemptions are organized in a disorderly manner. The main framework is without a doubt provided by the InfoSoc Directive, which includes a single mandatory exemption as well as twenty optional limitations and exceptions to the rights harmonized by that directive. Member States may not stray beyond this exhaustive list, not even in the interest of the protection of fundamental rights, as the CJEU emphasized in *Afghanistan Papers* and *Spiegel Online*.218 The framework provided by the InfoSoc Directive is essentially declared *mutatis mutandis* applicable by the Rental and Lending Rights and Database Directives to (most of) the rights harmonized therein.219 The Software Directive provides a specific framework of exemptions to the rights in computer programs, including some mandatory ones.220 Three directives provide for horizontal limitations or exceptions that apply to rights generally: the Orphan Works Directive, the Directive implementing the Marrakesh Treaty and the recently adopted DSM Directive. Finally, the SatCab Directive and the

217 Case C-203/02 *The British Horseracing Board and Others v William Hill* ECLI:EU:C:2004:695, para 46 in conjunction with para 51. See also Case C-304/07 *Directmedia Publishing* ECLI:EU:C:2008:552, paras 31-33; Case C- 545/07 *Apis-Hristovich* ECLI:EU:C:2009:132, para 40 and Case C-202/12 *Innoweb* ECLI:EU:C:2013:850, paras 33-36. Similarly, the concept of database itself must also be construed broadly. See Case C-444/02 *Fixtures Marketing* ECLI:EU:C:2004:697, paras 20; Case C-30/14 *Ryanair* ECLI:EU:C:2015:10, para 33 and Case C-490/14 *Verlag Esterbauer* ECLI:EU:C:2015:735, para 12 in conjunction with para 16.


219 See Art. 10(2) Rental and Lending Rights Directive, which does so with regard to the rights harmonized by Chapter 2 of that Directive, containing fixation rights and rights of communication to the public and distribution, and art. 6(2)(d) Database Directive. The Rental and Lending Rights Directive moreover permits an exemption for public lending (art. 6(1)), while the Database Directive includes a mandatory exception to enable lawful use (art. 6(1)).

220 Art. 5 & 6. Whether the list of exceptions is exhaustive or not is unclear. See Janssens 2014, para 5.95.
Online Broadcasting and Retransmission Directive include provisions on mandatory collective licensing.\textsuperscript{221}

The EU system of limitations and exceptions is criticized for several reasons. The brunt of the criticism has been directed at the system as put in place by the legislature.\textsuperscript{222} The focus here will be, as it has been in the previous sections, on the approach of the CJEU.\textsuperscript{223} Much like, in particular, the approach to the right of communication to the public, the Court has been inconsistent and incoherent in an apparent attempt to balance the interest of the author in obtaining an (appropriate) reward with other, countervailing, interests. This is best illustrated by the CJEU’s wavering use of two particular interpretative arguments, the strict interpretation of exemptions and an interpretation in accordance with the three-step test.

51. **Strict interpretation.** In the majority of its decisions dealing with questions concerning the substantive scope of exemptions the CJEU stresses the need for a strict interpretation of those provisions, being derogations from the general rule of protection. Although the Court, consistent with its case law in other areas of law,\textsuperscript{224} often presents the principle of strict interpretation as a systemic way of interpreting derogations from the general rule,\textsuperscript{225} it unquestionably has an important teleological component. That is to say, the principle of strict interpretation can be understood as an additional technique of guaranteeing a high level of protection to authors and other right holders in order to enable them to obtain an appropriate reward. Accordingly, the principle can be viewed as the corollary of the principle of broad interpretation of economic rights. They are two sides of the same coin, so to speak: rights are interpreted broadly, exemptions strictly.\textsuperscript{226}

In three cases the principle of strict interpretation appears to have been determinative of the outcome. For instance, in *AKM* the Court held that a national provision excluding the broadcast of protected works by a communal antenna that has no more

\textsuperscript{221} Art. 9 SatCab Directive and art. 4 Online Broadcasting and Retransmission Directive.


\textsuperscript{223} The following analysis excludes decisions dealing with questions concerning the compatibility of national measures with the obligation to pay a fair compensation, given that those decisions typically do not relate to the substantive scope of exemptions.

\textsuperscript{224} See, e.g., Case C-476/01 *Kapper* ECLI:EU:C:2004:261, para 72 and case law cited there.

\textsuperscript{225} See, principally, the case law cited infra, n 228.

\textsuperscript{226} See, to that effect, Case C-138/16 *AKM v Zürs.net* ECLI:EU:C:2017:218, para 42.
than 500 subscribers from the scope of the right of communication to the public, was not permitted under article 5(3)(o) of the InfoSoc Directive. It considered that a decision otherwise would be contrary to the principle of strict interpretation, since it would allow “a multiplicity of economic operators to distribute, without having obtained the authorisation of the authors, protected works” and thus undermine the high level of protection pursued. Similar force appeared to be attached to the principle in *Ranks* and in *VCast*. In five further cases the principle was, together with other arguments, used in support of a decision in favour of the author.

By contrast, in some decisions the principle of strict interpretation is merely paid lip service, being noted as a preliminary consideration in a decision ultimately favourable to the user without any further reference to it. In other decisions, typically all resulting in an outcome that favours users, the CJEU made no reference to the principle at all.

In some cases the CJEU has explicitly mitigated the force of the principle by considering that the interpretation of that provision “must enable the effectiveness of the exception thereby established to be safeguarded and permit observance of the exception’s purpose”. Thus, in *Painer* and in *Deckmyn* the Court rejected certain restrictive conditions for the application of respectively the quotation exception and the parody exception in order to protect their effectiveness. In *FAPL, VOB, Ulmer,*

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227 Art. 5(3)(o) InfoSoc Directive permits Member States to provide for a limitation or exception for “use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.”

228 Case C-138/16 *AKM v Zürs.net* ECLI:EU:C:2017:218, para 42.

229 Case C-166/15 *Ranks and Vasilevičs* ECLI:EU:C:2016:762, paras 42-43 and Case C-265/16 *VCAST v RTI* ECLI:EU:C:2017:913, paras 32 & 34.

230 Case C-36/05 *Commission v Spain* ECLI:EU:C:2006:672, paras 30-31; Case C-53/05 *Commission v Portugal* ECLI:EU:C:2006:448, paras 22; Case C-5/08 *Infopaq International* ECLI:EU:C:2009:465, paras 57 & 61; Case C-145/10 *Painer* ECLI:EU:C:2011:798, paras 109-11 and Case C-435/12 *ACI Adam and Others* ECLI:EU:C:2014:254, paras 29-31 (see also Case C-463/12 *Copydan Båndkopi* ECLI:EU:C:2015:144, paras 74-79, essentially repeating its conclusion in *ACI Adam*).

231 Case C-302/10 *Infopaq II* ECLI:EU:C:2012:16, para 27; Case C-360/13 *Public Relations Consultants Association (PRCA)* ECLI:EU:C:2014:1195, para 27 and Case C-469/17 *Funke Medien NRW (Afghanistan Papers)* ECLI:EU:C:2016:856, para 69. See also Case C-463/12 *Copydan Båndkopi* ECLI:EU:C:2015:144, para 87, which asserts art. 5(2)(b) InfoSoc Directive “should be interpreted restrictively”, not just strictly.

232 Case C-527/15 *Stichting Brein v Wullems (Filmspeler)* ECLI:EU:C:2017:300 is an exception in this regard, leading to a decision favourable to authors.

233 Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* ECLI:EU:C:2011:641, para 163. See also Case C-145/10 *Painer* ECLI:EU:C:2011:798, para 133; Case C-201/13 *Deckmyn and Vrijheidsfonds* ECLI:EU:C:2014:2132 para 23 and Case C-174/15 *Vereniging Openbare Bibliotheken (VOB)* ECLI:EU:C:2016:856, para 50.

234 Case C-145/10 *Painer* ECLI:EU:C:2011:798, paras 132-136 (rejecting the condition that in order for the quotation exception to apply the quoting subject-matter must itself be a work
Afghanistan Papers and Spiegel Online the effectiveness argument similarly played a role in a user-friendly outcome.\footnote{55}

Why does a strict interpretation make a decisive appearance in some cases, while in other cases it plays little to no role? The Court’s reasoning in this regard may be explained by the nature of the use under consideration. Tito Rendas has suggested that the Court tends to rely on formalistic reasoning, including the principle of strict interpretation, when the use is of a profit-making nature and/or causes market harm. By contrast, the Courts has shown itself more willing to adopt a flexible argumentation in cases in which it deems other interests, such as freedom of information and expression and cultural promotion, to weigh strongly enough.\footnote{56}

This observation is consistent with the suggestion that the principle of strict interpretation is the corollary of the broad interpretation of economic rights and should be understood as a tool to ensure a high level of protection, in particular to enable the author to obtain an appropriate reward. As may be clear from the preceding sections, the Court attaches great weight to this objective. In AKM the principle of strict interpretation is clearly used as a tool to protect the ability of the right holder to exploit the work. Similarly, in Ranks the CJEU considered that a strict interpretation of article 5 of the Software Directive, which \emph{inter alia} allows the lawful acquirer of a copy of a computer program to make a back-up copy, implied the lawful acquirer cannot use that copy in order to resell the computer program. A decision to the contrary, as pointed out by the AG, would have “significantly complicate[d] any measure to combat counterfeit copies”.\footnote{57} On the other hand, decisions like Ulmer and VOB show the Court’s willingness to give precedence to other interests. In Ulmer the Court concluded that a unilateral offer by a right holder to a library could not, by itself, be sufficient to preclude the applicability of article 5(3)(n) of the InfoSoc Directive.\footnote{58} If that were so, the objective of that provision of advancing the public

\footnote{55} \textit{Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others ECLI:EU:C:2011:631, para 179; Case C-117/13 TU Darmstadt v Eugen Ulmer ECLI:EU:C:2014:2196, paras 32 & 43; Case C-174/15 Vereniging Openbare Bibliotheken (VOB) ECLI:EU:C:2016:856, para 51; Case C-469/17 Funke Medien NRW (Afghanistan Papers) ECLI:EU:C:2019:623, paras 71-75 and Case C-516/17 Spiegel Online ECLI:EU:C:2019:625, paras 72-73.}
\footnote{56} Rendas 2018, p. 173, whose empirical study on the CJEU’s approach to “technology-enabled uses” did not concern only the interpretation of limitations and exceptions, but also the interpretation of exclusive rights.
\footnote{57} Opinion of AG Saugmandsgaard Øe in Case C-166/15 Ranks and Vasilevičs ECLI:EU:C:2016:384, para 53.
\footnote{58} \textit{Art. 5(3)(n) InfoSoc Directive permits Member States to provide for a limitation or exception for “use by communication or making available, for the purpose of research or}
interest in promoting research and private study would not be attained. Similarly, in VOB the Court, in reaching the conclusion that the derogation for public lending in article 6(1) Rental and Lending Rights Directive also applies to e-lending, pointed to “the importance of the public lending of digital books” and “the contribution of [the derogation] to cultural promotion”.

52. The three-step test. A similar concern with the ability of the author to exploit their work to obtain a reward is also displayed by decisions in which the CJEU considered the impact of the three-step test. Article 5(5) of the InfoSoc Directive prescribes that the exemptions enumerated in article 5 of the same “shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”.

Much like the use of the principle of strict interpretation, the CJEU’s approach to the three-step test has not been consistent. On some occasions the CJEU has held that the three-step test is “not intended either to affect the substantive content of the [different exceptions and limitations] or, inter alia, to extend the scope of the different exceptions and limitations”.

In Infopaq II the Court even went as far as to conclude that if the disputed reproductions fulfil all the conditions of the exemption in article 5(1) of the InfoSoc Directive “as interpreted by the case-law of the Court, it must be held that they do not conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the rightholder”. On other occasions, however, the CJEU emphasized that limitations and exceptions should be interpreted in light of the three-step test in some instances even requiring that the acts of the user themselves comply with the three step test.
The lack of a consistent approach is probably best illustrated by the CJEU’s decision in *ACI Adam*. In that decision the Court considers generally that the three-step test does not affect the substantive content of limitations and exceptions but at the same time holds that a certain use (making a private copy from an unlawful source) ought to be categorically excluded from the scope of the private copying exception specifically for being contrary to the three-step test. The only way to make sense of this is if one understands the three-step test, in particular that of article 5(5) InfoSoc Directive, as principally directed at the Member States, including national courts. In fact, the Court also stated as much in *ACI Adam*: “[The three-step test] takes effect only at the time when [exceptions and limitations] are applied by the Member States.” In those cases in which the CJEU does itself apply the three-step test, it should be understood as doing nothing more than providing the national court with a specific outcome of its application. In those cases, the Court may simply want to put the (il)legality of the use in question beyond question and guarantee a consistent application of the three-step test throughout the EU.

As suggested, a concern with the author’s ability to generate an appropriate reward is dominant in those decisions in which the CJEU made actual use of the three-step test. In *ACI Adam* the Court concluded that allowing private copies to be made from unlawful sources would reduce the volume of lawful transactions and therefore conflict with the normal exploitation. In *Filmspeler* the Court reached a similar conclusion with regard to temporary copies made in the memory of a multimedia player of works made available online without authorization. By contrast, in *PRCA* the Court concluded that making temporary reproductions on-screen and in a computer’s memory of works made available online with authorization does not violate the three-step test. The Court considered that the “legitimate interests of the copyright holders concerned are … properly safeguarded” because they have control over the communication online by virtue of the communication right and that “viewing of [authorized; DJ] websites … represents a normal exploitation of the

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246 Case C-435/12 *ACI Adam and Others* ECLI:EU:C:2014:254, paras 25-26 versus paras 38-40.
248 Case C-435/12 *ACI Adam and Others* ECLI:EU:C:2014:254, para 25.
249 Cf. also Case C-463/12 *Copydan Båndkopi* ECLI:EU:C:2015:144, para 90, in which the Court also emphasized that the three-step test “is not intended ... to affect the substantive content of [the provision at issue]”, but in which the Court did not apply the test as it did in *ACI Adam*. In such cases the CJEU merely leaves the assessment of the compatibility of the contested use with the three-step test to the national court.
250 Case C-435/12 *ACI Adam and Others* ECLI:EU:C:2014:254, para 39. In para 40 the Court added that allowing such use would “unreasonably prejudice copyright holders”.
251 Case C-527/15 *Stichting Brein v Wullems (Filmspeler)* ECLI:EU:C:2017:300, para 70.
work”. The differentiating factor is thus whether the right holder is given the chance to exploit the work and obtain a reward. This reasoning of the Court is not beyond dispute. After all, in situations such as those at issue in ACI Adam and Filmspeler the right holder is not deprived of their right to authorize or prohibit the making available. It is just that in such cases they have not done so. Moreover, the Court’s conclusion is based on the factual assumption that such use actually has adverse impact on the “normal exploitation” and that such exploitation exists to begin with. Perhaps ACI Adam and Filmspeler can be traced back to the Court’s intuitive beliefs about the fairness of the use in question (“downloading or streaming from unlawful sources is wrong”), in an attempt to guide demand towards authorized offers and thus protect the ability of the author to exploit the work.

53. **More inconsistencies.** Even if at first glance it appears that the (non-)reliance by the CJEU on the principle of strict interpretation and the use of the three-step test can be explained by reference to the nature of the use, it still remains largely unclear why in some cases the interests of the author prevail (e.g. leading to a strict interpretation) while in others other interests prevail (leading to a more flexible interpretation).

For instance, in Filmspeler the CJEU considered whether temporary copies made on a multimedia player in order to watch works such as movies that are made available on the internet without consent constituted a “lawful use” within the meaning of article 5(1) of the InfoSoc Directive, in particular given the fact that the users of those multimedia players knew full-well of the lack of consent. The Court concluded that such use was not “lawful”, invoking the three-step test. However, had the Court instead relied on the argument that the effectiveness of the exception must be safeguarded and its purpose observed, in this case to enable passive uses not traditionally covered by copyright, the decision might just as well have gone the other way.

By contrast, in Ulmer a strict interpretation might have led to a more author friendly ruling. It held, first, that an offer by a right holder to enter into a licensing agreement does not make a work “subject to purchase or licensing terms” within the meaning of

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252 Case C-360/13 Public Relations Consultants Association (PRCA) ECLI:EU:C:2014:1195, paras 56-61. See also Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others ECLI:EU:C:2011:631, para 181.

253 Cf. Linders & Alberdingk Thijm 2015, p. 16, who point out that the existence of normal exploitation is principally a factual question to be answered by the national court and point at empirical evidence that “illegal downloads” may not have adverse effects on legal transactions. See, similarly, Quintais 2015, p. 88.

254 Even if the result of, in particular, ACI Adam is that an exception subject to payment of fair compensation is replaced by a potentially unenforceable exclusive right. Cf. Quintais 2015, p. 88.
article 5(3)(n) of the InfoSoc Directive,\textsuperscript{255} in part because that would negate the effectiveness of the exemption.\textsuperscript{256} Second, the Court held that the same exemption would risk “being rendered largely meaningless, or indeed ineffective” if Member States were not permitted to introduce an ancillary right, based on article 5(2)(c) of the InfoSoc Directive,\textsuperscript{257} for publicly accessible libraries to digitise their collections.\textsuperscript{258} Following a strict interpretation the Court could just as well have concluded that a reasonable offer to enter into a licensing agreement does preclude the application of the exception, as well as that there is no such ancillary right.\textsuperscript{259} One can also juxtapose the use of the three-step test by the CJEU in Ulmer with its use in Filmspeler. Apparently allowing libraries to digitise their collections does not conflict with the normal exploitation of digital copies of works, even if it arguably may lead to a “diminution of lawful transactions relating to the protected works”, which was the decisive argument for the Court’s finding in Filmspeler that the making of temporary copies in the circumstances at issue did conflict with the normal exploitation.\textsuperscript{260}

54. **Hidden balancing.** Arguably, what the CJEU actually does in cases such as Filmspeler and Ulmer, is striking a balance between competing interests. In fact, in Ulmer the Court admitted as much, noting that an interpretation of article 5(3)(n) that would permit the right holder to effectively rule out the applicability of that exemption by making a unilateral offer would be “difficult to reconcile with the aim ... to maintain a fair balance between the rights and interests of rightholders [and users]”.\textsuperscript{261} Similarly, the CJEU had already held in in FAPL and in PRCA that the mandatory exception for temporary copying in article 5(1) of the InfoSoc Directive, which was at the centre of Filmspeler, is intended to safeguard a fair balance.\textsuperscript{262}

\textsuperscript{255} Art. 5(3)(n) permits Member States to introduce a limitation or exception for “use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections”.

\textsuperscript{256} Case C-117/13 TU Darmstadt v Eugen Ulmer ECLI:EU:C:2014:2196, para 32.

\textsuperscript{257} Art. 5(3)(c) permits Member States to introduce a limitation or exception “in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage”.

\textsuperscript{258} Case C-117/13 TU Darmstadt v Eugen Ulmer ECLI:EU:C:2014:2196, para 43.

\textsuperscript{259} Cf. the analysis of the referring court: German Federal Supreme Court (First Civil Senate), 20 September 2012. I ZR 69/11 – Elektronische Leseplätze, paras 17-18. See also the literature cited ibid., paras 13 & 15.

\textsuperscript{260} Case C-527/15 Stichting Brein v Wullems (Filmspeler) ECLI:EU:C:2017:300, para 70.

\textsuperscript{261} Case C-117/13 TU Darmstadt v Eugen Ulmer ECLI:EU:C:2014:2196, para 31.

\textsuperscript{262} Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others ECLI:EU:C:2011:631, para 181 and Case C-360/13 Public Relations Consultants Association (PRCA) ECLI:EU:C:2014:1195, paras 56-61.
The suggestion that whether exemptions are interpreted strictly or liberally depends on an underlying balancing exercise between the interest of right holders to obtain a reward through the exploitation of their creations and the (fundamental) rights of users finds further support in the judgements in *Afghanistan Papers* and *Spiegel Online*, both from 29 July 2019. Using the same wording in both cases, the CJEU set out more generally the limits of the principle that “any derogation from a general rule must, in principle, be interpreted strictly”. The Court considered that the limitations and exceptions enumerated in article 5 of the InfoSoc Directive confer rights on users, that they are intended to ensure a fair balance between the rights and interests of right holders and of users, and that their interpretation must allow their effectiveness to be safeguarded and their purpose to be observed. Consequently, “in striking the balance which is incumbent on a national court … [it] must, having regard to all the circumstances of the case before it, rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter”. Arguably, the same must be true for the CJEU when it itself determines the scope of limitations and exceptions. However, in most of the cases discussed in this section one is hard-pressed to find any explicit or even implicit but actual balancing of competing interests.

Instead of making this balancing explicit, the Court typically presents us only with the outcome of an – at best – implicit balancing exercise. It does not explain why in some cases a certain other right or interests perseveres over the right of the author, just that it perseveres, nor why in other cases user interests are incapable of outweighing those of the author. The argument that a certain interpretation does not sit well with the required strict interpretation or effectiveness of the exemption can be understood as the result of the preceding balancing exercise. The lack of a consistent approach does little for the predictability of the Court’s case law and gives the impression that the Court acts in an unprincipled manner. This raises the question whether, in certain cases, the CJEU should perhaps turn to more explicit balancing.

### 2.5 The creation of EU copyright: striking a balance?

**55. Striking a balance.** The CJEU has the (arguably to some extent self-imposed) task to (re)define the meaning of the many of copyright’s central concepts that now find a basis in EU law. As a result, the CJEU performs an essential function in determining the scope of protection offered by copyright in the EU. In doing so, the CJEU has not always been consistent. It has identified criteria and principles, such as

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“new public” and “strict interpretation”, to help determine the scope of rights and of exemptions, only to attenuate their impact by identifying conflicting criteria or by introducing new principles, such as “different technical means” and “effectiveness”. This sometimes gives the impression the Court knows the result it wants to obtain even before it identifies those criteria and principles.

In general, the Courts seems to be guided by the objective to guarantee authors an appropriate reward. This objective appears to have informed the Court’s position that rights should be construed broadly and exemptions strictly. Insofar as the Court resorts to a broad interpretation of rights and a strict interpretation of limitations and exceptions as a matter of principle, it is suggested that such an interpretation is of little use. As illustrated by the inconsistent manner in which these “principles” are used, they are unsuitable to function as point of departure for the determination of the appropriate scope of those rights and limitations and exceptions. It reflects a one-sided conception of copyright law in which more protection is better, which is similarly true for the idea that rewarding authors necessitates a “high level of protection”. Both are largely unhelpful ideas in determining the scope of copyright, perhaps reflective of an approach to copyright which views it as an end in itself.264

At the same time, it seems incorrect to conclude that the frequent emphasis by the CJEU on a broad/strict interpretation means that the CJEU structurally favours the interests of authors. As has been illustrated in the preceding analysis, the CJEU has on numerous occasions refused to extend the scope of rights or, conversely, limit the scope of limitations and exceptions. In fact, quantitative analysis of the copyright case law of the CJEU weighs against such a conclusion. Favale et al., in their analysis of case law up until Svensson decision of 2014, concluded that “the high protection of the copyright owner, or the narrow construction of copyright limits, do not guide the copyright jurisprudence of the Court as one might have expected”.265 They also suggest that “[t]he Court in fact seems to strive to balance the ... principle [of a high protection of copyright holders] with other considerations”.266 A similar conclusion was reached by Rendas, whose study was discussed in the previous section.

The Court’s approach is better explained if one assumes that the CJEU uses the objective of rewarding the author as a point of departure, balancing it against other considerations. If this is accepted, the (non-)application of the principles of broad/strict interpretation can be understood merely as the outcome of this balancing process. The CJEU has alluded to such a balancing approach in a number of decisions.

265 Favale, Kretschmer & Torremans 2016, p. 58.
266 Ibid., p. 67.
On several occasions the Court has pointed out that the provision under consideration is intended to safeguard a fair balance between the rights and interests of right holders and those of users.267 In *GS Media*, *Afghanistan Papers*, *Metall auf Metall* and *Spiegel Online* held the same with regard to InfoSoc as a whole.268 On a number of occasions the CJEU has even gone as far as to explicitly consider that a particular interpretation would not strike a fair balance between the rights and interests of author and users. Some of these, notably *Metall auf Metall*, *Renckhoff* and *Ulmer* have already been discussed in the preceding sections.269 These and other decisions are more elaborately discussed and evaluated in Chapter 4, specifically in Sections 4.3.2.3 and 4.4.

For now, I merely point out that, as was noted already in paragraph 54, the CJEU typically provides little insight into why its decision is in the interest of (a fair) balance. No consistent approach as to why a certain interest prevails can be discerned. Moreover, the Court’s analysis is oftentimes one-sided, focusing only on those arguments that support its decision. This assertion is corroborated by recent critical discourse analysis of a selection of three seminal CJEU copyright decisions. Kalimo et al. found that the CJEU’s analysis in those cases lacked discursive elements, its own voice being dominant and other voices typically only used to reinforce its own views.270 Emblematic in this sense are those cases in which the CJEU refers to the fair balance of rights and interests, but subsequently fails to address why this fair balance favours a certain decision. This may even raise the question of whether such a reference is more a means to bolster the Court’s conclusion than truly reflective of a search for balance.271 This does drive home one of the central questions of this study:

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268 Case C-160/15 *GS Media* ECLI:EU:C:2016:644, para 31; Case C-469/17 *Funke Medien NRW (Afghanistan Papers)* ECLI:EU:C:2019:623, para 57; Case C-476/17 *Pelham and Others (Metall auf Metall)* ECLI:EU:C:2019:624, para 32 and Case C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 36.
269 See supra, paras 37, 42 and 54, respectively.
270 Kalimo, Meyer & Mylly 2018, p. 286 & 305.
271 Cf., however, Favale et al. 2016, p. 66, who appear to suggest that whether the CJEU refers to competing arguments may depend on the expertise of the Judge Rapporteur. They point out that Judge Malenovský, the Rapporteur in the majority of cases, was the only judge who referred to the fair balance in cases decided favourably to right holders. See also Kalimo et al. 2018, p. 307, who cite the study by Favale et al. However, a closer look at those cases casts doubt on this conclusion. In their codebook Favale et al. coded two decisions as “favourable to right holder” in which Malenovský was Rapporteur and in which the CJEU referred to a fair balance of rights and interests. In the first of those decisions, Case C-462/09 *Stichting de Thuiskopie* ECLI:EU:C:2011:397, the Court referred to the “fair balance” in the context of its decision that it is in principle the user who makes a private copy, and therefore causes harm.
what in this regard is the utility of the concept of fair balance? The next part of this study will explore the “conventional” meaning of the concept of (fair) balance, as developed outside the area of copyright law and compare this to its use in copyright.

to the right holder, who is liable to pay fair compensation, but that Member States may establish a private copying levy chargeable to producers of reproduction equipment, and similar devices. As set forth in Section 4.3.2.3(i), the determination of whether a levy may be imposed to ensure fair compensation is not really an issue of balance between right holders and users. The same applies to other decisions concerning the obligation to pay fair remuneration in which the CJEU refers to a “fair balance” and which were decided after Favale et al. had conducted their study. In the second decision coded as favourable to the right holder in which the CJEU made reference to the fair balance of rights and interests, Case C-145/10 Painer ECLI:EU:C:2011:798, the particular reference was actually made in the context of one of several questions referred, which particular question was actually decided non-favourably to the author (see paras 129-137).
The previous part concluded with the observation that the CJEU often strives to achieve a fair balance between competing rights and interests when interpreting the scope of exclusive rights and of the limitations and exceptions thereto, but that it does not proceed by applying a consistent set of principles in a methodical manner. This part explores the contours of the concept of “fair balance”, principally as it has featured in the case law of the CJEU and the ECtHR, as well as the general desirability of balancing in EU copyright. It commences, in Chapter 3, with a legal theoretical perspective on balancing, including the broader concept of proportionality, as a method to determine the priority between conflicting principles. This illuminates how balancing can serve rational, coherent and consistent decision-making, both as a tool to review legislation and as a way for courts to give content to a judge-made rule. This overview provides a framework for the analysis of the approach of the CJEU and the ECtHR in Chapter 4.
3 BALANCING AND PROPORTIONALITY ANALYSIS: A THEORETICAL PERSPECTIVE

3.1 Introduction

56. Introduction. As alluded to in the general introduction, the issue of balance is central to copyright. The fact that the CJEU has, on numerous occasions, made an explicit reference to the concept of fair balance in delineating the scope of protection of authors and other right holders is therefore not necessarily surprising. Similarly, the suggestion made in the previous chapter that also other decisions, in which the Court does not make an explicit reference to a “fair balance”, evince the Court’s desire to bring into balance the rights and interests of authors and those of users should not be surprising either. The question of balance is also brought up beyond the interpretation of norms of copyright, when it is asked whether fundamental rights of others can act as an (external) counter-balance to (overbroad) copyright protection.¹

The question is what “(fair) balance” means in these contexts. Judicial balancing occurs at various stages in the judicial process. For instance, balancing may occur at a factual level when judges consider whether they are, on balance, convinced a certain state of affairs indeed occurred. By contrast, balancing concerning the validity or the scope of a particular provision or its applicability in a particular case is balancing at the normative level between different arguments, such as goals or rights. Such arguments can be referred to as principles insofar as they are typically viewed as being only valid in principle.² It is this type of balancing that occurs when courts seek to ascertain whether a particular norm “strikes a fair balance” between various rights and interests at stake or whether that norm should be disapplied for violating a particular fundamental right.

3.2 A brief legal theoretical view of balancing and proportionality analysis

3.2.1 Elements of balancing and proportionality

57. Optimization and review. Balancing different principles against each other concerns the question about the priority between those principles given a particular set of circumstances, essentially seeking an optimal or proportional relationship between the benefits to the one principle and the costs to the other. Balancing can occur at different levels of decision-making. It occurs when striking a balance at the time of creation of a norm, either by the legislature or a court. In those

¹ This question will be substantively addressed in Chapter 7.
cases, the primary decision-maker will typically seek what it deems to be the optimal trade-off between the different principles, such as individual rights and collective interests or goals, that are at stake. This can be called optimization balancing. Balancing can also play a role when reviewing the balance struck by someone else, for instance a court reviewing the constitutionality of a legislative act. In contrast to optimization balancing, this review balancing typically does not necessarily aim to ascertain whether the balance struck is optimal, but instead looks whether there is a justifiable proportional relationship between the costs and benefits of the measure being reviewed.

58. **Balancing and proportionality.** The principles that are balanced are often characterized as norms, goals, values or ideals, whose realization may or must be pursued to the greatest extent possible. The former (“may”) is generally true of public interests, which the legislature can typically choose to pursue or optimize. The latter (“must”) seems certainly true of individual fundamental rights if one views them as the positivization of human rights ideals. This character of such legal principles implies that certain criteria or requirements must be observed when striking a balance between them. These requirements can often be found as part of the tripartite proportionality test that has its historical origins in Germany and that is now applied by many courts around the globe.

Proportionality is often associated with three separate “tests”, in particular in the context of review of a measure adopted by a primary decision-maker: the contested measure should be suitable, necessary and proportionate in the narrow sense.

59. **Suitability.** The requirement of suitability means that the measure must be capable of achieving the aims pursued by the legislator or other public authority that adopted the measure. It is a factual test that looks for a rational connection between means and end. Irrelevant at this stage is whether the measure is efficient at achieving its purpose or whether there are more suitable measures available.

60. **Necessity.** The necessity requirement demands that there are no alternative means that both realize the purpose of the contested measure to the same extent and
limit the opposing principle to a lesser extent. The necessity test, as is the suitability test, is thus reflective of the idea of Pareto-efficiency. Like the suitability test, the necessity test is a factual one. The only thing that matters at this stage is whether the hypothetical means limit the constitutional right to a lesser extent, *all other things being equal*. Irrelevant is the existence of less limiting hypothetical alternative means if those means are less effective than the contested measure, or if there is a significant difference in the probability that the alternative means will advance the purpose of that measure. Thus, the necessity test does in principle not prohibit the legislature to pursue a policy of maximalist protection of authors in order to ensure them a reward that is as great as possible, making all uses traditionally covered by limitations and exceptions subject to authorization, if the alternatives do not provide the same level of reward. Similarly, the choice for the introduction of a particular exclusive right (e.g. an exclusive rental right) cannot be attacked because of a lack of necessity solely because the legislature could also have opted for a remuneration right, if one assumes that the latter does not offer same degree of additional protection to the interests of authors as an exclusive right. Whether such policies would nevertheless be considered disproportionate depends on their impact on other rights (as well as potential public policy goals). This is the subject of the third test.

61. **Balancing/proportionality stricto sensu.** Proportionality in the narrow sense (or: *stricto sensu*) concerns what is commonly referred to as balancing. It compares the positive effects of a measure on one principle with the negative effects on the other principle. If the negative effects exceed the benefits, the measure cannot be deemed proportional. By contrast to the suitability and necessity tests, the balancing exercise is not factual, but evaluative. Balancing in this sense requires a normative assessment as to the degree of interference with the principle that is limited by the measure and the degree of fulfilment of the principle that the measure aims to protect, taking into consideration the intrinsic (or: abstract) importance attributed to both principles. Well-known is Robert Alexy’s concretization of this balancing

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8 If a state of affairs is pareto-efficient this means it is not possible to improve the position of one party or preference criterion (in this case: principle) without making another worse off. Cf., with regard to balancing and pareto-efficiency, Alexy 2002, p. 398, Barak 2012, p. 320, Rivers 2006, p. 198 and Sieckmann 2012, p. 93.
9 Cf. Alexy 2002, p. 397. Nevertheless, one can characterize the (sub-)question of whether the hypothetical alternative means limit the constitutional right to a lesser extent as a question of law. See Barak 2012, p. 327.
11 One could argue that extending protection to uses where market failure prevents authorization being sought is not necessary, since the author would not obtain remuneration either way.
12 Cf., infra, Section 4.3.2.2 and the discussion of the Metronome case.
13 Sometimes this analysis is dependent on a factual assessment. For instance, the purpose of a measure may be to prevent harmful health effects of a certain substance by banning that
exercise by way of a triadic model, in which interference and fulfilment are both qualified as either light, moderate, or serious, and then compared. Numerous occasions of judicial balancing in this sense will be discussed in this chapter. An early example in the copyright context can be found in the German Schallplatten case, in which the BVerfG had to consider, inter alia, the question whether a reconfiguration of the rights of performers, by which certain exclusive rights were replaced by remuneration rights not only for new but also for existing performances, was (un)constitutional. The Court found no violation of the right to property in this regard. It noted that the need for uniformity of the law was such a weighty consideration as to justify an interference with existing rights. In contrast, the Court noted that the interference with existing legal positions was only “minor” (geringfügig). This trade-off between benefits and costs was therefore proportional.

In general, the greater the degree of interference with one principle, the greater must be the degree of fulfilment of the other principle. One should only consider the marginal effects of the measure under consideration: what are the costs and the benefits to the level of fulfilment of the respective principles with and without the measure? Potential (hypothetical) alternatives to the measure under consideration may also need to be taken into account when considering proportionality stricto sensu. That is, a particular measure may also be disproportionate if an alternative measure is available which fulfils the one principle to a slightly lesser extent, while interfering significantly less with the other principle. Thus, although one might not be able to question the choice for the introduction of a particular exclusive right for a lack of necessity, one could argue that the availability of an alternative measure in the form of a remuneration right renders the choice for an exclusive right disproportionate stricto sensu.

The comparison of degrees of fulfilment and interference should take account of the intrinsic importance of the competing rights and interests, that is the importance attached to them regardless of the circumstances of the case. Their intrinsic substance. The importance of the purpose (protection of health) will depend on the actual harmful effects of that substance, which is a factual matter. Cf. the discussion of the German Cannabis case, which provides a good example, by Klatt & Schmidt 2012, p. 78 et seq.

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14 See Alexy 2002, p. 401 et seq. and Alexy 2003a, p. 440 et seq. Alexy readily admits that a model with finer graduations can be used, although he points out the finer scale used the more difficult it may be to distinguish between the different steps.

15 German Federal Constitutional Court (First Senate), 8 July 1971, 1 BvR 766/66 – Schallplatten, para C.V.1., published in GRUR 1972, p. 491, at p. 495.


19 Cf. the discussion of the Metronome judgement, infra, in Section 4.3.2.2.
importance may not be the same. This is not only true when one compares a public policy objective with a fundamental right, but also when one compares fundamental rights. Although there generally is no hierarchy between different fundamental rights, this does not necessarily mean that interferences of similar intensity with different fundamental rights are always valued the same. The right to life, for instance, may be valued higher than the right to freedom of expression, which in turn may be valued higher than the right to property. In such a case a moderate degree of fulfilment of the right to property will not be able to outweigh a similarly intensive degree of interference with the right to freedom of expression.

Finally, a particular degree of fulfilment of a certain principle will only be proportional to a similar degree of interference with another principle if the probability of those degrees of fulfilment and interference actually materializing are the same. That is to say, a small chance of great positive effects on one principle will not be capable of outweighing almost certain great negative effects on the other principle. The chances of those effects are often subject to uncertainty. Such uncertainty may cause the primary decision-maker to have considerable discretion.

3.2.2 Proportionality, balancing and discretion

62. Deference and restraint. This sub-section explores the subject of discretion of the primary decision-maker. When reviewing the proportionality of a particular measure, all elements (degree of fulfilment/interference, intrinsic importance, uncertainty/unreliability) of the balancing equation may impact the exercise of restraint or deference (or both) by courts. Deference is understood here as the willingness to accept as accurate factual or normative assessments made by the primary decision-maker. Restraint is understood here as the willingness to accept the choice of the primary decision-maker which degree of fulfilment of the principles at stake to realize.

63. Uncertainty and “epistemic discretion”. Every step of the proportionality assessment may be complicated by unreliability or uncertainty surrounding the premises on which it is based. This raises the question which

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20 Cf. Alexy 2003a, p. 440, referring to “abstract weight”.
21 Barak 2012, p. 361 notes that a principle’s intrinsic importance (“social importance”) may be influenced by both external and internal factors. External factors concern “society’s fundamental perceptions ... shaped by the culture, history and character of each society”. Internal factors concern the relation between fundamental rights. For example, those rights whose protection is a precondition for the exercise of other rights have a higher intrinsic importance.
22 Cf. Rivers 2007b, p. 120.
principle is to be given precedence in light of this unreliability or uncertainty, as well as whether a court should defer to the assessments made by the legislature (or other primary decision-maker) in cases of review.

Following Alexy, two types of uncertainty are distinguished: factual and normative. The former concerns uncertainty about relevant factual prognoses. For instance: will granting authors an exclusive right incentivize creation? The latter concerns the normative qualification of the attainment of or interference with a particular principle. For instance: does an interpretation of the exclusive reproduction right of phonogram producers that would permit them to prohibit the use of samples for the creation of new works create a moderate or serious interference with the freedom of arts? These forms of uncertainty give rise to what Alexy termed “epistemic discretion”, because it arises due to gaps in our knowledge about the world.

64. **Factual uncertainty.** Factual uncertainty impacts all three stages of proportionality analysis. Factual prognoses already play a significant role when determining the suitability and necessity of a measure. Respect for the rule of law, which includes respect for human rights, arguably requires the legislature to at least enquire whether the measure is suitable and whether less restrictive means are available.\(^\text{24}\) If the legislature has duly undertaken such an enquiry the judge may have to defer to the legislature’s assessment, given that it typically lacks the institutional competence or expertise to make the relevant assessment fully by itself.\(^\text{25}\) For Robert Alexy, such legislative discretion flows from the formal principle of democratic decision-making, which holds that important societal decisions should as much as possible be made by the democratically elected legislature.\(^\text{26}\) The legislature should be permitted to legislate even if the effects of the measures it adopts are uncertain, and even if this means there exists a possibility that constitutional rights will in reality be breached (but which breach is itself epistemologically uncertain).\(^\text{27}\) However, the stronger the intensity of the interference with a right, or the greater its intrinsic importance, the less a court should defer and the more evidence it should require as to the veracity of the factual basis for the contested measure.\(^\text{28}\) This is because as the interference with a right increases, the less courts should accept as true the empirical

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\(^{27}\) Rivers 2007a, p. 183 asserts that this is better explained by two different formal principles, since it is arguable that the importance of a decision increases together with the seriousness of interference. Instead, he submits that “we need a formal principle stating that courts should care more about checking that serious limitations of rights are indeed proportionate [and that t]his must be balanced with another formal principle stating that legislatures should identify and evaluate the factual basis for their proposed policies”.

prognoses made by the legislature. Alexy captured this in his second “Law of Balancing”: “The more heavily an interference in a constitutional right weighs, the greater must be the certainty of its underlying premises.” 29 In regard to the intensity of the review courts should employ in respect of empirical assessments the foregoing implies that, in the words of Julian Rivers, “as a limitation of rights becomes more serious, the reliability of the factual prognosis must rise, in the sense that the court may demand that the legislature put more procedural resources into establishing the factual basis, before it will accept the prognosis as correct.”30

Unreliability may also affect the balancing stage. The assessment of the degree or seriousness of the interference may be unreliable. This may be a factual issue. For instance, the assertion that the grant of a bundle of exclusive rights to phonogram producers will lead to substantial investment in the recording industry and provide a necessary incentive for the production of phonograms may be unreliable given the available evidence. This concerns first of all the question of suitability. Even if (some degree of) suitability is established, however, it may for instance still be uncertain whether the lack of protection would only affect (the incentive for) production of phonograms in a minor way, and hence result in a light interference, or instead greatly, and hence a serious interference.

It must be recalled that in balancing one weighs a particular degree of interference of one principle against the degree of fulfilment of another, both in light of their respective reliability.31 But how should it be determined which particular degree of interference should be “placed in the balance”, so to speak, if different evidence points to different degrees of interference? For instance, there may be evidence that the absence of protection for phonogram producers only affects phonogram production in a minor way, while there may simultaneously be evidence that it does so greatly. What is the level of interference to be relied on in balancing? Klatt and Schmidt have called this the problem of classification. They suggest that, prior to balancing, one should consider the two or more possible degrees of interference and their respective reliability, in order to determine which degree of interference should be relied on. The guiding principle in this process, which they have termed the “Law of Classification”, holds that “[t]he more reliable a more intensive classification of intensity of interference is, the more reliable must be a less intensive classification of intensity of

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29 Alexy 2002, p. 418. His first (substantive) Law of Balancing espouses the idea that the greater the degree of interference with one principle, the greater must the degree of fulfilment of the other principle (Alexy 2002, p. 102)
30 Rivers 2007a, p. 183.
31 Like for the degree of interference, Alexy suggests the use of a triadic scale to qualify the reliability (reliable, maintainable or plausible, not evidently false). See Alexy 2003a, p. 447.
interference.”32 Thus, if, for instance, both the reliability of the evidence that copyright protection creates a minor incentive and the reliability of the evidence of it creating a great incentive, is weak, one should assume for the sake of balancing that it creates a great incentive, taking account of the weak reliability of the premises on which that assumption is based. When a constitutional right is concerned, there can be no empirical epistemic discretion for the primary decision maker in those cases, according to Klatt and Schmidt.33

65. **Normative uncertainty.** As noted, it may also be uncertain how a certain interference should be normatively qualified (e.g., if using the triadic scale, as light, moderate or serious). This issue is conceptually more problematic than factual uncertainty, because it is ultimately the task of courts to say what the law is. In cases of legislative decision-making, the legislature must respect fundamental rights and should not be put in a position in which it itself can determine what those rights require. In many cases there will be no reasonable disagreement concerning the degree of interference, meaning this type of uncertainty does not arise.34 However, in some cases the degree of interference may be arguable, in particular given the fact that such classifications cannot always be made with much precision. Alexy has suggested that in those cases of uncertainty there may be reason to grant what he calls normative epistemic discretion to the legislature.35 The pertinent question is, of course, when granting such discretion is appropriate. Application of the Alexy’s second law of balancing36 appears counterintuitive. If one is not certain how “heavily an interference in a constitutional right weighs” to begin with, the answer to the question as to the “certainty of its underlying [normative] premises” cannot be answered. Clearer in this regard is Rivers’ reformulation, which holds that “the greater the chance that one principle may be seriously infringed, the greater must be the chance that another principle is realised to a high degree”.37 How to recognise cases of

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32 Klatt & Schmidt 2012, p. 81.
33 Klatt & Schmidt 2012, p. 83. Such discretion only exists if there is a stalemate between the possible degrees of interference in light of their respective reliability. For instance, if there is only less reliable evidence of protection creating a great incentive, but relatively certain evidence of it providing a weak incentive, it should be left to the authorities to choose with degree of interference should be relied upon. Klatt and Schmidt 2012, p. 94-99 further submit that using “classification balancing” to determine the empirical epistemic discretion makes recourse to formal principles, a weak point in the theory of Alexy, unnecessary. Cf. however, Rivers 2007a, p. 188, who points out that “[l]egislative discretion is unavoidably related to questions of competence and legitimacy, and is thus institutionally aware. It requires the recognition of formal principles, not least the principle that the judiciary are the guardians of rights”.
36 See, supra, n 29 and accompanying text.
37 Rivers 2007a, p. 181.
uncertainty? In practice, it is up to the ultimate decision maker or reviewing body, typically a court, to grant normative knowledge-based discretion or not. In the judicial context, the starting point should be that courts should assess interferences with rights independently. This is so because courts, certainly constitutional courts, are typically viewed as the guardians of right. The question as to the degree of interference is a legal question. The stronger a court itself perceives the interference to be, the less it should defer to the judgement of the legislature. In case of lighter (perceived) interferences courts could grant more leeway. Classification balancing may again further illustrate how discretion can arise. A court may find it plausible that a certain measure moderately interferes with a particular right. At the same time, it may recognize as not evidently incorrect the argument that the interference should be classified as serious. In this case one could argue that the lower degree of interference combined with a (proportionally) larger degree of certainty offsets against the higher degree of interference combined with a lower degree of certainty. The legislature may assume there is only a moderate interference. Conversely, if the measure is instead intended to prevent an interference with a particular right it may, given the same arguments are made, assume it prevents a serious interference. The legislature has discretion; courts should defer.

A second form of (normative) uncertainty concerns the intrinsic importance to be given to certain rights or interests. Should, for instance, a serious interference with the right to freedom of expression and a serious interference with the right to property both be given equal weight in the abstract sense? The abstract valuation of such rights may differ depending on time and place. An important instance of discretion as

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38 This is not universally true. For instance, in the Netherlands art. 120 of the Constitution prevents courts from reviewing the constitutionality of acts of Parliament and treaties. However, Dutch courts are to some extent able to indirectly review such acts for interferences with fundamental rights by virtue of art. 94 which states: “Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.”

39 Using a nine-point scale (qualifying interferences as very serious, moderately serious, less serious and so forth, down to very light) this can be more easily illustrated (on this “double-triadic” model see also Alexy 2002, p. 412). A court may be uncertain whether to qualify a certain interference as very or only as moderately light. In this case there may be little objection to either qualification. See also Rivers 2007a, p. 184-185, pointing out that courts can grant greater discretion by using more or less fine scales. In case of the example, using the single-triadic model would mean the interference should be qualified as “light” either way, implying greater discretion for the legislature. The foregoing comports with the assertion by Alexy 2002, p. 424, that “as interference with a constitutional right increases, so also does not only its substantive resistance, but also the cognizability of gradual distinctions.”. In other words, the more serious an interference is, the more courts should, and are able to, recognise finer distinctions of interference.

40 On normative epistemic discretion, see Klatt & Schmidt 2012, p. 85 et seq. A separate issue is how courts ought to take account of uncertainty when they are the primary decision-maker. Some suggestions in this regard are made in Section 5.4.2.
regards the intrinsic importance of principles is found in supranational adjudication. The relative nature of the intrinsic importance of principles may (or arguably: should) move international adjudicators, such as the ECtHR, to allow a certain diversity as to how different rights are valued. This follows from the subsidiary nature of such adjudicators, permitting different political communities to maintain, to a certain extent, their own hierarchy of values. The ECtHR recognises this as part of the doctrine of the margin of appreciation granted to states, discussed further in § 81. This type of deference has been appropriately termed “cultural discretion” by Rivers.41 The result is that the intrinsic importance attached to a certain convention right relative to another right or (public) interest may differ from one state to another. As a result, the supranational court will accept as “balanced” a greater variety of measures.

66. “Structural discretion”. Unreliability and uncertainty may thus give rise to what Alexy termed “epistemic discretion”, typically giving rise to deference on the part of courts when they review legislation. (Legislative) discretion may also be “structural”, giving rise to restraint.42 In the first place, such discretion may arise in the rare event that the scales are considered balanced. Alexy suggests that in those instances the primary decision-maker can choose to give precedence to either principle.43 Barak argues we should distinguish between conflicts between constitutional rights on the one hand, and conflicts between the public interests and a constitutional right on the other. In regard to the former he appears to agree with Alexy, considering it arguable that there is no reason to find a limiting law disproportional where the advancement of one right is equal to the limitation of another right.44 However, when it comes to conflicts between the public interest and a constitutional right Barak suggests that whether legislatures ought to be granted discretion is more dependent on the views adopted by a particular constitutional democracy. In some democracies the public interest may be considered particularly weighty, meaning the legislature should be free to choose to pursue it in the event of balanced scales. In others, the special position of human rights may mean no discretion exists. Barak himself is a proponent of the latter view, based on the special

41 Rivers 2007a, p. 178-180 and Rivers 2007b, p. 118-119. Rivers points out that this type of discretion has “no role in a single political community”, because like cases must be treated alike, which implies a “single scheme of legal values” (Rivers 2007b, p. 119). One could argue that national courts may defer to evaluation of the legislature as to the intrinsic importance of various rights, provided the legislature uses the same evaluations consistently, although it may allow slight fluctuations of those evaluations over time as public morality changes.
42 The term “structural discretion” was coined by Alexy. See Alexy 2002, p. 394 et seq.
position of human rights in a constitutional democracy and the role of the courts as guardians of those rights.45

In the second place, structural discretion may arise due to the fact that there are various “necessary” policy options which are all balanced. For instance, the legislature may consider a measure which would create a serious interference with a right, but which would cure or prevent a serious interference with another right or legitimate public interest. Alternatively, the legislature could also opt for a measure that creates only moderate interference, but which would only offer moderate protection to the other right or public interest. The discretion that exists as a result follows primarily from the interplay between the necessity requirement and balancing. This can be explained as follows. Provided the end is legitimate, the legislature typically has great freedom in choosing which ends to pursue and which means to use.46 The requirement of necessity permits any means as long as no less restrictive means are available that achieve the end to the same extent. In the words of Rivers: “[Necessity] allows every level of achievement of every permissible end.”47 Ordinarily, this means there are many “necessary” options, all of which achieve a certain end to a different degree. Thus, if the legislature decides to pursue maximal protection of the author, then broad exclusivity and abolition of (most)48 limitations and exceptions could be considered “necessary” to achieve the end (protection of the author) to the chosen degree (maximal). Equally, a more limited form of protection of the author by way of a remuneration right might provide the legislature with another “necessary” option (protection of the author, but to a lesser degree). The legislature can choose between these options, meaning they can choose to what degree to pursue a certain end, as long as the option chosen is also balanced/proportional in the narrow sense, which the first option arguably is not.

As with epistemic discretion, courts play an essential role in determining the scope of this type of “structural” discretion, which is principally based on the belief that democratically elected legislatures are better placed, have more legitimation, to decide the appropriate trade-off between conflicting principles. As Rivers has pointed out, courts can take a pragmatic attitude which allows basically any degree of realisation of a certain end as long as the costs are minimized, i.e. necessary. Courts can also take an idealistic attitude, requiring an optimisation of interests to the

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45 Cf. Barak 2012, p. 367. Cf., however, Alexy 2002, p. 384 et seq., where he suggests that in the event of balanced scales liberty should prevail. The suggestion that in that case the legislature has discretion first appeared in the postscript in the English translation, written fifteen years later.
46 Alexy 2002, p. 395-396 calls this “end-setting” and “means-selecting” discretion.
47 Rivers 2007a, p. 171.
48 Cf. supra, n 11.
highest point. Rivers: “[T]he court will need to be convinced itself that the decision, rule or policy in question, even though necessary, really is the best way of optimising the relevant rights and interests.”49 Courts can also take a middle-of-the-road approach, in essence focusing on making sure a certain measure is not evidently disproportional.50

The degree of restraint is a function of the principle that courts respect the balance struck by the democratically elected legislature.51 In this regard the degree of restraint bears close resemblance to the degree of deference. But whereas the latter specifically concerns respecting the legislature’s assessment as to the degree of interference or fulfilment (or the intrinsic importance), the former concerns respecting the assessment as such that the measure in question is balanced. The degree of deference decreases as the degree of interference increases: the more serious an interference, the more closely courts should examine whether the degree of fulfilment of the purpose pursued is really commensurate with the seriousness of the interference.52

The degree of restraint, in turn, should decrease as the intrinsic importance of the limited right increases. The more important the right that is interfered with is, the more closely (idealistcally) courts should scrutinize the policy-choice made to ascertain that the alternative, less restrictive policy options are really not appropriate.53

Either way, the pragmatic approach, which allows any “necessary” trade-off, should be rejected because it gives practically unlimited discretion to the legislature, provided the chosen measure does not go further than necessary, permitting even very serious limitations of rights set off against negligible gains. The legislature’s choice, however, should always at the very least be reasonable. Someone burdened by a certain measure must hypothetically be able to agree with it. That is, they must be able to admit that, even though they disagree with the appropriateness of a particular measure, the appropriateness is subject to reasonable disagreement. Proportionality in the narrow sense therefore requires courts to ascertain at the very least that the trade-off is not unreasonable.54

50 Cf. Rivers 2007a, p. 170-177 and Rivers 2007b, p. 114-118. For an enlightening graphical illustration of the relation between necessity and proportionality in the narrow sense, see both contributions by Rivers cited in this footnote.
52 The fact that both interference and importance are ranked as “serious” is not sufficient to give discretion to the legislature. At that point, courts may be forced to ascertain whether both are really equally “serious”; they should use finer scales. On the “nine-point scale”, see supra, n 39.
Some may justifiably object even more categorically to this type of restraint, which accepts as authoritative the balancing decision reached by the legislature. It is the duty of courts to say what the law is, specifically to say what fundamental rights command (and conversely, what they do not command). A measure is either proportional or it is not. This itself, is a legal question, to be answered by a court. Moreover, if one agrees with the conceptualization of fundamental rights as consisting of values or ideals that must be respected and realized as far as possible, one cannot accept as proportional measures that promote one right (or public policy goal) to a lesser degree than it limits a particular fundamental right. That the legislature accepts it as proportional does not make it constitutionally acceptable. Nevertheless, although questions as to intensity of interference and fulfilment are legal ones, courts may be only willing to ascertain whether the cost/benefit relationship is roughly commensurate. This is in part due to the fact that exact qualifications are impossible (normative uncertainty), but also a result of the restraint courts may ultimately choose to exercise in evaluating the trade-off as such. Thus, a highly pragmatic court will qualify any interference/fulfilment the same (using a monadic scale), while an idealistic court will use a very fine scale. The fine-ness of the scale is therefore both a function of the intensity of the interference and the importance of the principles involved. The greater either the degree of interference with or the intrinsic importance of a right, the greater the urgency for a court to determine whether the degree of fulfilment of the countervailing principle is equivalent, implying the use of finer scales.

As noted above, restraint is also in order when there are different “necessary” policy options that can be considered balanced. This leaves the choice which of these policy options to adopt free. The choice will be political. In that regard restraint is in order; it is not the place of the judge to choose the preferred policy. As suggested earlier, the choice to introduce a particular exclusive right may be attacked for being disproportionate stricto sensu in comparison with the alternative policy option of a remuneration right. If the court concludes both options are balanced, it will not question the legislature’s choice for either. Note that this result can also be reached by granting the legislature epistemic discretion. In that case, discretion would arise because it impossible to tell which policy better achieves the legislature’s aim and/or how to qualify the respective interferences with the limited fundamental right(s). That

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56 Cf. Alexy 2002, p. 401 et seq. See also, supra, n 3.  
57 See, supra, n 39.  
is, it is considered both arguable that the law permits and that it prohibits the choice for an exclusive right in the place of a remuneration right.

Structural and normative epistemic discretion can go hand-in-hand. Let us again take the example of the introduced exclusive right. Assume that, compared to the status quo, it moderately contributes to its aim and that the assessment that it does so is reliable. This means that, in order to be proportional, the interference with the countervailing right may not be greater than moderate. If we consider it both arguable that the existence of a moderate interference is reliable and that of a serious interference plausible, there may be a stalemate giving rise to normative uncertainty (giving rise to discretion on the part of the legislature to accept as true either the existence of a moderate or a serious interference). At the same time, the degree to which the alternative remuneration right would interfere with the countervailing right may be similarly uncertain, also giving rise to normative uncertainty. This means that the legislature has the normative epistemic discretion in regard to either option to assume that they are balanced. At the same time, it permits the legislature a choice between either option. It also has structural discretion.

### 3.2.3 Some further remarks

67. **Levels of abstraction in balancing.** It should be noted that balancing can occur at different levels of abstraction. At a high level of abstraction the process of balancing can be defined as constituting a general rule which requires costs and benefits to be compared in the manner described here. As Barak explains, at this level of abstraction balancing “does not specifically relate to many of the aspects in which the particular right in question becomes a special object of either limitation or protection”. Balancing occurs at a much lower level of abstraction when this general rule is applied to a specific set of circumstances. This form of balancing, often called “ad hoc” balancing, looks to determine the proportionality of a particular measure. The costs and benefits of that measure to the relevant principles are determined in light of the specific circumstances. Ad hoc balancing is thus used to determine the outcome for the specific case at hand. For instance, a particular parody might be denied the protection offered by the parody exception because, due to its specific

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59 Assuming that the legislature is free to legislate if the scales are balanced. See, *surpa*, n 42-45 and accompanying text.
60 Cf. Barak 2012, p. 362ff, who calls this the “basic balancing rule”.
61 Barak 2012, p. 542.

characteristics, the application of that exception would not “strike a fair balance”.63 There is also an intermediate form of balancing, with a higher degree of abstraction than ad hoc balancing. This has been called “rule-balancing” and “definitional balancing”.64 The aim of this type of balancing is to not just resolve the conflict in the case at hand, but also to formulate a specific rule which can be applied in future cases without further balancing. A weakness of such rules is that they can always be subject to the argument that their application in subsequent cases does not lead to a balanced outcome given their specific circumstances.65 A variation on this, is Barak’s principled balancing, which does not per se lead to a specific rule but rather to an elaboration of conditions or criteria guiding the balancing process.66 For instance, based on the generally accepted differentiation in the degree of protection accorded to political, artistic and commercial speech, the CJEU could define different standards to adjudge the permissibility of political, artistic and (purely) commercial parodies, respectively.

68. **Courts as legislators.** Oftentimes courts resort to balancing, not in order to review legislation, but to determine the content or applicability of a particular rule, such as determining whether a particular kind of use should fall within the scope of the exclusive reproduction right (definitional balancing) or whether a particular parody should be regarded as permissible (ad hoc balancing).67 In that sense, one could say that courts themselves act as legislator. Courts must in these cases themselves determine which of the available scenarios provides the “optimal” outcome. Typically, this is a binary choice: the use falls within the scope of the rule or not; the rule applies or not. Obviously, the question of discretion will play little role in such scenarios. Only in answering the hypothetical question whether, if the legislature intended for the rule to apply in these circumstances, would it have acted outside the scope of its discretion, does the question of discretion arise. More commonly, however, a court will assess which of the available scenarios reconciles the conflicting principles. Nevertheless, empirical and normative uncertainty may still arise and impact decision-making. The impact of a decision one way or the other on the degree of fulfilment of one principle may be unknown. This should impact the weight attributed to this principle. One could argue that normative uncertainty ought to be

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66 Barak 2012, p. 542 et seq.

67 Whether and to what extent balancing indeed does and can play a role in copyright adjudication is discussed in subsequent chapters.
largely irrelevant, since a court must decide and since it has the competence to “say what the law is”. Nevertheless, courts should take account of reasonable disagreement of the premises on which they base their (balancing) conclusions. If such disagreement exists, the weight they attach to a certain principle should be attenuated accordingly.68

3.3 In defence of (judicial) balancing

69. Controversiality of balancing. Judicial balancing is certainly not uncontroversial.69 A number of objections merit specific discussion, because they also affect the extent to which balancing is viewed as a viable model for judicial decision-making in copyright discourse.70 The first of these objections concerns the argument that balancing is incapable of providing a consistent and coherent framework leading to a predictable outcome, the second that where the balance has already been struck by the legislature further judicial balancing is undemocratic.

3.3.1 The lack of rational decision-making

70. Incommensurability and rationality. First, does the use of balancing promote consistent and coherent decision-making? One can distinguish two elements to the criticism that it cannot: (i) balancing cannot proceed along rational standards, nor (ii) is there a common metric that would allow different values to be compared, i.e. they are incommensurable. In the case of copyright this criticism implies, for instance, that it is impossible to compare the degree of interference with the right to freedom of expression created by copyright with the degree to which granting authors exclusivity fulfils the purposes underlying that protection. And even if these values were comparable, judges would be unable to do so rationally. The incommensurability objection is discussed first.

71. Incommensurability. The incommensurability objection to balancing is often illustrated with the observation by US Supreme Court Justice Antonin Scalia that it requires “judging whether a particular line is longer than a particular rock is heavy”.71 That is to say, it is suggested that there is no common metric to determine whether the intensity of interference with one right is greater than the degree of

68 On this also Section 5.4.2.
69 For an overview of common objections, see, e.g., Barak 2012 ch. 18 (including a retort) and Jestaedt 2012.
70 See further, infra, Section 0.
fulfilment of another right. It would require some form of utilitarianism, making the feasibility of proportionality analysis “stand or fall on having the correct answer to an extremely vexing and controversial question in moral philosophy”, and turn balancing into a consequentialist assessment which seems difficult to square with the deontological foundations of human rights.

Does incommensurability stand in the way of judicial balancing? Both Barak and Alexy have suggested common denominators that preserve the character of balancing as an evaluative comparison of the effects of a particular measure on different rights (and in some cases the public interest). Barak has submitted that a common denominator, which he points out need not be quantitative, can be found in the marginal social importance of rights and public interests. Whether balancing rights against each other or rights and the public interest, one can compare the marginal social benefits gained by protecting or advancing one against the marginal social costs of the harm to the other. The social importance of rights and public interests is contingent on several factors which may differ from one country to the next, such as the prevailing political and economic ideologies, a country’s history and its political system. Alexy argues rights and interests can be compared indirectly, that is by determining their importance to the constitution, charter of rights, etc. As soon as one admits that a rational discourse is possible about what is permitted and prohibited by the constitution, “a common point of view is possible”.

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73 Tsakyrakis 2009, p. 471.
75 Barak 2012, p. 483-484.
76 Ibid., p. 349. Endicott 2013, p. 8-9 argues that the identification of this single criterion does not “eliminate incommensurability if the application of the criterion depends on considerations that are themselves incommensurable” and that “the availability of the covering value, ‘importance’, does not give us any reason to think that the grounds on which judgements are to be made are commensurable”. Nevertheless, for Endicott this does not mean that courts should not be authorized to “reconcile incommensurable considerations” (p. 14), suggesting that “certain human interests can be best secured by a power in an independent tribunal” (p. 17). He recognizes that this role imparts a significant discretion onto courts, although he is unconvinced that proportionality analysis can make good on its promises to bring “objectivity or transparency to human rights adjudication” (p. 19).
77 Alexy 2003a, p. 442. Skeptical about the potential for the constitution to provide a common point of view is, e.g., Webber 2010, p. 194-196, who argues that if a constitution is to enable commensuration, “the constitution should provide for the triadic scale Alexy develops or it should provide guidance for how to classify degrees of interference”. Moreover, he suggests that the constitution says little about the degree of fulfilment as “light, moderate, or serious” of principles which are not protected as such by the constitution but admitted by it as reasons for the interference with other principles, such as the public interest. This, in my opinion fails to appreciate that balancing is not a mathematical and technical exercise in which degrees of fulfilment and interference are independently determined and compared, even if it may often presented as such, but first and foremost a model of rational legal argumentation that requires
Once one accepts the existence of such a common denominator, meaningful comparisons become possible. One should be careful, however, to resist the argument that meaningful comparisons are not possible because degrees of interference and fulfilment are not quantifiable in the first place. Exact quantification of such degrees is not necessary. They need not be determined on a cardinal scale. It is sufficient that one can establish an ordinal relationship between the principles at issue. That is, one outweighs the other, or they are of equal weight. The use of limited scales, such as Alexy’s triadic model, reflects this. It allows us to compare the impact of a measure on different principles. This permits a rational justification of the decision as to why a particular principle outweighs another principle.

Ultimately, one could argue that the incommensurability challenge fails, because it questions the existence of an element which is not essential to balancing in the first place, namely an accurate quantification of the values of principles. That is, one may question whether the common denominators suggested by Barak and Alexy render the degrees of fulfilment of different principles commensurable on a cardinal scale, whether what matters in balancing is whether they can be rendered comparable and ranked ordinally. Even if neither common denominator achieves the former, they certainly appear capable of enabling the latter, permitting a rational discourse about the relative weight of the conflicting principles. Thus, while it is, for instance, not possible to claim that in a particular set of circumstances the right to freedom of expression weighs 2.347 times heavier than the right to property, it is possible to claim that the degree of fulfilment of the former is important enough as to outweigh the degree interference caused with the latter, compared to the alternative state of affairs. Of course, as noted above, some would argue that rational justification in balancing is equally impossible, which is discussed next.

more and better reasons for an interference the more serious that interference or important the right is (reflected in the idea of variable scales, see § 66), both determined in light of the values enshrined in the constitution.

78 Cf. Borowski 2013, p. 1413, arguing that Alexy’s triadic scale “resembles far more closely an ordinal scale than a cardinal scale” (p. 1415), and Klatt & Meister 2012, p. 59.
80 Critical hereof is nonetheless Urbina 2015, p. 595-596, who suggests that degrees of fulfilment of different values cannot be compared if those values themselves are incommensurable. The counterargument is that different (degrees of fulfilment of) principles (values) are not compared as such, but in reference to their common Archimedean point (e.g. the values enshrined in the constitution as such; cf., however, the critique of Endicott, supra, n 76), and in relation to their degree of fulfilment in the alternative state of affairs. E.g., the status quo may provide for a great degree of fulfilment of two principles, while the alternative provides an even greater degree of fulfilment of the one principle (although slightly) but only a minor degree of fulfilment of the other principle, meaning it seems possible to rationally prefer the former alternative. That is not to say there will never be subjectivity in this determination, which is discussed in the following paragraph.
72. **Irrationality.** Some have questioned that balancing can proceed rationally, even if one accepts commensurability or comparability. Habermas’ critique that “weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies” is well-known.\(^{81}\) Similarly, McFadden has suggested that there can be no consistency in balancing because it is entirely dependent on the judge’s world views.\(^{82}\) In other words, it is suggested that balancing is a subjective undertaking depending on a judge’s personal preferences and beliefs and should therefore be rejected.

Balancing does not claim to lay down a “fully determinate objective yardstick”.\(^{83}\) It is questionable whether determining the content of normative propositions can ever be fully objective.\(^{84}\) There is therefore no denying that subjective evaluations do play a role. But the existence of a subjective element does not by itself render a judgement irrational or arbitrary.\(^{85}\) The judge has a certain measure of discretion, but this discretion is hardly unlimited and does not by itself lead to irrationality of their decisions.\(^{86}\) This is not the case for normal legal argumentation, and there is no reason why this would be the case for balancing.\(^{87}\) In fact, it is submitted that balancing (or more broadly: proportionality analysis) promotes rational decision-making by providing a framework that forces courts to be clear, coherent and transparent. It forces courts to recognize which rights and legitimate (public) interests are affected by a specific measure and adduce good reasons for any limitation of rights. Judges should clarify why they attach a particular (intrinsic) weight to a right or interference. And by considering both sides of the balance, they must justify precisely why the outcome is one way or another.\(^{88}\) In the words of Barak: they must “expose ... their train of thought”.\(^{89}\)

All this does not mean that balancing is morally neutral.\(^{90}\) Moral considerations concern the “external justification” of the balancing decision. That is, they relate to the premises used in balancing, that is the intrinsic importance and degree of interference/fulfilment of the principles in question.\(^{91}\) There often may be a fierce debate about the qualification of a particular degree of interference of one principle

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\(^{81}\) Habermas 1996, p. 259.
\(^{82}\) McFadden 1988, p. 642 et seq.
\(^{83}\) Borowski 2013, p. 1411.
\(^{84}\) Cf. Pulido 2006, p. 197.
\(^{86}\) Cf. Barak 2012, p. 391-392, who points to various procedural and substantive constraints on the discretion of the judge.
\(^{87}\) Cf. Borowksi 2013, p. 1411.
\(^{88}\) Cf. Feteris 2008, p. 482.
\(^{89}\) Barak 2012, p. 486.
\(^{90}\) Cf. the criticism by Möller 2007, p. 460.
(e.g. as light or serious) and how this relates to the degree of fulfilment of the other principle. But, again, this does not mean that balancing as a process is irrational. In response to Habermas, Alexy has countered that even in regard to unquantifiable values courts are capable of making reasoned judgments as to the intensity of interferences. This does not mean their judgment cannot be beyond dispute, but it does not make their judgment arbitrary, as long as it is supported by justifiable arguments. For instance, one can disagree with the qualification by the CJEU in Scarlet Extended of the obligation imposed on an Internet Service Provider to introduce a certain filtering measure to detect copyright protected content as a serious interference with the freedom to conduct a business, but one can agree that the CJEU adduced good (if scant) reasons why it considered that interference serious.

3.3.2 Judicial review, democracy and judges as legislators

73. An objection from democracy. Perhaps the real problem with proportionality analysis, at least for some, is the idea itself of judicial discretion and the associated uncertainty. It is telling that Habermas himself subscribes to Dworkin’s improbable view that adjudication should focus on a solution that “fits” the total constellation of norms, to the extent that there is a single right solution for every case. Judicial discretion, by contrast, implies a degree of uncertainty. But whether couched in terms of discretion or not, judicial decision-making is anyway uncertain. This is all the more true for fundamental rights adjudication, in which norms are characterized by a large degree of open texture. Only through repeated and consistent application will the uncertainty concerning application subside. Nevertheless, one has to agree with the statement that the discretion inherent in proportionality analysis/balancing does “expose judges as lawmakers”. Along with creating uncertainty, it therefore appears to give judges a role as policy-makers, although making policy is traditionally the domain of the other branches of government. Where a law strikes a balance between two rights, or between a right and the public interest, it is not the judge’s position to intervene. This, at least, is the second common

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94 Case C-70/10 Scarlet Extended v SABAM ECLI:EU:C:2011:771, paras 47-48. See, similarly, Case C-360/10 SABAM v Netlog ECLI:EU:C:2012:85, paras 45-46. More egregiously, the CJEU did not qualify the degree of interference with the right to property, making its balancing considerations one-sided. See further, infra § 110
95 Habermas 1996, p. 211 et seq. See also p. 260-261. Habermas’ alternative, which requires courts to “examine prima facie applicable norms in order to find out which is most suitable to the case at hand” (p. 260), seems incapable of avoiding his own criticism of the balancing paradigm. His solution “hides the balancing, but cannot make it disappear” (Maes 2008, p. 86). Borowski 2013 notes that the problem with much of the criticism of proportionality is that it fails to suggest a convincing alternative.
96 Stone Sweet & Mathews 2008, p. 76.
objection against proportionality analysis and balancing in particular, and judicial review in general.

74. **The importance of (limited) review.** The position that courts ought not to review the “constitutionality” of laws should be rejected, at least as far as the CJEU, and by extension Member State courts as EU courts, is concerned. This is so, in the first place, because the power to decide on the compatibility of certain acts with treaty norms and fundamental rights protected in the EU Charter has been explicitly delegated to the CJEU.97 Related to this formal argument is a substantive one. If fundamental rights are to be taken “seriously”,98 that is to say not subject to the whims of the majority, it is questionable that the decision power as to which regulations do and which do not violate fundamental rights should lie with the body against whose regulatory power those rights are intended to offer protection. On the other hand, it is true that this power should not lie completely in the hands of judges either. In the first situation the legislature has unlimited discretion with regard to the protection and limitation of fundamental rights. In the second situation it has no discretion at all. Both situations are undesirable.99 As set forth in the previous section, a proper conception of proportionality analysis recognises both structural and epistemic forms of discretion, to use Alexy’s terminology. The legislature’s margin of discretion may be substantial, both to make factual and normative determinations in the face of uncertainty and to make reasonable policy choices. But this does not eliminate judicial control of legislative decision-making. The more important a right is and the more serious its limitation, the greater must be the scrutiny by the courts. This control itself also reflects a balance, between the principle that courts are the guardians of rights, which should be protected as far as possible, and the principle that the legislature takes as many important decisions for society as possible.100

75. **Democracy and review.** This substantive defence of proportionality analysis as a tool for review can also be rooted in the idea of democracy. Alexy has suggested that judicial review is compatible with democracy because courts, although typically not directly elected, can nevertheless take part in public decision-making through deliberation: they constitute a form of argumentative representation of the people, looking for correct answers through practical discourse. But, judicial review can work “only if the arguments presented by the constitutional court are sound and only if a sufficient number of members of the community are able and willing to

97 Art. 6 TEU in conjunction with art. 263 and 267 TFEU.
98 Not necessarily in the Dworkinian sense as trumps superseding the general interest, but in the sense that, in the words of Barak 2012, p. 365, “[i]t is required that the public interest be so important that it justifies the limitation of the constitutional right at issue”.
exercise their rational capacities.” 101 If these conditions are met, however, rational members of society will normally accept the court’s judgements as correct. Judicial review would be accepted as a democratic institution because it is able to represent those members of society. Mattias Kumm has added to this argument by making the case that judicial review is not just compatible with, but also required in a liberal constitutional democracy. For the outcome of democratic deliberation to be binding on all citizens as free and equal parties, it must be possible for those citizens whose rights are limited by a particular piece of legislation to recognise that that legislation, despite possible reasonable disagreement about the issue, plausibly reflects “a collective judgement of reason” about how to best actualize the commitment to rights. 102 The key question is whether the possible disagreement is reasonable. Courts, in this regard, function to “police the boundaries of the reasonable”. 103 They should be able, through judicial review, to strike down that legislation that constitutes an unreasonable interference with rights by the majority. Kumm: “[I]t is implausible to claim that [a citizen’s] right to justification [that good public reasons for a limitation of their rights exist] is taken seriously without the appropriate institutionalizing of a procedure that allows acts of public authorities to be subjected to impartial review in a way that provides the unduly burdened individual with an effective remedy.” 104

76. Review and proportionality. A final question that must be discussed is whether proportionality analysis, with its three prongs, is the appropriate tool for determining the priority between different rights and public policy goals, in particular as a tool to review measures that limit the enjoyment of a particular fundamental right. For Alexy, this follows from the necessary connection between fundamental rights and proportionality. One must take two steps to conclude this necessity. 105 First, one must accept that the requirements of proportionality follow from the character of certain norms. Second, one must accept that fundamental rights have that character.

As noted at the start of Section 3.2, balancing concerns the search for an optimal or proportional relationship between different principles. If one intends to realize a particular right, goal, value, ideal et cetera as far as possible, it must be admitted that limitations imposed on those norms must be pareto optimal, that is conform to the

103 Ibid., p. 215 (italics in original).
104 Ibid., p. 216. Similarly, Barak 2012, p. 472 et seq. See also ibid., p. 474, n 75 for an extensive collection of references to further literature about the relation between judicial review and democracy.
requirements of suitability and necessity.\textsuperscript{106} As to proportionality \textit{stricto sensu}, the extent to which one such norm can be realized depends on its relation to the other norms.\textsuperscript{107} Thus, this character of norms requires that a measure which, for instance, sacrifices the level of fulfilment of one principle to increase the level of fulfilment of another principle, must balance the costs to the first and the benefits to the second.\textsuperscript{108} This conception of the (meta-)principle of proportionality as being implicit in the character of certain norms can explain how courts view the norms they apply. If, for instance, a court is willing to accept measures limiting a right in a manner that is not strictly necessary, it is unlikely to view that right as a norm that must be realized to the greatest extent possible.\textsuperscript{109}

Do fundamental rights have the character of norms that must be realized to the greatest extent possible? It has been suggested that they only have this character if it has been given to them by a “positive legal decision of the constitutional legislature”.\textsuperscript{110} First, one could argue that as far as EU Charter rights are concerned, this character is confirmed by article 52(1), which explicitly requires limitations on rights to comply with the “principle of proportionality”. Second, Alexy argues that this character follows from the human rights nature of fundamental rights.\textsuperscript{111} Reflecting ideals of liberty, equality and human dignity, human rights certainly aspire to their full realization. (Most) fundamental rights, in turn, are the positivization of these human right ideals.\textsuperscript{112} They are typically subjectively intended as the implementation of human rights by the “constitutional legislature”. More importantly perhaps, it must be considered the objectively construed intention that fundamental rights are to reflect human right ideals, a cornerstone of liberal democracy.\textsuperscript{113} In some instances, this ideal character may be expressed by way of formulating fundamental rights in an absolute manner, for instance in the case of the prohibition of torture and slavery.\textsuperscript{114}

\textsuperscript{106} Cf. the literature cited, \textit{supra}, n 8.
\textsuperscript{109} See in this regard, \textit{infra}, § 80, concerning the suggestion that the ECtHR views ECHR rights as minimum norms.
\textsuperscript{110} Jestaedt 2012, p. 161.
\textsuperscript{112} Cf. Barak 2012, p. 40-41, referring to constitutional rights as “made up of fundamental values [that] in turn reflect ideal aspiring to be realized to their maximum extent”. Nevertheless, Barak questions the necessary connection between fundamental rights and proportionality, suggesting proportionality merely defines the extent of the realization of rights at the sub-constitutional level, not their actual scope. Ultimately, however, Barak rejects alternative methods of evaluating the constitutionality of the limitations of rights, concluding proportionality is the only appropriate method of review.
\textsuperscript{113} Cf. Alexy 2014, p. 61. This objective intention can be construed both based on the intention one could reasonably ascribe to the constitutional legislature and on the “fundamental values of the legal system” that fundamental rights are intended to realize. Cf. Barak 2002, p. 67.
\textsuperscript{114} Cf. art. 4 and 5(1) of the EU Charter, respectively.
In other cases, fundamental rights may be formulated in a more open-textured way, such as the right to freedom of expression in article 10 ECHR and article 11 EU Charter. In those cases the meaning given to those rights arguably must be in accordance with the underlying human rights dimension.

How the character of fundamental rights is construed, of course, is a matter of interpretation in which a court may have discretion. However, generally there will be little reason not to interpret fundamental rights in accordance with their human rights dimension. This is in particular true of classic civil and political rights in which this dimension will typically be especially strong. Nevertheless, in the case of supranational “human rights” documents, such as the ECHR, courts might take a more relaxed approach, treating norms instead as minimum requirements. This is not necessarily egregious, since most signatory states will have a bill of rights of their own which serves to give full effect to the protection of human right ideals. However, if a supranational human rights document is the only source of human rights protection the interpretation of fundamental rights should fully reflect their underlying human right dimension. This may be the case in respect of the EU Charter if the application of national standards of fundamental rights protection endangers the “primacy, unity and effectiveness of EU law”, meaning Charter rights should be treated as rights aspiring to their full realization, since they will be the only fundamental rights norms that apply.

3.4 Synthesis

Balancing of normative arguments entails the search for an optimal or proportionate relationship between those arguments given a particular set of circumstances. When these normative arguments, or principles, have the character of norms that must be realized as far as possible, it follows that any measure that limits them must be pareto-optimal and must represent a proportionate benefit to another principle. These requirements are reflected in the (meta-)principle of proportionality as it is applied by numerous (constitutional) courts. The principle of proportionality has been originally developed and applied in order to review (legislative) measures that limit fundamental rights: such measures must be suitable, necessary and proportionate stricto sensu. This review of legislation is typically characterized by the exercise of deference and restraint on the part of courts in order to recognize the primacy of the legislature as a norm-maker, granting that legislature a certain degree of discretion.

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115 Cf. art. 11 of the EU Charter.
116 Case C-399/11 Melloni ECLI:EU:C:2013:107, para 60.
Courts may also resort to balancing to determine the “optimal” outcome in a particular case. A prime example hereof is the horizontal effect of fundamental rights, notably in the course of the application of open-ended standards. It permits courts to establish the priority between conflicting rights and interests in the particular circumstances of the case. For instance, the question whether a particular quotation is in accordance with fair practice, as required by article 5(3)(d) of the InfoSoc Directive, can be conceptualized as a balancing exercise.

Balancing has been criticized but the criticism is generally not convincing. The suggestion that balancing is “more like a slogan than a methodology” is therefore – in my opinion – unwarranted.\textsuperscript{117} It may have some merit when balancing is applied haphazardly, as a rhetorical tool to justify the outcome one desires. But properly applied, balancing can increase the coherence and transparency of decision-making and promote rational and impartial decision-making, by elucidating which factors ought to be taken into account every time. Moreover, by clarifying which arguments the court considered persuasive and by explaining their relative weight vis-à-vis other arguments, the predictability of judgements can be increased. It must be admitted that there is discretion in balancing, not in the last place because balancing is not morally neutral, but this does not make balancing judgements irrational.

\textsuperscript{117} De Schutter & Tulkens 2008, p. 191.
4 PROPORTIONALITY, FUNDAMENTAL RIGHTS AND THE CONCEPT OF FAIR BALANCE IN COPYRIGHT ADJUDICATION AND BEYOND

4.1 Introduction

78. **Introduction.** There exists a long history of use of proportionality analysis and balancing among European courts. This is certainly also true for the two “highest” European courts, the European Court of Human Rights and the Court of Justice of the European Union. In fact, the concept of “fair balance” as used by the latter finds its origin in the case law of the former. This chapter examines how that concept has been developed against the background of the use of proportionality analysis both generally and in copyright cases, first by the ECtHR (Section 4.2) and second by the CJEU (Section 4.3). Finally, the use of proportionality analysis and balancing in copyright, in particular by the CJEU, is evaluated (Section 4.4).

4.2 Proportionality and balancing at the European Court of Human Rights

79. **Outline.** This section hardly pretends to offer a full account of the use of proportionality analysis and balancing by the European Court of Human Rights. Instead, it makes some general observations against the background of the framework outlined in the previous chapter and discusses the use of proportionality and the concept of “fair balance” in cases concerning copyright.

4.2.1 General observations

80. **Fair balance.** The concept of fair balance, at the centre of this study, has its roots in the case law of the European Court of Human Rights. The Court found this notion, originally conceived of as a “just balance”, to be implied in the European Convention on Human Rights. According to the Court, the general aim of the Convention is the effective protection of human rights within the context of the “considerable possibilities [for the contracting states] for regulating the exercise of these rights”, which regulation “may vary in time and place according to the needs and resources of the community and of individuals”. The ECtHR recognized that the ECHR operates in a force field of the demands of the general interest on the one hand.

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and protection of individual rights on the other. According to the Court “[t]he Convention therefore implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter”. Although in the French language versions of its judgements the Court has consistently used the term “juste équilibre”, it switched to using the term “fair balance” in the English language versions of later judgements. It has not explained this terminological shift from “just” to “fair”, but it does not seem that the Court intended this shift to imply a change in meaning. The balance sought by the Convention is thus, in a general sense, one between the general interest of the community and rights of individuals, although the concept of fair balance also makes a frequent appearance in conflicts between different fundamental rights themselves.

The concept of fair balance is closely connected to the principle of proportionality as elaborated in the previous chapter. In the words of the Court: “[A]n interference must strike a ‘fair balance’ between the demands of the general interest and the requirements of the protection of the individual’s fundamental rights. There must be a reasonable relationship of proportionality between the means employed and the aim pursued.” This determination of proportionality is highly fact-specific. In particular, the Court does not appear to strictly adhere to the three-prong analysis often associated with proportionality. Nevertheless, proportionality analysis plays an important role in determining the lawfulness of interferences with Convention rights, notably with regard to articles 8 through 11 of the Convention and article 1 of the First Protocol.

Only rarely does the ECtHR reject a measure as disproportionate for a lack of suitability. As to the requirement of necessity, the Court’s approach has been

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3 Ibid.
4 See, for instance, Decision of the European Court of Human Rights (Plenary), in the case of Sporrong and Lönnroth v. Sweden, Appl. No. 7151/75 and 7152/75, of 23 September 1982, para 69, in which the Court started to refer to the “fair balance” implied in the Convention, while citing the “Belgian Linguistics” case (supra, n 2) in which the originally termed concept of just balance had been identified. On some other occasions the Court has instead used the term “correct balance”. See, e.g., Decision of the European Court of Human Rights (Third Section), in the case of Giurun v. Romania, Appl. No. 24360/04, of 21 June 2011, para 43 and decision of the European Court of Human Rights (Grand Chamber), in the case of Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, Appl. No. 931/13, of 27 June 2017, para 122.
5 See, for instance, Decision of the European Court of Human Rights (First Section), in the case of L.B. v. Italy, Appl. No. 32542/96, of 15 November 2002, para 23.
6 In general, see Christoffersen 2010. Critical about the lack of a separate assessment as to suitability and necessity is for instance Gerards 2013.
7 Cf. Brems & Lavrysen 2015, p. 140.
8 In some simple cases the Court may find a measure disproportionate because it is clearly unsuitable to achieve the aims pursued. For example, Gerards 2013, p. 471 who points to
inconsistent.\textsuperscript{9} In some cases it is explicitly endorsed,\textsuperscript{10} while in others it is categorically rejected.\textsuperscript{11} Jonas Christoffersen has suggested that the reluctance to adopt an independent necessity test stems from the minimum nature of the ECHR. He asserts that the Convention leaves the Contracting Parties a certain margin of discretion with regard to the level of protection. As a result, the fact that a less restrictive measure was available to it does not by itself mean that the Convention has been violated. The question as to the availability of less restrictive means may become relevant when the Court considers the minimum level of protection to be violated.\textsuperscript{12}

\textbf{81. Discretion and the margin of appreciation.} Instead of explicitly addressing the issues of suitability and necessity, the ECtHR typically conducts an integrated proportionality assessment in which factual and normative considerations are combined, asking whether the state has struck a fair balance given the margin of appreciation (i.e. discretion) afforded to it.\textsuperscript{13} All of the balancing factors identified in § 61 (intrinsic importance, degree of fulfilment/interference, reliability) play a role in this determination and influence the margin of appreciation.

First, the intrinsic importance of the Convention right influences the margin of appreciation. It was suggested in § 66 that the greater the intrinsic importance of a right, the smaller the degree of discretion of the legislature ought to be. In a supranational context such as in the case of the ECHR it is not the legislative discretion that decreases specifically, but the discretion (or: margin of appreciation)

\textit{Soltsyak v. Russia} (Appl. no. 455/05 of 10 February 2011), in which it was held that the confiscation of the passport of a retired civil servant who had worked with classified information to protect national security was disproportionate, because that measure was not suitable for the protection of national security; the confidential information could also be transmitted without the former civil servant needing to travel. Cf. also the discussion of the \textit{Bölan} judgement in § 83.

\textsuperscript{9} See for an extensive analysis the survey by Brems & Lavrysen 2015.
\textsuperscript{10} E.g. Decision of the European Court of Human Rights (Grand Chamber), in the case of \textit{Nada v. Switzerland}, Appl. No. 10593/09, of 12 September 2012, para 183 (“[F]or a measure to be regarded as proportionate and as necessary in a democratic society [under article 8], the possibility of recourse to an alternative measure that would cause less damage to the fundamental right in issue whilst fulfilling the same aim must be ruled out”).
\textsuperscript{11} E.g. Decision of the European Court of Human Rights (Plenary), in the case of \textit{James and Others v. The United Kingdom}, Appl. No. 8793/79, of 21 February 1986, para 51 (“This amounts to reading a test of strict necessity into [article 1 of the First Protocol], an interpretation which the Court does not find warranted.”) and Decision of the European Court of Human Rights (Grand Chamber), in the case of \textit{Evans v. The United Kingdom}, Appl. No. 6339/05, of 10 April 2007, para 91 (“[T]he central question under Article 8 is not whether different rules might have been adopted by the legislature, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it under that Article.”).
\textsuperscript{12} Christoffersen 2010, p. 23-26.
\textsuperscript{13} Several authors, such as Gerards 2013 and Greer 2004, have called for a decoupling of factual and normative consideration.
of the signatory state as a whole. Peggy Ducoulombier has observed in this regard that:

“A hierarchy of Convention rights would thus follow the scope of the margin of appreciation allocated to States, confirming that at the top of this hierarchy lie non-derogable and absolute rights such as articles 2 (the right to life), 3 (prohibition of torture and inhuman and degrading treatment and punishment) and 4§1 (prohibition of slavery and servitude), for which the margin of appreciation plays no or almost no role, then would come articles 5 (right to liberty) and 6 (right to a fair trial), the margin of appreciation only playing a residual role in restrictions imposed on these articles, then we would find articles 8-11 (respectively the right to private and family life, freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association) for which the margin plays an important albeit variable role, and at the bottom of the hierarchy would lie other articles, in respect of which the margin usually deploys its full effect, such as articles 1 or 3 of the first additional protocol (respectively the right to property and the right to free elections).”

Moreover, the ECtHR will exercise greater restraint if the state has to strike a balance between two Convention rights than when it is confronted with a limitation aimed at protecting other (legitimate) interests (with a presumably lower intrinsic importance). As to the latter, the ECtHR considered in Chassagnou that such a limitation must be supported by “indisputable imperatives”. Second, the more serious an interference, the better the reasons must be in support of the measure creating the interference. The margin of appreciation in this regard increases, however, when there is a lack of a European consensus, in particular as regards morals. One could view this as a form of normative epistemic discretion. Third, the Court takes into account the reliability of the premises that form the basis of the balancing assessment: if the right interfered with is weightier or the interference particularly severe, the level of factual support for the (degree of) fulfilment of the aim by the limiting measure must be larger. On the other hand, if the aim pursued weighs particularly heavy, less factual support may be required.

The foregoing can be illustrated by the Grand Chamber’s approach in Hatton, concerning the alleged interference with the right to respect for private and family life in article 8 ECHR of people living in the vicinity of the London Heathrow by the increase in noise coming from night time flights to and from that airport. In

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14 Ducoulombier 2015, p. 45-46 (footnote omitted).
15 Decision of the European Court of Human Rights (Grand Chamber), in the case of Chassagnou and Others v. France, Appl. No. 25088/94, 28331/95 and 28443/95, of 29 April 1999, para 113.
17 E.g, Decision of the European Court of Human Rights (Plenary), in the case of Handyside v. United Kingdom, Appl. No. 5493/72 of 7 December 1976, para 48 and Decision of the European Court of Human Rights (Plenary), in the case of Rees v. The United Kingdom, Appl. No. 9532/81, of 17 October 1986, para 37 et seq.
determining whether the state had struck a fair balance the Court referred, *inter alia*,
to the fact that comparatively few people were affected by the flight noise, that the
value of homes had not been negatively affected, that measures available to reduce
noise had been taken and that it was reasonable to assume that the night flights at
least to some extent contributed to the economy, despite a lack of “specific indications
about the economic cost of eliminating specific night flights”. It concluded that the
state had not exceeded its margin of appreciation. In other words, because it did not
regard the interference with article 8 as particularly serious, the lack of concrete
evidence supporting the measure was not inhibitory.19

Nevertheless, the margin of appreciation granted to states in a particular case is
notoriously difficult to predict.20 Moreover, it is important to note that the margin of
appreciation afforded to states under the ECHR is different from the margin of
discretion national courts may want to grant to legislatures, either when applying
(national implementations of) Convention rights, national constitutional rights, or
even EU Charter rights. This is because the ECtHR is in a position that demands the
exercise of both greater deference and restraint. It must exercise greater deference
because it evaluates not just legislative action, but also factual and normative
determinations by national courts. It must exercise greater restraint because the
ECtHR (must) take(s) account of cultural differences in a way national courts do not.21
National courts show deference and restraint in order to respect the separation of
powers, while the ECtHR does so based on the subsidiary nature of (the protection
offered by) the Convention.22

On a final note, one could ask the question whether the concept of “just balance” or
“fair balance” is impacted by any substantive notions of justice or fairness. I would
argue that in the context of the assessment of the permissibility of a measure limiting

19 Decision of the European Court of Human Rights (Grand Chamber), in the case of *Hatton and Others v. The United Kingdom*, Appl. no. 36022/97, of 8 July 2003, paras 125-129. The Chamber, by contrast, had found an interference based on both a lack of government research into the suitability and necessity of the measure (Decision of the European Court of Human Rights (Third Section) of 2 October 2001, para 102 et seq.). The Grand Chamber rejected this overture to a requirement of strict necessity by considering that “[w]hilst the State is required to give due consideration to the particular interests, ... it must in principle be left a choice between different ways and means of meeting this obligation’ and that ‘[t]he Court’s supervisory function ... is limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance’ (para 123).

20 For that reason, Brauch 2004 argued that the margin of appreciation should be abandoned altogether. Others, such as Gerards 2010 have instead proposed a more structured approach to the margin of appreciation.

21 Cf. Rivers 2006, p. 175, pointing out it would be “inappropriate for the courts of a single political community” to take cultural diversity into account when reviewing legislation applicable to that community.

the exercise or enjoyment of a right (i.e. review balancing\textsuperscript{23}), the qualification that the balance struck must be “just” or “fair” is intended to reflect that it must not exceed the margin of appreciation left to the state. That is, the measure must not be disproportionate. Whether the state could have struck a “fairer balance” is not in question.\textsuperscript{24} A balance is not just or fair, if the gains to the public interest or a right are incapable of outweighing the harm done to a Convention right. Of course, considerations concerning justice and fairness do indirectly play a role in assessing the intrinsic importance and degree of fulfilment of a particular right or interest. As noted, this assessment is not morally neutral.\textsuperscript{25}

4.2.2 The European Court of Human Rights and copyright

82. Proportionality and copyright. Proportionality analysis of state interference with a Convention right in the copyright context has occurred in relation to two rights, the right to property (art. 1P1) and the right to freedom of expression (art. 10 ECHR). In some other cases, the applicant’s claim was rejected \textit{ratione materiae or personae}, that is to say before any proportionality analysis was conducted.\textsuperscript{26} These cases are discussed, where relevant, elsewhere.\textsuperscript{27}

83. The right to property. In Bălan the applicant complained about the violation of his right to property as a result of a government decision to use, without consent, a photographic work in which he owned the copyright on official national identity cards and the subsequent national courts’ refusal to enforce his copyright. The ECtHR considered that there was an interference with the applicant’s right because the “unauthorised use was expressly prohibited by law and was opposed by the applicant”.\textsuperscript{28} The Court concluded that this interference was not proportionate because it was “apparent that this socially important aim could have been reached in...

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\textsuperscript{23} Cf., supra, § 57.
\textsuperscript{24} Decision of the European Court of Human Rights (Grand Chamber), in the case of S.H. and Others v. Austria, Appl. No. 57813/00, of 3 November 2011, para 106.
\textsuperscript{25} Cf., supra, § 72.
\textsuperscript{26} For a recent overview of the ECtHR’s case law with regard to intellectual property law in general, see Geiger & Izyumenko 2018.
\textsuperscript{27} See in particular, infra, § 126 for a discussion of Dima v. Romania. Not discussed are Decision of the European Court of Human Rights (Third Section), in the case of SC EDITURA ORIZONTURI SRL v. Romania, Appl. No. 15872/03, of 13 May 2008 (violation of art. 6 ECHR and 1P1 as a result of the reversal by the Romanian courts of a final and irreversible decision of the Romanian supreme court) and Decision of the European Court of Human Rights (Second Section), in the case of AEPI S.A. (société hellénique pour la protection des droits d'auteur) v. Greece, Appl. No. 48679/99, of 3 May 2001, in which the ECHR rejected a complaint based on art. 1P1 for the lack of a sufficiently established claim (possession) and a complaint based on art. 10 ECHR \textit{ratione personae}. For a brief discussion of the latter decision in English, see Geiger & Izyumenko 2018, p. 41-42.
\textsuperscript{28} Decision of the European Court of Human Rights (Fourth Section), in the case of Bălan v. Moldova, Appl. No. 19247/03, of 29 January 2008, para 39.
a variety of ways not involving a breach of the applicant’s rights”.\textsuperscript{29} In essence, the Court thus rejects the measure for a lack of any rational connection between the public interest in issuing identity cards and the need to use the applicant’s photo to achieve that purpose. The means were wholly unsuitable to achieve the aims pursued.

\textit{SIA AKKA/LAA} concerned an alleged interference with the right to property of a collective rights management organization (CRMO), representing about two thousand Latvian and two million international authors. The CRMO had been unable to reach an agreement on the terms of new licensing agreements with a number of broadcasters for the broadcast of musical works, after the previous licensing agreements had expired. It started legal proceedings against several broadcasters which continued to broadcast works, requesting damages and injunctions. In two different sets of proceedings the Latvian courts did not grant an injunction, but instead imposed on the parties an obligation to enter into a licensing agreement on terms determined by the court. After considering that there was an interference with a possession and that this interference was prescribed by law, the ECtHR considered the questions whether the interference pursued a legitimate aim and struck a fair balance. As to the former (existence of a legitimate aim), the Court recalled that the State’s margin of appreciation “in implementing social and economic policies” is wide when it comes defining the “general interest” in limiting the right to property, meaning it will only intervene if the State’s “judgement is manifestly without reasonable foundation”.\textsuperscript{30} The Court emphasized that the national courts had attempted to strike a balance between the right of the CRMO to be remunerated for the use of the works and the interest of the defendants to obtain a license. Taking into account that the fact that the lack of an existing licensing agreement covering both those interests “was to a certain extent due to the [CRMO’s] limited efficiency in carrying out negotiations with the defendants”, the ECtHR concluded that the national courts’ “judgement on the question of public interest could not be considered as manifestly without reasonable foundation”.\textsuperscript{31} As to the proportionality question, the ECtHR identified what can be called a number of principled balancing rules.\textsuperscript{32} It noted that, one, the national courts gave the parties the time during the proceedings to reach an agreement themselves, two, an injunction would not be in the best interest of authors because they would not “receive the maximum benefit from the oeuvres” and, three, the obligation to enter into a licensing agreement was limited in scope and

\textsuperscript{29} Ibid., para 45.

\textsuperscript{30} Decision of the European Court of Human Rights (Fifth Section), in the case of \textit{SIA AKKA/LAA v. Latvia}, Appl. No. 562/05, of 12 July 2016, para 69.

\textsuperscript{31} Ibid., para 70.

\textsuperscript{32} Cf. supra, § 67.
time. In regard to the latter consideration, the Court added that “the authorities had minimally restricted the right of the [CRMO]”, which one can read both as an indication of necessity (pareto optimality) and as the suggestion that the Court considered there to be only a light interference with the right to property. Based on these considerations the Court concluded that the national courts had struck a fair balance between the right to property and the general interest. As for the three criteria identified by the Court, it may be presumed that if courts give “due consideration” to those criteria in future similar cases, the ECtHR will require “strong reasons” to find a violation of the right to property.

84. **Freedom of expression.** The potential interference by (the enforcement of) copyright of the right to freedom of expression has been the subject of a number of decisions by both the ECtHR and the now abolished European Commission of Human Rights. The older decisions, all from the Commission, were relatively succinct in their rejection of the applications’ claims that their right to freedom of expression had been violated.

In *De Geïllustreerde Pers* the applicant complained that its right to freedom of expression was violated as a result of the refusal of the copyright holder to permit it to use comprehensive lists of television and radio programme information in weekly magazines. The Commission argued that only the author of such information, being a “compilation of facts”, could invoke the right to freedom of expression to disseminate it. Further, the freedom of the press was not threatened because the public was deprived of any information, because that information could be obtained from a wide variety of other sources.

In *France 2* the applicant, a television broadcaster, had been held liable for copyright infringement after broadcasting images showing paintings under copyright in their entirety during a news broadcast. In this case the Commission did not have trouble finding that there was an interference with the applicant’s right to freedom of expression as a result of the judgement ordering the applicant to pay damages. Nevertheless, it again had similarly little trouble rejecting the complaint. The

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33 Decision of the European Court of Human Rights (Fifth Section), in the case of SIA AKKA/LAA v. Latvia, Appl. No. 562/05, of 12 July 2016, paras 77-79.
34 Ibid., para 79.
35 Cf. for instance, by analogy, Decision of the European Court of Human Rights (Grand Chamber), in the case of Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, Appl. No. 931/13, of 27 June 2017, para 198.
36 European Commission of Human Rights, in the case of *De Geïllustreerde Pers v. the Netherlands*, Appl. No. 5178/71 of 6 July 1976, paras 82-86. Cf. also European Commission of Human Rights, in the case of *Televisier v. the Netherlands*, Appl. No. 2690/65 of 3 October 1968, which concerned an issue similar to that in *De Geïllustreerde Pers N.V.*, but which was settled before the Commission decided on the merits.
limitation was prescribed by (copyright) law, and “necessary in a democratic society”, as prescribed by article 10(2) ECHR. The Commission noted it was not the task of the Convention institutions to regulate conflicts that are liable to arise between the right to freedom of information and the rights of authors. It did consider that it must ascertain whether there is a proportional link between the limitation imposed and the interests protected by that limitation. Such a link existed, according to the Commission, simply because the limitation, existing in a judgement ordering the payment of damages, was the result of the neglect to pay a royalty fee prior to the broadcast in the first place. It was “reasonable” for the national courts, to take account of the interest of authors.37

In Aral, the last of these cases decided by the Commission, the original authors of a cartoon claimed a violation of their right to freedom of expression, after the Turkish national courts had held that they were no longer permitted to publish certain copyright protected cartoons as a result of a contractual relationship with a previous employer. The Commission was concise in its rejection, considering that the national courts had explicitly noted that the original authors were not prohibited from drawing the same cartoon characters in different “subjects and stories” and that any limitation of the right to freedom of expression was necessary in a democratic society in order to protect the rights of “one of the parties to a contract”.38

Although one can recognize some elements of proportionality and balancing in the Commission’s decisions, one can hardly call its analysis comprehensive. In particular its consideration in De Geïllustreerde Pers that copyright did not limit the right to freedom of expression of the applicant and the lack of engagement with the limitation imposed by copyright itself in France 2, which created an obligation to seek authorization and pay a royalty fee in the first place, are difficult to understand. The Commission’s approach reflects a position of utmost deference and restraint in evaluating limitations imposed on freedom of expression by national copyright legislation and enforcement measures.

In two 2013 decisions, Ashby Donald and Neij and Sunde Kolmisoppi (also: The Pirate Bay) the ECtHR took a different, more structured approach to the issue. Ashby

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38 European Commission of Human Rights (Second Chamber), in the case of Aral, Tekin and Aral v. Turkey, Appl. No. 24563/94 of 14 January 1998. The applicants in Aral also argued a violation of art. 1P1. This was rejected for a lack of an interference with the right to property, as the transfer of the copyright was considered a result of (the interpretation of) domestic law and a lawful contract, which finding of the national courts was neither arbitrary nor unreasonable.
Donald concerned the criminal conviction by the French courts for copyright infringement of three fashion photographers who had taken photographs at various fashion shows and disseminated these online, on the website of a fashion magazine. Together the defendants were ordered to pay fines and damages of almost 300,000 euro. Neij and Sunde Kolmisoppi also concerned a criminal conviction, specifically of two persons behind the file-sharing website The Pirate Bay for their involvement in the furtherance of copyright infringement by the users of that website. They were sentenced to ten and eight months in prison, respectively, and held jointly liable for damages of approximately five million euro.

Although the ECtHR rejected both complaints, the one in Neij and Sunde Kolmisoppi specifically as manifestly ill-founded, some elements of its assessment in both cases, which share great similarity, stand out. The Court started by emphasizing the broad scope of the right to freedom of expression, noting that it covers both the right to impart information and the right of the public to receive it, that it applies to both the content of the information and to the way it is transmitted or received, and that it also covers commercial expressions. Therefore, there had been an interference with that right in both cases.\footnote{Cf. Decision of the European Court of Human Rights (Fifth Section), in the case of Ashby Donald and Others v. France, Appl. No. 36769/08, of 10 January 2013, para 34 and Decision of the European Court of Human Rights (Fifth Section), in the case of Neij and Sunde Kolmisoppi v. Sweden, Appl. No. 40397/12, of 19 February 2013, Section A.} The Court had no trouble finding that the interferences were both provided by (copyright) law and pursued a legitimate purpose in protecting the rights of others.\footnote{Cf. Decision of the European Court of Human Rights (Fifth Section), in the case of Ashby Donald and Others v. France, Appl. No. 36769/08, of 10 January 2013, para 36 and Decision of the European Court of Human Rights (Fifth Section), in the case of Neij and Sunde Kolmisoppi v. Sweden, Appl. No. 40397/12, of 19 February 2013, Sections B & C.} Decisive was thus whether the interferences were necessary in a democratic society, in essence a question of proportionality. In Ashby Donald the Court started with some general considerations. It recalled that the right to freedom of expression is one of the essential foundations of a democratic society and that, as such, exceptions to that right should be interpreted restrictively, but it also emphasized the subsidiary role of the Court, considering it must not take the place of the national courts, but that it must ascertain whether the interference is proportionate to the aim pursued and whether the justification for the interference is supported by relevant and sufficient reasons.\footnote{Decision of the European Court of Human Rights (Fifth Section), in the case of Ashby Donald and Others v. France, Appl. No. 36769/08, of 10 January 2013, para 38.} It emphasized, in both decisions, that the states’ margin of appreciation was particularly wide, due to a combination of two factors. First, the motives of the applicants were predominantly commercial, explicitly adding in Ashby Donald that the expression did not touch on a debate of the general...
interest and in Neij and Sunde Kolmisoppi that the “[safeguards afforded to the] type of information at issue ... cannot reach the same level as that afforded to political expression and debate”. 42 Second, the national authorities had to balance two competing interests which were both protected by the Convention (the right to freedom of expression versus the right to property). 43 In Ashby Donald the Court concluded that the French courts had not exceeded its margin of appreciation by giving precedence to the rights of authors in light of the consideration that the defendants had knowingly ignored the system of press accreditation put in place to control the dissemination of the copyright protected works to the public, regardless whether that system was completely effective. 44 In Neij and Sunde Kolmisoppi the Court considered that there existed “weighty reasons” for the restriction of the applicants’ right to freedom of expression and that the Swedish courts had “advanced relevant and sufficient reasons to consider that the applicants’ activities within the commercially run [The Pirate Bay] amounted to criminal conduct requiring appropriate punishment”, reiterating that the conviction concerned only copyright protected works. 45 Finally, in both cases the ECtHR considered that the sanctions imposed were not such that they could be considered disproportionate. In Ashby Donald it concluded that the applicants had adduced no support for the claim that the sanctions left them financially strangled and that the French judge had duly motivated its decision. In Neij and Sunde Kolmisoppi it emphasized that the applicants had taken no action to prevent specific infringements of particular works on their website when it was brought to their attention by the right holders.

A further decision by the ECtHR concerning the conflict between the enforcement of copyright and the right to freedom of expression followed in Akdeniz. This case concerned a blocking order by a Turkish court, requiring Internet access providers to block access to the websites myspace.com and last.fm because these websites disseminated copyright protected musical works without authorization. A private user of these websites initiated proceedings opposing the blocking order, arguing that they

42 In Decision of the European Court of Human Rights (Fifth Section), in the case of Neij and Sunde Kolmisoppi v. Sweden, Appl. No. 40397/12, of 19 February 2013 the Court did not explicitly address the commercial nature of expression when considering the scope of the margin of appreciation, but when it reviewed the decision-making process by the national authorities it emphasized that The Pirate Bay was “commercially run”.
43 Decision of the European Court of Human Rights (Fifth Section), in the case of Ashby Donald and Others v. France, Appl. No. 36769/08, of 10 January 2013, paras 39-41 and Decision of the European Court of Human Rights (Fifth Section), in the case of Neij and Sunde Kolmisoppi v. Sweden, Appl. No. 40397/12, of 19 February 2013, Section D.
44 Decision of the European Court of Human Rights (Fifth Section), in the case of Ashby Donald and Others v. France, Appl. No. 36769/08, of 10 January 2013, para 42.
45 Decision of the European Court of Human Rights (Fifth Section), in the case of Neij and Sunde Kolmisoppi v. Sweden, Appl. No. 40397/12, of 19 February 2013, Section D.
constituted a disproportionate interference with his right to receive information. After having his claim rejected for lack of standing by the national courts he applied to the ECtHR. Similarly, the ECtHR rejected his application, considering that the applicant was not a victim within the meaning of article 34 ECHR. Nevertheless, in support of this finding the Court adduced some arguments resembling an assessment of the intensity of the interference with the applicant’s right. The Court considered that the applicant can still access musical works in multiple ways that do not involve copyright infringement, that the blocking order does not prevent him from engaging in a debate of general interest and that his use of the website was only passive.46 Considering the potential (lack) of collateral effects of the blocking order, the large margin of appreciation of states to regulate freedom of expression in the commercial domain, and the fact that the national courts had to balance conflicting interests both protected by Convention rights, the Court then concluded, somewhat enigmatically, that it was “not convinced that the present affair raises an important question of the general interest”.47 It appears that in this case the Court considered the interference with the applicant’s right to be so light that it did not rise to the level of conferring upon the applicant the status of “victim” of a violation of a Convention right.

85. **Preliminary evaluation.** Before turning to the CJEU and its use of proportionality analysis, some remarks are in order regarding the ECtHR’s approach to the conflict between copyright and the right to freedom of expression. After initial hesitation by the Commission, the Court now clearly recognizes that limitations imposed on freedom of expression by or as a result of copyright legislation must be “necessary in a democratic society” and thus proportionate. Nevertheless, in Ashby Donald and Neij and Sunde Kolmisoppi no independent evaluation of either the intensity of the interference with the right to freedom of expression or the degree of fulfilment of the right to property took place. In this regard the Court largely deferred to the national courts. In fact, the hypothetical degree of interference with the right to property that would have been created had the national courts ruled in favour of freedom of expression, was left practically unaddressed. As noted, the Court, in Neij, simply stated that there were “weighty reasons” for limiting the right to freedom of expression. As to the degree of interference with the right to freedom of expression, the Court exclusively focused on the commercial nature of the expression and the lack of contribution to a debate of the general interest, which in turn also added to the large degree of deference and restraint. This implies the Court did not consider the degree of interference particularly severe. As a result, given the apparent low intensity

47 Ibid., para 28 (my translation).
of review, the conclusion that the balance struck by the national courts was within their margin of appreciation was hardly surprising.

The (low) intensity of review exercised by the Court in *Ashby Donald* has been criticized. Geiger & Izyumenko have argued in this regard that the Court concluded too easily that fashion shows are not a matter of general interest.\(^{48}\) Had it held differently, it might not have focused so much on the commercial character of the expression, and instead have exercised the greater scrutiny typically associated for expression touching on matters of general interest.\(^{49}\) In fact, the Court said as much by referring to its decision in *Hertel*, in which it did exactly that. In that decision, a commercial expression was nonetheless considered a participation in a debate of general interest and the limitation was scrutinized accordingly.\(^{50}\) In a similar vein, Geiger & Izyumenko suggest that the fact that the press performs an essential function in democratic society and that the display of photographs was indispensable to effective reporting on fashion shows, ought to have led greater scrutiny.\(^{51}\) Although there is some truth to the latter argument that the form of the expression could (and perhaps: should) have played a greater role in *Ashby Donald*, whether fashion shows are a matter of general interest – and thus whether the press performed its essential function in this regard, seems a matter of reasonable disagreement.

Of course, the margin of appreciation, insofar as it is determined by reference to the nature of the information, should not just be based on a simple dichotomous distinction between issues of general interest and other issues. Ultimately, the margin of appreciation should be a function of the degree of interference and the intrinsic importance of the right, of which the nature of information is only one indicative factor. The question is what it will take for the ECtHR to find a violation of the right to freedom of expression where copyright is duly enforced in accordance with national law. It can be presumed that the scrutiny exercised by the Court will be more intense where it does conclude that a particular expression touches on a debate of general interest, in particular if it concerns political expression.\(^{52}\) In such cases, the ECtHR

\(^{48}\) Geiger & Izyumenko 2014, p. 325-327.


\(^{50}\) See the reference in Decision of the European Court of Human Rights (Fifth Section), in the case of *Ashby Donald and Others v. France*, Appl. No. 36769/08, of 10 January 2013, para 39 to Decision of the European Court of Human Rights, in the case of *Hertel v. Switzerland*, Appl. no. 25181/94, of 25 Augustus 1998, para 47..

\(^{51}\) Geiger & Izyumenko 2014, p. 335 *et seq*.

\(^{52}\) Cf. Decision of the European Court of Human Rights (Grand Chamber), in the case of *Mouvement Raëlien Suisse v. Switzerland*, Appl. No. 16354/06, of 13 July 2012, para 61, holding that “[t]he breadth of such a margin of appreciation varies depending on a number of factors, among which the type of speech at issue is of particular importance. Whilst there is little scope under Article 10 § 2 of the Convention for restrictions on political speech, a wider margin of appreciation is generally available to the Contracting States when regulating...
may already consider that article 10 is violated simply when the national court does not consider the potential limitation of the right to freedom of expression or whether or not the expression under consideration contributed to a debate on a matter of general interest or general concern, meaning the national court has not applied standards which are “in conformity with the principles embodied in Article 10”.53 However, it appears that such formalistic shortcomings will not necessarily cause a violation of article 10 ECHR in cases where there is a cumulation of conflicting rights (e.g. the right to property vs. the right to freedom of expression) and commercial expression, leading to a particular wide margin of appreciation.54 The latter implies that national courts need not explicitly consider whether enforcement of copyright is really “necessary in a democratic society” in cases of commercial use.55 As noted, this may be different when national courts deal with political expression or even artistic expression.

4.3 Proportionality and balancing at the Court of Justice

86. Outline. This section examines the use of proportionality analysis and balancing by the CJEU, both in general and in the context of copyright. It starts with a general overview of the introduction of the principle of proportionality into EU law, its application in the course of review of both EU and Member State action, and its use as a tool to adjudicate on disputes involving fundamental rights (Section 4.2). It then views how the Court has used both proportionality analysis and the concept of fair balance in copyright cases against this general background (Section 4.3.2).

4.3.1 General observations

87. Historical development. Although article 5(1) TEU now prescribes that “[t]he use of Union competences is governed by the principles of subsidiarity and proportionality”,56 the evaluation of EU action (and that of its predecessors) through freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Similarly, States have a broad margin of appreciation in the regulation of speech in commercial matters or advertising” (references omitted).

53 E.g. Decision of the European Court of Human Rights (First Section), in the case of OOO Ipress and Others v. Russia, Appl. No. 33501/04, 38608/04, 35258/05 and 35618/05, of 22 January 2013, para 79 and Decision of the European Court of Human Rights (First Section), in the case of Reznik v. Russia, Appl. No. 4977/05, of 4 April 2013, para 51.
55 I therefore disagree with van Deursen & Snijders 2018, p. 1090 when they write that “the ECtHR [in Ashby Donald] holds that the finding of an interference with Art. 10 ECHR inevitably requires a balancing test” insofar as they mean to assert that the ECtHR requires national courts to explicitly consider the conformity with the ECHR every time art. 10 will be interfered with as a result of the enforcement of copyright.
56 An early explicit allusion to proportionality was made in the Treaty of Maastricht, which added an article 3b to the Treaty establishing the European Economic Community that stated
the application of the principle of proportionality far predates its explicit inclusion in the treaties. The (at the time) Community courts considered that the proportionality principle, together with other principles of administrative law, was implied in the Treaties. The Court of Justice alluded to proportionality as early as 1956, and applied the concept for the first time in 1971. Almost five decades later, its use of the principle is well-developed. It consists of the three sub-tests of suitability, necessity and proportionality stricto sensu elaborated above. Although the CJEU does not always cleanly distinguish between the different tests, a paradigmatic example in which it does make the distinction can be found in the judgement of the Grand Chamber in Sky Österreich. At issue was the question whether the obligation for exclusive licensees of broadcasting rights to authorise other broadcasters to make short news reports on events of high interest to the public, without a right to compensation beyond the costs to provide access, infringed the freedom to conduct a business. This obligation was created by the Audiovisual Media Services Directive in the interest of the right to freedom to receive information and media plurality. Having found an interference with the freedom to conduct a business, the Court considered first that the interference was appropriate (suitable). Second, it considered the measure necessary. A less restrictive measure, consisting in a remuneration beyond the mere cost of access, would not achieve the pursued objective as effectively. Finally, the Court considered the proportionality in the narrow sense, pointing out that “the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the

that “[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty”.

58 In Case 8/55 Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community ECLI:EU:C:1956:11, ECR 1954-1965, p. 290 the Court noted that the “reaction by the high authority to illegal action on the part of the undertakings must be in proportion to the scale of that action”.
60 Cf. Tridimas 2006, p. 139, who points out that the Court typically does not distinguish between necessity and proportionality in the strict sense and Sauter 2013, p. 9-10, who similarly argues that the Court often conflates the necessity and proportionality stricto sensu tests.
61 Other examples are Case C-101/12 Schaible ECLI:EU:C:2013:661, paras 36-74 and Case C-547/14 Philip Morris Brands and Others ECLI:EU:C:2016:325, paras 154-161.
62 Case C-283/11 Sky Österreich ECLI:EU:C:2013:28. Similarly, the Court was asked whether the obligation violated the right to property. As regards this complaint the Court ruled that there was no interference with the right to begin with, so there was no need for any proportionality assessment. On this, see also, infra, § 128.
63 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.
64 Case C-283/11 Sky Österreich ECLI:EU:C:2013:28, para 53.
65 Ibid. paras 54-57. Cf. on this, supra, § 60.
requirements of the protection of those different rights and freedoms and a fair balance between them”. It held that, given the importance of safeguarding the right to freedom of information and media pluralism and the precise limits imposed on the freedom to conduct a business, the rule in the Directive was not disproportionate.

88. **EU action.** When used as a general principle to determine the lawfulness of EU action, the application of the principle of proportionality is characterized by considerable degree of deference and restraint on the part of the CJEU. In policy matters involving “political, economic and social choices and in which [the EU legislature] is called upon to undertake complex assessments and evaluations”, the Court will typically merely ascertain whether the choice made was not “manifestly disproportionate” given the information available at the time. This reluctance to second guess policy choices made by the EU legislature is fuelled in part because the future effects of a measure cannot always be accurately foreseen. In that same vein, when a measure seeks to protect an interest or rights that is regarded as being of particular importance such as the need to protect human health, the CJEU will not readily interfere. Thus, in spite uncertainty surrounding certain health risks of particular substances, “protective measures may be taken without having to wait until the reality and seriousness of those risks become fully apparent”.

89. **Member State action.** Member State action, often in the form of a restriction of one of the four freedoms, is typically the subject of stricter scrutiny than EU action. The reason for this is the particular status of the four freedoms as “central to the very idea of market integration that lies at the economic heart of the EU”. Nevertheless, the standard typically formulated by the CJEU when reviewing restrictions of the four freedoms is that the Member State action “should be appropriate for ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective”. This implies a large degree of

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66 Ibid., para 60.

67 Ibid., paras 58-66.

68 E.g. Case C-58/08 Vodafone and Others ECLI:EU:C:2010:321, para 52. Sometimes the standard formulated by the CJEU is that of “manifestly inappropriate” instead of “manifestly disproportionate”, but nevertheless applied as an overall standard specifying the intensity of review, even though “appropriate” is also used by the Court as a synonym for “suitability”. For an example of terminological consistency, see Case C-547/14 Philip Morris Brands and Others ECLI:EU:C:2016:325, paras 170-190 in which the Court uses the standard of “manifestly inappropriate”, “go manifestly beyond what is necessary to achieve the objective sought”, and “manifestly disproportionate” in the context of suitability, necessity and proportionality stricto sensu, respectively.


70 Case C-157/14 Neptune Distribution ECLI:EU:C:2015:823, para 81.

71 Craig & de Búrca 2015, p. 557.

72 E.g. Case C-201/15 AGET Iraklis ECLI:EU:C:2016:972, para 61.
restraint, as in that it suggest that any “necessary” measure is deemed acceptable, regardless whether it imposes great burdens against only minimal gains. However, in these cases the CJEU often appears to work with a broader concept of “necessity”, in that it will also consider alternatives which may be less effective at achieving the aim pursued.\footnote{Cf. Case 40/82 Commission v the United Kingdom ECLI:EU:C:1984:33, para 14 et seq. in which the Court rejected as disproportionate a blanket import ban on poultry to prevent the spreading of a contagious disease, noting the low risk of infection and the fact that the UK was free to carry out controls and to introduce import restrictions “where necessary”, although such measures surely would be less effective at achieving the aim pursued. Similarly, in Case C-112/00 Schmidberger ECLI:EU:C:2003:333 the Court considered that Austria was permitted to authorize a demonstration on a motorway that limited intra-Community trade since the aim could not have been achieved through less restrictive measures, noting that national authorities “must balance that interest [in free movement] with that of the demonstrators” (para 90).}

Comparing such alternatives is, more properly conceived, an issue of balancing.\footnote{Cf., supra, § 60-61.} Often the CJEU will thus combine questions of necessity and proportionality \textit{stricto sensu}.\footnote{Cf. Craig 2004, p. 342 and Harbo 2015, p. 38. On some occasions the Court has explicitly formulated a proportionality \textit{stricto sensu} test. See, e.g., Case C-169/91 Council of the City of Stoke-on-Trent and Norwich City Council v. B & Q Plc ECLI:EU:C:1992:519, paras 15-16.} Certain factors will cause the CJEU to be more lenient in its review, again all relatable to those identified in Section 3.2. For instance, the CJEU has permitted Member State measures interfering with free movement to safeguard that Member State’s own values regardless whether that value is accorded the same weight and scope in the rest of the EU.\footnote{E.g. Case C-36/02 Omega ECLI:EU:C:2004:614. This is a form of cultural discretion. Cf., supra, Chapter 3, n 41 and accompanying text.} In other instances, the CJEU has granted Member States discretion to protect human health in light of the empirical uncertainty concerning the risks of a particular substance, or to determine the appropriate level of protection or fulfilment of another fundamental value, such as press diversity or freedom of expression.\footnote{Cf. Case C-368/95 Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Bauer Verlag ECLI:EU:C:1997:325 in which the Court considered restrictions placed on the free movement of goods by a rule of Austrian law that prohibited the sale of periodicals containing prize puzzle competitions in order to protect press diversity, limiting its assessment to formulating certain conditions to help determine whether less restrictive means were available and Case C-112/00 Schmidberger ECLI:EU:C:2003:333 in which the Court considered that the Austrian national authorities were “reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider” that the aim of a demonstration on a public motorway intended to draw attention to the environmental and public health effects of the increased traffic on that motorway could not be achieved by a measure “less restrictive of intra-Community trade” (para 93).}

\textbf{90. Interferences with fundamental rights.} At the same time, scrutiny of both EU and Member State action will also be more intense when it interferes with a fundamental right, although it does appear that the intensity of review is variable, depending on (the intrinsic importance of) the right involved. The Union courts
carried out human rights scrutiny long before the adoption of the EU Charter, the EU’s catalogue of fundamental rights. The CJEU, in its seminal judgment in *Internationale Handelsgesellschaft*, recognized fundamental rights as general principles of law, drawing inspiration from the constitutional traditions common to the Member States.\(^{78}\) In *Nold*, the Court famously added that also international conventions “on which the Member states have collaborated” such as the ECHR “can supply guidelines which should be followed within the framework of Community law”.\(^{79}\) Eventually it was in the context of fundamental rights adjudication that the Court started to make more frequent use of the concept of “fair balance” in the context of proportionality analysis.\(^{80}\) Highlighting the “migration” of this concept from Strasbourg to Luxembourg, the CJEU in *Connolly v Commission* emphasized the “special significance” of the ECHR before eventually considering that it had to decide “whether a fair balance has been struck”, in this case between the right to freedom of expression of a Commission official and the Commission’s interest that its officials observe their “duties and responsibilities”.\(^{81}\) It should be noted that although the Court often refers to the concept of “fair balance” when discussing proportionality in the narrow sense, in other instances it has referred to fair balance as the overarching concept containing all the elements of proportionality.\(^{82}\) This supports a tentative conclusion that for the CJEU, perhaps more so than for the ECtHR, the concept of fair balance refers to a three-tiered proportionality analysis, at least insofar as that concept is used to ascertain compliance of certain measures with fundamental rights. One should be again hesitant to assume that this concept constitutes a reference to any substantive conception of fairness. Just like the ECtHR started by referring to a concept of “just” balance,\(^{83}\) the CJEU has also been inconsistent in its use of terminology. In addition to fair balance it has also referred to a “proper balance” or

\(^{78}\) Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114, para 4. See also the judgement in Case 29/69 *Stauder v Stadt Uhm* ECLI:EU:C:1969:57, para 7, delivered one year prior, in which the CJEU already alluded to “the fundamental human rights enshrined in the general principles of Community law and protected by the Court”.


\(^{80}\) Earlier, the concept was predominantly referred to in competition cases, in the context of determining the appropriateness of measures imposed on private undertakings. Cf. e.g. the series of judgements in the cases T-1/89 through T-15/89.


\(^{82}\) E.g. Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* ECLI:EU:C:2010:662, para 77 et seq., in which the Court discussed necessity in the context of balancing. Similarly, see Case C-544/10 *Deutsches Weintor* ECLI:EU:C:2012:526, para 47 et seq., Case C-157/14 *Neptune Distribution* ECLI:EU:C:2015:823, para 75 et seq., Case C-547/14 *Philip Morris Brands and Others* ECLI:EU:C:2016:325, para 154 et seq.

\(^{83}\) Cf., supra, § 80
sometimes simply to a “balance”. All these terms seem to refer to the same concept: a balancing (or: proportionality) exercise intended to ensure a proper reconciliation of different interests in which the detriment caused to one principle may not outweigh the gains to another.

Before the (variable) intensity of review of measures that restrict fundamental rights is explored in more detail, it is important to point to article 52(1) of the EU Charter, which contains a general limitation clause in respect of all Charter rights. This article provides that:

“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

This provision thus positivizes the proportionality requirement. It is important to note that article 52 not only requires that limitations be proportionate, but also that they respect the “essence” of rights. The Explanations to the Charter unfortunately do not offer any explanation concerning the concept of essence, other than noting that it is based on the case law of the CJEU where it considered that restrictions on fundamental rights may not constitute a “disproportionate and unreasonable interference undermining the very substance of those rights”. The concept appears to be reflective of the idea that rights have an independently identifiable inviolable core, which may never be intruded upon. The utility of the idea that this essence can be independently identified and applied outside of and prior to proportionality analysis is heavily contested. Critics of this so-called absolute theory contend that it is incapable of identifying the content of this core without reference to other rights and interests, meaning it ultimately has little independent value. Insofar as one can identify positions of which one can say with great conviction that they can never be intruded upon, this can just as well be conceptualized in terms of proportionality, meaning that certain interferences are so serious that it is difficult to conceive of countervailing reasons capable of outweighing it. It is also questionable whether the

\[84\] See Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke and Eifert ECLI:EU:C:2010:662, paras 79 and 83, Case C-283/11 Sky Österreich ECLI:EU:C:2013:28, para 59 and Case C-101/12 Schaible ECLI:EU:C:2013:661, para 60.

\[85\] Some charter rights, such as those in art. 8 (protection of personal data) and art. 17 (right to property) also include their own limitation clauses. The relationship between these and the one in art. 52 is unclear. See, to that effect, Stothers & Oliver 2017, p. 536.

\[86\] Explanations relating to the Charter of Fundamental Rights (OJ 2007/C 303/02), explanation on article 52.

CJEU initially used the concept as an independent requirement, as will illustrated below.

In *Nold* the CJEU noted that the right to property and the freedom to “choose and practice their trade or profession” may be limited if “justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched”.88 In *Hauer* it reformulated this test, holding that a limitation of the right to property may not constitute “a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property”.89 Formulated this way, the “very substance” is connected to the principle of proportionality. It is likely that the notion of “very substance” was intended as laying a standard of review, reflecting a large degree of restraint. In this regard it is noteworthy that it was the German government, in its written observations, which suggested this standard, noted that an interference with right to property should not constitute an “excessive burden”.90 This is evidenced by the subsequent examination of the Court, which considered that the measure at issue did not create an “undue limitation upon the exercise of the right to property” and therefore concluded that it did “not infringe the substance of the right to property”.91 Also in subsequent cases, the Court appeared to treat the “very substance” requirement as part of the proportionality analysis.92 In some other, later cases, however, the Court started to separate a “very substance” test from the proportionality analysis.93 It may have done so in an attempt to differentiate between, on the one hand, the assessment of the interference with the right to property and the freedom to pursue a trade and, on the other hand, the general application of proportionality analysis as it had developed it prior to its starting to evaluate the validity of Community action in light of fundamental rights. Although, as suggested above, this distinction between an “inviolable core” and proportionality analysis could be viewed as unnecessary, fact is that in its more recent case law has held on to this approach.94 The CJEU’s use of

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89 Case 44/79 Hauer v Land Rheinland-Pfalz ECLI:EU:C:1979:290, para 23.
90 Cf. also Oliver & Stothers 2017, p. 539, n 128, who have compared the formulation of the Court to the “individual and excessive burden” standard applied by the ECtHR.
94 Notably, in Case C-426/11 Alemo-Herron and Others ECLI:EU:C:2013:521 the CJEU rejected a particular interpretation of EU law as violating the essence of the freedom to conduct a business.
concept of essence will be criticized later, after having discussed its use by the CJEU in cases concerning copyright.95

When reviewing measures interfering with the freedom to pursue a trade or profession/conduct a business and the right to property (now laid down in articles 15 and 16, and article 17 EU Charter, respectively), on which the case law of the Court is relatively abundant, the CJEU grants the EU legislature a reasonably wide margin of discretion. One can distinguish two strategies by which it achieves this. The first is limiting its analysis to the question whether the essence or (very) substance of a right is impaired by the measure.96 The second strategy is emphasizing the broad discretion the legislature necessarily has when it must make political, economic or social choices, and limiting the enquiry to whether the action is based on manifest error or is manifestly disproportionate.97 Nevertheless, despite this broad margin of discretion, when it comes to limitations of the freedom to conduct a business and the right to property, the Court has at times been willing to conduct a thorough analysis of all three prongs of proportionality,98 although it has been reluctant to find an infringement of those rights.99

It is questionable whether the consideration that a certain matter involves choices of a political, economic or social nature should indiscriminately lead to a broad discretion, for instance by applying the manifestly disproportionate standard, irrespective of the right concerned. After all, almost every EU action will involve such choices. Nevertheless, in *Neptune Distribution*, concerning a prohibition of certain health claims on the labelling and advertising of natural mineral waters, the Court considered the proportionality of the interference with the freedom to conduct a business and the right to freedom of expression together and concluded simultaneously in regard to both that the legislature had a broad discretion in the matter at hand.100 However, in *Philip Morris*, decided one year later, which concerned a largely similar issue, that is a ban of certain information on the labelling and

95 See, *infra*, Section 4.4.1.
96 Cf., recently, Case C-544/10 *Deutsches Weintor* ECLI:EU:C:2012:526, paras 54-59.
97 Case C-101/12 *Schaible* ECLI:EU:C:2013:661, para 47 *et seq.* and Case C-547/14 *Philip Morris Brands and Others* ECLI:EU:C:2016:325, para 166 *et seq.* Cf. also Case C-157/14 *Neptune Distribution* ECLI:EU:C:2015:823, para 76, in which the Court similarly stresses the broad discretion of the EU legislature, but makes no express reference to the manifestly disproportionate standard.
98 See, in particular, Case C-283/11 *Sky Österreich* ECLI:EU:C:2013:28, paras 53-66, Case C-101/12 *Schaible* ECLI:EU:C:2013:661, paras 52-75 and Case C-547/14 *Philip Morris Brands and Others* ECLI:EU:C:2016:325, paras 170-190.
99 Tridimas 2006, p. 315 notes that “[w]here Community legislation seriously threatens such rights the Court prefers to address the claim on different grounds such as breach of the principle of equality ... or of the protection of legitimate expectations”.
100 Case C-157/14 *Neptune Distribution* ECLI:EU:C:2015:823, para 76.
packaging of tobacco products, the CJEU separated both enquiries. In regard to the right to freedom of expression the Court noted that “the discretion enjoyed by the EU legislature, in determining the balance to be struck, varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question”. The Court nevertheless appeared to take an understandably deferential position, pointing to both the fact that the expression was of a commercial nature and (implicitly) the importance of health protection, the aim pursued. The Court carried out a separate proportionality assessment of the “negative economic consequences for certain operators”, eschewing an explicit reference to the freedom to conduct a business, and applied the more exacting manifestly inappropriate/disproportionate standard. Appropriately, the CJEU has conducted a more intensive proportionality analysis in several cases (principally) concerning an interference with the right to respect for private and family life and to protection of personal data. Applying a strict necessity test, the Court has struck down various EU measures for breach of those rights. Interestingly, in two of those decisions, Schecke and Schrems, the Court found that the EU institutions had acted outside the margins imposed by proportionality on procedural grounds. In Schecke the Council and Commission had failed to consider the existence of less restrictive but equally effective measures, even though such measures could be envisaged, and therefore not properly balanced the aim pursued against the rights affected. In Schrems, the Commission had adopted a Decision designating the protection of personal data in the USA as adequate without considering whether the interference with the right to protection of personal data was limited to the extent strictly necessary, leading the Court to invalidate the Decision. In Digital Rights Ireland, which concerned the validity of Directive 2006/24/EC, the CJEU specified, in general, that the degree of the legislature’s discretion depends

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101 Case C-547/14 Philip Morris Brands and Others ECLI:EU:C:2016:325, para 155.
102 Ibid., paras 155-156.
103 Ibid., para 185.
104 Ibid., para 166. The AG did explicitly assess the interference with the freedom to conduct a business, as an interference with “negative economic consequences for certain operators” can be construed without difficulty (Opinion of AG Kokott in Case Case C-547/14 Philip Morris Brands and Others ECLI:EU:C:2015:853, paras 148 et seq.).
106 Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke and Eifert ECLI:EU:C:2010:662, paras 78-86.
107 Case C-362/14 Maximillian Schrems v Data Protection Commissioner ECLI:EU:C:2015:650, in particular paras 96-97.
on precisely those factors identified in Section 3.2, such as, “in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference”. In the case at hand, the importance of the rights concerned and the “extent and seriousness of the interference” meant the “legislature’s discretion is reduced, with the result that review of that discretion should be strict”.

91. **CJEU review in short.** In reviewing EU and Member State Action the CJEU thus requires the measures adopted to be suitable, necessary and proportionate *stricto sensu*, in addition to respecting the essence of rights. The intensity of review applied is flexible. The Court has mitigated its traditional approach of granting the EU legislature a (very) broad discretion in political, economic and social matters in cases concerning fundamental rights limitations, although the intensity of its review depends on the particular rights affected. The Court appears more lenient in regard to limitations of the right to property and the freedom to conduct a business. This implies it assigns a lower intrinsic importance to those rights than for instance to the right to freedom of expression and, particularly, the right to respect for private and family life. It has nevertheless been suggested that the Court may apply the more lenient manifestly disproportionate standard if the EU legislature has to strike a balance between two fundamental rights. This argument is largely based on the more relaxed scrutiny the Court appeared to apply in *Sky Österreich*, discussed above, and in *Schaible*, concerning certain obligations imposed on farmers in an attempt to curb foot-and-mouth disease and in which the CJEU applied the manifestly erroneous standard. Another explanation for the more relaxed review, may be the fact that those cases concerned limitations of the freedom to conduct a business in the interest of values with an arguably greater intrinsic importance, that is the right to freedom of information and press plurality (*Sky Österreich*) and the protection of health (*Schaible*).

92. **Optimization balancing and horizontal effect.** Finally, it must be recalled that balancing in the first place is a process geared towards establishing a priority between different principles. It is principally in the context of review of norms established by others that a court must typically exercise deference and restraint when considering if the balance struck is appropriate. On occasion, balancing is also used, not in the context of review of legislative measures, but in order to (further) define the

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109 Joined Cases C-293/12 and C-594/12 Digital Rights Ireland ECLI:EU:C:2014:238, para 47.
111 Anagnostaras 2014, p. 117 et seq.
112 See, supra, § 87.
113 Case C-101/12 *Schaible* ECLI:EU:C:2013:661, para 47 et seq.
rights and obligations flowing from EU law. Where this balancing concerns fundamental rights, this is typically a form of indirect (horizontal) effect: norms that govern the rights and obligations of individuals are interpreted in light of the fundamental rights obligations of the state (or, as the case may be, the EU). The most notorious occurrence within the context of EU law outside copyright law is probably the CJEU’s judgement in Google Spain, in which the Court held that “a fair balance should be sought” between the legitimate interest of Internet users in having access to personal data of others processed by a search engine and the right to respect for private and family life in determining whether the subject of that personal data can require its removal from the list of search results displayed. In such cases the question is thus not one of review, but which right (or in this case “legitimate interest”) has priority over the other. It must be noted that this decision has not been free from criticism. Specifically, the Court has been criticized for essentially devolving the task of striking a fair balance onto operators of search engines, creating a substantial risk of private censorship. It was in part for this reason, and the associated interference with the right to freedom of information, that AG Jääskinen had concluded that no general right to “be forgotten” ought to be recognized. It is this type of balancing in the context of the interpretation of private law norms which plays an important role in the CJEU’s copyright case law, as will be demonstrated in the following section.

4.3.2 The CJEU, copyright, and proportionality

93. Outline. The use by the CJEU of proportionality analysis and balancing (rhetoric) in copyright cases has a long history. It was first used in cases in which the Court was asked whether, in the circumstances in question, copyright conflicted with the provisions on free movement of goods and services. This led the CJEU to define the essential characteristics of copyright, the so-called “specific

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114 Case C-131/12 Google Spain and Google ECLI:EU:C:2014:317, para 81.
116 Opinion of AG Jääskinen in Case C-131/12 Google Spain and Google ECLI:EU:C:2013:424, para 133.
117 In several cases, starting with Case 56/64 Consten and Grundig v Commission of the EEC ECLI:EU:C:1966:41, the Court of Justice stressed that the Community law did not affect the existence of intellectual property rights, but only their exercise. This distinction is not altogether helpful because, as pointed out by many commentators, a right that cannot be exercised is in effect non-existent. See concerning this discussion Tritton et al. 2008, paras 7-011-012. Since the existence versus exercise doctrine is in essence an expression of the “same conceptual approach”, having “no independent significance for resolving specific questions of delimitation”, as the specific subject-matter doctrine, to be discussed in the following subsection, I will not separately discuss the existence versus exercise doctrine (Opinion of AG Gulmann in Joined Cases C-241/91 P and C-242/91 P Magill ECLI:EU:C:1994:210, para 31, also pointing out that “an exercise of rights that falls within the specific subject-matter of an intellectual property right will relate to its existence”).
subject-matter”, that as a rule justify an incursion on free movement.118 This case law will be explored first (Section 4.3.2.1). Next, I discuss the two cases in which the CJEU was asked to determine the validity of two acts of EU legislation in light of, inter alia, an alleged fundamental rights violation (Section 4.3.2.2) and the use of balancing in the course of interpretation of the acquis communautaire on copyright (Section 4.3.2.3).

4.3.2.1 Free movement and copyright

94. Specific subject-matter. Article 34 TFEU (formerly art. 30 EEC and art. 28 EC) prohibits quantitative restrictions on imports and measures having equivalent effect. Similarly, art. 56 TFEU (formerly art. 59 EEC and art. 49 EC) prohibits inter-Member State restrictions on services. Nevertheless, article 36 TFEU (formerly art. 36 EEC and art. 30 EC), which can be mutatis mutandis applied to the freedom to provide services, specifies that the provisions on free movement of goods “shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of ... the protection of industrial and commercial property”.

Against this background, as well as that of competition law, the CJEU has defined what it calls the “specific subject-matter” of copyright (and intellectual property rights more generally). In its 1972 decision Deutsche Grammophon v Metro it held that limitations on the free movement on grounds of “protection of industrial and commercial property” are allowed “to the extent to which they are justified for the purpose of safeguarding rights which constitute the specific subject-matter [of that property]”.119 In subsequent decisions the Court further clarified the content of this specific subject-matter.

In Phil Collins the Court gave a general characterization of the specific subject-matter. It noted that the specific subject-matter “is to ensure the protection of the moral and economic rights of their holders”. As to moral rights the specific subject-matter included “in particular, [the right] to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honour or reputation”. The economic component of the specific subject-matter of copyright “confer[s] the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties”.120 This “right to exploit

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118 Cf. Husovec 2016, p. 266.
119 Case 78/70 Deutsche Grammophon v Metro ECLI:EU:C:1971:59, para 11.
120 Joined Cases C-92/92 and C-326/92 Phil Collins and Others ECLI:EU:C:1993:847, para 20. In Case 158/86 Warner Brothers v Christiansen ECLI:EU:C:1988:242 prior to its decision in Phil Collins, the Court had put it as follows: “[L]iterary and artistic works may be the subject of commercial exploitation, whether by way of public performance or of the reproduction and marketing of the recordings made of them ... The two essential rights of the author, namely
commercially” has been concretized on other occasions, both prior and subsequent to Phil Collins.

95. **Exhaustion.** First, the specific subject-matter includes the right to consent to the first marketing of a copy of the work (or other copyright protected subject-matter) within the Union (and the EC and EEC before it). This right was delimited in a number of cases. From Deutsche Grammophon itself it follows that the right to object to the importation or sale of a copy of the work is not part of the specific subject-matter if that copy has been placed on the market by the right holder or with their consent in another Member State. In Musik-Vertrieb Membran v GEMA it was clarified that this is not even the case if the copies are placed on the market in a Member State with a *de facto* fixed royalty rate that is lower than the royalty rate in the Member State of importation. By contrast, where those copies are lawfully placed on the market without their consent in the Member State of exportation, due to the term of protection already having expired in that Member State, the exercise of the exclusive distribution right in the Member State of importation does not violate the provisions on the free movement of goods. However, in Merck v Stephar, a patent case, the Court found that where the product has been placed on the market by or with consent of the patent holder in a Member State where patent protection was not available, the patent holder cannot object to the subsequent importation of those products into another Member State. Consent thus became the nucleus around which the right to distribute copies was erected, forming part of the specific subject-matter.

96. **Limits to exhaustion.** Second, the specific subject-matter comprises the right to authorize independent and repeatable acts of exploitation of the work, which by their nature give rise to an individual stream of revenue that cannot be (at least partly) appropriated by the right holder when they place an individual copy on the market. This rule can be inferred from a number of cases. In Coditel I the Court was confronted with the question whether the right holder (or their assignee) could prevent the retransmission of a film broadcast in another Member State. The Court

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121 Strictly speaking, this applies to Iceland, Liechtenstein and Norway, members of the European Economic Area.
122 Or the embodiment of subject-matter protected by a related right.
123 Case 78/70 Deutsche Grammophon v Metro ECLI:EU:C:1971:59.
125 Case 341/87 EMI Electrola v Patricia ECLI:EU:C:1989:30.
127 It must be noted that this case law developed before harmonization of the distribution right. On the latter see, supra, § 44-46.
pointed to the particular nature of the work, a film, which is typically exploited by repeat performances. The Court emphasized that under such circumstances the right holder has a legitimate interest in obtaining a remuneration based on the actual or probable number of performances, the right to require a fee for every single performance being a part of the “essential function” of copyright. Moreover, in *Basset v SACEM* the Court stated that charging a fee for the performance of a work is allowed, even if it restricts the free movement of goods “inasmuch as it must be regarded as a normal exploitation of copyright and does not constitute a means of arbitrary discrimination or a disguised restriction”.

Similar considerations featured in decisions concerning the rental right. In *Warner Brothers v Christiansen* the Court was confronted with the question whether a right holder could enforce their exclusive rental right against a commercial establishment that rented out copies that had been imported from a different Member State that did not grant authors such a right. The Court pointed to the emergence of the rental market as a new form of exploitation of works, which reached a distinct public and constitutes an important source of potential revenue, and noted that the right holder would be unable to be remunerated for every hiring out of their works if their control extended only to the initial sale. The granting of a rental right was therefore “clearly justified on grounds of the protection of industrial and commercial property”.

97. **A definition of the specific subject-matter.** The essential (economic) element of the specific subject-matter can be defined as follows: the right to authorize independent and repeatable acts of exploitation, whether the initial marketing of a copy or another independent and repeatable act of exploitation, allowing the author

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128 Case 62/79 Coditel v Ciné Vog ECLI:EU:C:1980:84, para 13-14. See also Case 395/87 Tournier ECLI:EU:C:1989:319, paras 12-13. In his Opinion in Joined Cases C-241/91 P and C-242/91 P Magill ECLI:EU:C:1994:210 AG Gulmann pointed out that the term “essential function” used by the Court in *Coditel I* is an unfortunate one and that, in fact, the right described by the Court is instead part of the specific subject-matter of copyright, the essential function of copyright being to reward creative effort (by way of granting the rights that constitute the specific subject-matter (para 60, n 47).


or related right holder to obtain a reward in the form of remuneration. This explains the difference in treatment between the resale of a copy placed on the market by the right holder and, for instance, the exploitation by way of renting out that same copy. By selling that copy the right holder has already obtained a remuneration for that copy. A resale by the initial buyer is not an independent and repeatable act of exploitation that the right holder should be able to control. Of course, the copy can be sold multiple times, but only once by each buyer. Moreover, the value of these downstream sales can already be incorporated into the original price. Arguably this is different with regard to rental due to its repetitive nature and the fact that only a small number of copies placed on the market will be intended for rental. Effective contractual restrictions imposed upon the buyer also seem illusory, since this would not prevent a buyer who purchases on the second-hand market from renting out their copy, making effective price discrimination and ensuring remuneration for every repeated act of exploitation impossible.

131 The ultimate foundation of the specific subject-matter is to ensure a reward for creative effort. Although this has not been said with so many words by the Court in relation to copyright, it has been emphasized time and again by the Court in connection with the specific subject-matter of patents. See, e.g., Merck v Case 187/80 Merck v Stephar and Exler ECLI:EU:C:1981:180, para 10: “That right of first placing a product on the market enables the inventor, by allowing him a monopoly in exploiting his product, to obtain the reward for his creative effort without, however, guaranteeing that he will obtain such a reward in all circumstances.” As stated by AG Gulmann in his Opinion in Joined Cases C-241/91 P and C-242/91 P Magill ECLI:EU:C:1994:210, para 71, n 49: “[T]here is no reason for treating copyright differently in this respect.” See also the decisions by the Court of First Instance in the Magill case: Case T-69/89 RTE v Commission ECLI:EU:T:1991:39, para 71 and Case T-76/89 ITP v Commission ECLI:EU:T:1991:41, para 56.

132 It must be pointed out that, in particular in its early case law, much of the references by the Court to the nature of (commercial) exploitation were made in the context of the question whether copyright was covered by the concept “commercial and industrial property” in article 36 EEC (later art. 30 EC and art. 36 TFEU). See, Joined Cases 55 and 57/80 Musik-Vertrieb Membran v GEMA ECLI:EU:C:1981:10, para 12; Case 402/85 Basset v SACEM ECLI:EU:C:1987:197, para 11; Case 341/87 EMI Electrola v Patricia ECLI:EU:C:1989:30, para 7 and Joined Cases C-92/92 and C-326/92 Phil Collins and Others ECLI:EU:C:1993:847, para 21. However, in other cases, notably in Case C-61/97 FDV v Laserdisken ECLI:EU:C:1998:422, para 17 and in Case C-200/96 Metronome Musik v Music Point Hokamp ECLI:EU:C:1998:172, para 18, both relating to the rental right, the Court made more overt references to the fact that the specific subject-matter of copyright covers the right to control “other acts of exploitation of the protected work, such as rental, which are of a different nature from sale or any other lawful act of distribution” and which could not be rendered lawful by the mere “release into circulation of a picture and sound recording”.


134 Of course, the right holder could require its contractual parties to impose similar obligations on the buyers in the secondary market. However, compared to the grant of an exclusive right this would unnecessarily raise transaction costs as well as weaken the enforcement position of right holders in cases in which the contractual chain of imposing the obligation is broken. See, contra, the Opinion of AG Mancini in Case 158/86 Warner Brothers v Christiansen ECLI:EU:C:1988:31, para 7, who had argued that a national rental right could not be invoked against an establishment renting out copies imported from a different Member State where
In two more recent judgements the CJEU has further clarified that a right holder is only entitled to appropriate remuneration, meaning it “must be reasonable in relation to the economic value of the service provided”. Thus, legislation prohibiting the import, sale and use of decoding devices giving access to an encrypted broadcast from another Member State that includes protected subject-matter was deemed contrary to the freedom to provide services. It would allow the right holder to obtain remuneration beyond the remuneration obtained when licensing their content to the broadcaster, considering that when licensing its content the right holder can take account of the actual and potential number of viewers also in other Member States. Similarly, in Usedsoft the Court rejected the argument that the exhaustion of the distribution right concerning software should be limited to sale on a tangible medium. Doing so would enable the right holder to obtain an additional remuneration on the occasion of every resale, even though the first sale allowed the right holder to obtain an appropriate remuneration, and moreover allow the right holder to partition markets. This again underlines why a right to control rental is and a right to control resale is not part of the specific subject-matter.

There are a few decisions that are not fully consistent with an approach that views the nature of copyright as a right enabling the author to obtain a remuneration as a reward for their creative efforts. Firstly, this principle was arguably misapplied in Merck v Stephar, where the Court held that the right holder cannot prevent resale after having marketed a copy in a Member State where protection for the subject-matter in question was not granted. Under such circumstances, protection not being available, the price of a copy can be expected to approach marginal cost, meaning the right holder will not be in a position to obtain a reward in the form of remuneration above marginal cost. Secondly, in Laserdisken, which will be further discussed in the following section, the Court rejected the possibility for Member States to maintain a system of international exhaustion. Confronted with arguments that a rule excluding the possibility of international exhaustion constituted an unjustified restriction on the right to freedom of information, the Court merely held that “the

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they had been put on the market by the right holder and pointed to the possibility of “inserting appropriate clauses into the contract of sale”.

136 Ibid., paras 110-116.
138 Admittedly, this was a patent case, but that decision equally took as a starting point that the grant of a patent is intended to allow the inventor to obtain a reward (see supra, n 131).
139 See similarly Tritton et al. 2008, para 7-018-019. In his Opinion in Case C-267/95 Merck v Primecrown ECLI:EU:C:1996:228, para 106 et seq. AG Fennelly tried to persuade to reconsider its ruling in Merck v Stephar for similar reasons, but to no avail (see Case C-267/95 Merck v Primecrown ECLI:EU:C:1996:468).
alleged restriction on the freedom to receive information is justified in the light of the need to protect intellectual property rights". The Court did not consider that the right holder will typically have been able to receive a reward also in case of sale outside the territory of the European Economic Area. This of course highlights the fact that the specific subject-matter has been circumscribed in the context of the free movement of goods within the Community/Union.

98. **Specific subject-matter and proportionality.** What constitutes the specific subject-matter of copyright in essence concerns a question with regard to the balance between the rights of right holders and the free movement of goods and services. Nevertheless, one is hard-pressed to find an explicit reference to proportionality, let alone a comprehensive proportionality analysis, in the CJEU’s case law on the specific subject-matter. In general, it can be observed that the Court’s assessment concerning the rights that constitute the specific subject-matter has been notoriously meagre, defining the specific subject-matter on a case by case basis rather than comprehensively, without a profound analysis of the nature and function of copyright.

The definition of the specific subject-matter can be reconstructed in terms of proportionality. First, permitting control over a certain use must both be suitable and necessary to enable the author to obtain a reward, which can be considered as the legitimate purpose pursued. Second, that reward must be appropriate, that is the degree of fulfilment of the purpose of rewarding the author must not be disproportionate *stricto sensu* to the detriment caused to the functioning of the internal market. The latter is most clearly illustrated by decisions such as FAPL and Usedsoft, discussed in the previous paragraph.

Finally, it is important to recognize that the concept of specific subject-matter is not an entirely autonomous concept of Community/Union law in the sense that the Court can be said to have defined it independent of national copyright law. Instead it can

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140 Case C-479/04 Laserdisken ECLI:EU:C:2006:549, para 65.
141 Mylly 2015, p. 111. Cf. also Case 270/80 Polydor v Harlequin ECLI:EU:C:1982:43, in which the Court held that the copyright holder could enforce the copyright in a Member State against the importation and marketing of phonograms placed on the market with their consent in Portugal, at time not yet a member of the Community, even though the cooperation agreement between the European Economic Community and Portugal in force at the time included provisions prohibiting restrictions on free movement similar to those in the Treaty.
143 Cf. Gotzen 1985, p. 471 *et seq*.
144 Cf. Joined Cases C-92/92 and C-326/92 Phil Collins and Others ECLI:EU:C:1993:847, para 20: “The specific subject-matter of those rights, as governed by national legislation, is to ensure the protection of the moral and economic rights of their holders” (emphasis added).
be characterized as "an expression of the Court of Justice’s view of the essential aim pursued by the national copyright laws". It balances the aims pursued by (initially national) copyright legislation with the aims of the Treaties. However, the Court’s determination must necessarily have a certain independent character. That is to say, the aims pursued by national copyright legislation can only function as a starting point for what must be an independent evaluation of the legitimacy of those aims and determination of the rights that are suitable, necessary and proportional to achieve them. After all, in this respect the task of the Court has been to determine the conformity of certain measures with a norm of Community/Union law. If it were solely up to national law to specify the “specific subject-matter”, national law could itself determine its own conformity with the higher norms of EU law. This cannot be the case, since it would permit Member States to independently determine the content of the law that binds them. Accordingly, in Warner Brothers, in which the Court considered the exclusive rental right to be within the specific subject-matter, the conclusion was intimately linked to the consideration that without such a right, right holders could not be guaranteed a remuneration reflecting the number of occasions on which the work is rented out. One might argue that the Court did not intend to evaluate the validity of that aim (to guarantee that remuneration) but merely intended to ascertain whether the aim pursued was formally related to “the protection of industrial and commercial property pursuant to article 36 [EEC]”. However, as just stated, the conclusion that the rental right formed part of the specific subject-matter can only be based on independent evaluation of the underlying aim, which justifies the inclusion of the rental right in the specific subject-matter.

4.3.2.2 Proportionality review of EU copyright legislation

99. Metronome & Laserdisken. The previous section concluded with the observation that the definition of the specific subject-matter can be viewed as the

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147 Cf. Rivers 2006, p. 191, noting with regard to the “reasonableness-conception” of ECHR rights, rejected by the ECtHR, that it does not ask whether a measure “is actually proportionate, but whether a reasonable decision-taker might think that it is”, and that it therefore proceduralizes “Convention rights, making them merely mandatory considerations in the process of decision-taking, and denying their nature as substantive outcome-related rights”. It would mean that “[p]ublic bodies would have the power to determine the law intended to bind them.”
148 Case 158/86 Warner Brothers v Christiansen ECLI:EU:C:1988:242 and supra, n 130 and accompanying text.
149 Ibid., para 16.
result of a proportionality analysis.\textsuperscript{150} I argued that this analysis must necessarily proceed from an independent understanding of the aim pursued by copyright and the proportionality of the measures chosen to achieve it. Nevertheless, one can discern, in a case like \textit{Warner Brothers}, a certain reluctance of the CJEU to question whether exclusivity is really the most appropriate way of striking a balance. This restraint is even more evident in two cases in which the Court was asked about the validity of two acts of copyright legislation by the EU in light of a possible violation of fundamental rights.

Like in \textit{Warner Brothers}, discussed in the previous section, the rental right was at the centre of the dispute in \textit{Metronome Musik v Hokamp}.\textsuperscript{151} At issue was the introduction in the Rental and Lending Rights Directive of a harmonized exclusive rental right for authors and certain related right holders. The Court was asked about the compatibility of that right with “Community law, in particular Community fundamental rights”.\textsuperscript{152} The CJEU first considered the alleged incompatibility of the exclusive rental right with the principle of exhaustion as rooted in free movement of goods. It basically repeated its findings in \textit{Warner Brothers}, noting that a distinction between the effects of rental and sale was justified because it concerns different modes of exploitation. Second, the Court considered whether the exclusive rental right placed an undue restriction on the freedom to pursue a trade or profession. It started with its \textit{Hauer}-formula,\textsuperscript{153} considering that the freedom in question may be subject to restrictions in the general interest provided that they do not constitute a disproportionate and intolerable interference, impairing the very substance of that right. The Court discerned a variety of objectives pursued by the exclusive rental right: harmonization, guaranteeing an appropriate income for authors and performers and the amortization of investments by phonogram and film producers, and the protection of “industrial and commercial property”.\textsuperscript{154} In particular in regard to the right granted to phonogram producers, the Court went on to consider that, in light of the “extremely high and risky investments” an exclusive rental right “certainly constitutes the most effective form of protection” to guarantee remuneration and the continued creation of new works.\textsuperscript{155} After pointing out the existence of an international obligation to implement an exclusive rental right in respect of phonogram producers, the Court concluded that the restriction on the freedom to pursue a trade or profession was

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\textsuperscript{150} Cf., similarly, Gormley 1985, p 126.
\textsuperscript{151} Case C-200/96 \textit{Metronome Musik v Music Point Hokamp} ECLI:EU:C:1998:172.
\textsuperscript{152} \textit{Ibid.}, para 10.
\textsuperscript{153} See, \textit{supra}, n 89 and accompanying text.
\textsuperscript{154} Case C-200/96 \textit{Metronome Musik v Music Point Hokamp} ECLI:EU:C:1998:172, paras 22-23.
\textsuperscript{155} \textit{Ibid.}, para 24.
\end{footnotesize}
disproportionate nor intolerable, because a less restrictive measure appeared unavailable, adding that businesses were free to negotiate a license for rental.\textsuperscript{156}

Almost a decade later, in \textit{Laserdisken}, the Court had to determine whether the InfoSoc Directive precluded Member States from maintaining a system of international exhaustion and, if so, whether that proscription violated any higher norm of Community law.\textsuperscript{157} The Court concluded, first, that it followed from the wording, context and purpose of the provision that Member States were indeed no longer allowed to maintain a system of international exhaustion. Second, it rejected a host of arguments disputing the validity of the directive. Of particular relevance in the present context is the Court’s assessment of the alleged violation of the right to freedom of expression and infringement of the principle of proportionality by the Community’s choice for regional exhaustion.\textsuperscript{158} The Court first discussed the alleged violation of the principle of proportionality, separate from the inquiry into the alleged violation of the right to freedom of expression. The Court emphasized that differences between the Member States as to the rule of exhaustion are “likely to affect the smooth functioning of the internal market”.\textsuperscript{159} It added that the protection of copyright is important to ensure creativity and guarantee a reward and return on investment, and to protect the dignity of authors.\textsuperscript{160} The choice for regional exhaustion was therefore, in the opinion of the Court, not disproportionate. As to the limitation of the right to receive information\textsuperscript{161} the Court simply considered that “the alleged restriction on the freedom to receive information is justified in the light of the need to protect intellectual property rights, including copyright, which form part of the right to property”.\textsuperscript{162}

\textbf{100. Analysis.} \textit{Metronome} and \textit{Laserdisken} are characterized by their (in regard to the latter: extremely) skimpy proportionality analysis of the alleged fundamental rights violation. Tuomas Mylly has extensively criticized these decisions, calling the period during which the Court gave its judgements in \textit{Metronome} and \textit{Laserdisken}

\begin{itemize}
\item \textsuperscript{156} \textit{Ibid.}, paras 25-27.
\item \textsuperscript{157} Case C-479/04 \textit{Laserdisken} ECLI:EU:C:2006:549.
\item \textsuperscript{158} The Court also considered (and rejected) claims that the choice for regional exhaustion violated international agreements, adversely affected free competition, and infringed the principle of equal treatment and the obligations of the Community to “contribute to the flowering of the cultures of the Member States” and to contribute to the promotion to the right to information and education of consumers.
\item \textsuperscript{159} Case C-479/04 \textit{Laserdisken} ECLI:EU:C:2006:549, para 55.
\item \textsuperscript{160} \textit{Ibid.}, para 57.
\item \textsuperscript{161} The Court also dismissed the claim that the author’s right to freedom of expression was infringed, pointing out that the choice for regional exhaustion has no bearing on the author’s right to place a copy of their work on the market (para 63).
\item \textsuperscript{162} Case C-479/04 \textit{Laserdisken} ECLI:EU:C:2006:549, para 65.
\end{itemize}
one of “rejection and ignorance of fundamental rights”.

Mylly argues that in *Metronome* the Court failed to consider that a harmonized remuneration right could also have adequately protected the interests of right holders while being less restrictive of entrepreneurial freedom, reducing transaction costs and avoiding the risk of refusals to license. As to *Laserdisken*, he laments that the Court seemed to reject the idea of a conflict between copyright and the right to freedom of expression/information altogether by not substantiating in any manner why “the alleged restriction ... is justified in the light of the need to protect intellectual property rights”, suggesting that a full proportionality analysis could have led to the opposite conclusion because the right holder already received a reward outside the EU. Moreover, he suggests that in both cases that the Court had a very narrow perception of the potential conflicts that could arise. In *Metronome* the Court ignored the possible restriction of other fundamental rights such as the right to take part in cultural life. In *Laserdisken* the Court disregarded the threat to cultural diversity by the rule of regional exhaustion, which subjects the importation of cultural artefacts into the European Economic Area to private control. Moreover, the choice for regional exhaustion did not give right holders greater protection than a choice for international exhaustion, since it is unlikely it will lead to the negotiation of importation licenses and the right to price-discriminate is not necessarily a part of the right to property (moreover, individual authors are not likely to be the ones profiting from the ability to price-discriminate).

While I certainly agree with Mylly in the sense that the proportionality analysis in both *Metronome* and *Laserdisken* is inexcusably short, I do not necessarily agree insofar as he intends to suggest that a proper analysis would have led to a different outcome. As to the exclusive rental right, the conclusion that such a right is suitable to achieve the legitimate purpose of enabling authors and performers to obtain an

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164 Ibid., p. 109.
165 Ibid., p. 110-111.
166 Ibid., p. 109-111.
167 In a more recent publication Mylly has added that these cases are illustrative of the problem of “rights inflation”, that is the phenomenon of the increasing scope of fundamental rights, in these cases the right to property. He suggests that such an increasing scope is problematic because “challenges of intellectual property directives or regulations become systematically tamed, as their provisions implement property protection of intellectual property, a right recognized under Article 17(2) of the Charter, and could hence be used to justify the legislation in question” (Mylly 2019, p. 277). I am not sure I agree. While it is true that the CJEU in these cases appeared to treat the protection of property as the be-all and end-all, that is a problem with these particular decisions. A proper assessment would have considered the external justification of the specific measure, specifically whether the reasons for the measures in question could justify the limitations of other rights. In this regard, it probably matters little whether the legitimate purpose for the measures is found in the right to property, or instead in the public interest or even by reference to other rights.
income and of amortization of investments appears easily justified. As would be the conclusion that a remuneration right would not have reached that purpose “as effectively” as an exclusive right, meaning the measure cannot be faulted for a lack of necessity.\textsuperscript{168} Nevertheless, the alternative of a remuneration right should be re-introduced when assessing the proportionality strictly sensu of the exclusive right. In this regard, the CJEU essentially considered that the degree of fulfilment of the purpose pursued is great (“most effective”) and that the reliability of that assessment is similarly great (“certainly”). Conversely, it appeared to assess the degree of interference with the freedom to pursue a trade or profession as light by considering that rental businesses could pursue a license. It did not explicitly compare the measure to the alternative of a remuneration right, but did so implicitly by referring to the analysis of the AG in that regard, who had considered that there existed a risk that sales would decline because users could easily make their own copy by renting the work if right holders did not possess exclusive rights.\textsuperscript{169} It must be admitted that the Court and its AG easily accepted the legislature’s propositions concerning the importance of the exclusive rental right to the aim pursued, without requiring a strong evidential basis.\textsuperscript{170} Nevertheless, the outcome can be defended. The Court could have held that, considering the relative importance of the aim pursued and the low degree of interference with the freedom to pursue a trade or profession, it fell within the margin of discretion of the legislature to proceed based on the justifiable presumption that the aim pursued was best achieved by the introduction of an exclusive right. Similarly, the interference with other fundamental rights, including the right to take part in cultural life, did not seem so egregious as to the warrant a conclusion that they were limited disproportionately, although the lack of their consideration does hurt the persuasiveness of the judgement.

Similarly, the conclusion in \textit{Laserdisken} is not impossible to justify, although considerations as to the proportionality of the measure are practically completely absent. The considerations concerning the importance of the smooth functioning of the internal market and of copyright protection for the support of creative activity cannot support the conclusion as to the proportionality of the measure, because they say nothing about whether regional or international exhaustion is preferable. Nevertheless, as Oliver and Stothers note, the choice for regional exhaustion was made after extensive legislative debate.\textsuperscript{171} This choice can again be considered to fall within the discretion allowed to the legislature. In the first place, this discretion can

\textsuperscript{168} Cf., supra, n 65 and accompanying text.
\textsuperscript{169} Opinion of AG Tesauro in Case C-200/96 Metronome Musik v Music Point Hokamp ECLI:EU:C:1998:18, para 26.
\textsuperscript{170} Cf. Husovec 2016, p. 248.
\textsuperscript{171} Oliver & Stothers 2017, p. 530.
be said to increase due to the empirical uncertainty as to which alternative (regional vs. international exhaustion) ultimately increases overall welfare.\(^{172}\) Moreover, although the choice for regional exhaustion limits the right to receive information and may negatively affect cultural diversity, one could argue that the latter is far from certain and that the degree of interference with those principles is not particularly serious. In that light, the Court could grant a considerable margin of discretion to the legislature and demand good reasons to invalidate the choice it made.\(^{173}\)

4.3.2.3 The interpretation of the copyright acquis and the concept of fair balance

101. Outline. Chapter 2 concluded with the assertion that when interpreting copyright, the CJEU often appears to balance the objective of rewarding authors with competing considerations, if not explicitly then implicitly. The last decade or so has seen a greater use by the CJEU of explicit balancing terminology and proportionality analysis in its copyright case law. The CJEU emphasizes with increasing frequency the need to strike a “fair balance of rights and interests” within the context of interpretation and application of copyright law. It uses the concept of fair balance in a number of different contexts, which can be divided in the following three categories: (i) fair balance and fair compensation, (ii) fair balance and interpretation and application of copyright law, and (iii) fair balance and enforcement against intermediaries. I discuss these separately.\(^{174}\)

(i) Fair balance and fair compensation

102. Fair compensation. A first instance where the CJEU has referred to the concept of fair balance is in the context of the interpretation of articles 5(2)(a) and (b) of the InfoSoc Directive. These provisions make the introduction by the member states of an exception for certain acts of reprographic copying and for private copying conditional on the provision of “fair compensation” to the right holder. The use of the concept of fair balance in this context is of a particular nature, as it does not concern any fundamental right, nor does it concern a demarcation between rights and duties of right holders and of users. Instead, the CJEU ascertains whether the systems used by Member States to calculate fair compensation maintain a fair balance between the

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\(^{172}\) Cf., e.g., the dialogue between Malueg & Schwartz 1994 and Abbott 1998.

\(^{173}\) Cf. in this regard the Opinion of AG Sharpston in Case C-479/04 Laserdisken ECLI:EU:C:2006:292, para 71: “It seems to me that there is nothing in the present case to suggest that the choice by the Community legislator of mandatory Community exhaustion rather than optional international exhaustion was either unreasonable or disproportionate.”

\(^{174}\) Not discussed is Case C-168/09 Flos ECLI:EU:C:2011:29, para 56 et seq., concerning the proportionality of national transitional measures protecting acquired rights and legitimate expectations after the revival of copyright protection in designs that had entered the public domain in the Member State in question as a result of Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs (OJ 1998 L 289, p. 28).
persons concerned, that is whether those systems guarantee that ultimately only those persons who are in the position to make use of the reprography and private copying exceptions are liable to pay that compensation (typically indirectly by way of a levy on the copying equipment used). These decisions will not be discussed here due to the particular nature of the context in which the Court uses this concept, which is not directly related to the research question.

(ii) Fair balance and interpretation and application of copyright law

**103. Fair balance as the legislative intention.** Far more interesting for present purposes is the second context in which the CJEU has referred to the concept of fair balance of rights and interests, namely when determining the scope of exclusive rights and of limitations and exceptions. Some of these decisions have already been discussed to a greater or lesser extent in Chapter 2. It is nevertheless fruitful to discuss these decisions more systematically in order to get an idea whether the use of this concept has contributed (or is capable of contributing) to greater consistency and transparency of the process of judicial development of copyright law.

First, as a matter of principle, the Court has emphasized on several occasions that certain provisions of copyright law are intended to safeguard a fair balance of rights and interests of right holders and those of users. In *Football Association Premier League* and in *PRCA v NLA* the Court stated as much with regard to the mandatory exception for transient and incidental copying. In *Painer* the Court did so with regard to the quotation exception. By contrast, in that same decision the Court indicated that the public security exception is not intended to safeguard a fair

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175 One could conceive of this reference to fair balance as a consideration of the proportionality of the freedom to conduct a business of the various persons who make and sell copying equipment and/or the right to property of those who buy that equipment without being in the position to make use of the private copying or reprography exceptions, but the CJEU has not framed the issue in this manner.

176 See Case C-467/08 Padawan ECLI:EU:C:2010:620, para 38 et seq.; Case C-462/09 Stichting de Thuiskopie ECLI:EU:C:2011:397, para 25; Case C-521/11 Amazon.com International Sales and Others ECLI:EU:C:2013:515, paras 30 et seq.; Case C-435/12 ACI Adam and Others ECLI:EU:C:2014:254, paras 53 et seq.; Case C-463/12 Copydan Båndkopi ECLI:EU:C:2015:144, para 53; Case C-572/13 Hewlett-Packard Belgium v Reprobel ECLI:EU:C:2015:750, paras 81 et seq.; Case C-470/14 EGEDA and Others ECLI:EU:C:2016:717, para 42 et seq.


178 Case C-145/10 Painer ECLI:EU:C:2011:798, para 132.

balance between the rights and interests of right holders and freedom of the press specifically, but instead serves to ensure the protection of public security.180

In several subsequent cases the CJEU has, more generally, emphasized that the harmonization effected by the InfoSoc Directive aims to safeguard a fair balance between, on the one hand, the “interest” of authors and related rights holders in protection of their intellectual property rights guaranteed by article 17(2) EU Charter and, on the other hand, the interests and fundamental rights of users and the general interest.181 Member States, for their part, must ensure, “in transposing the exceptions and limitations referred to Article 5(2) and (3) of [the InfoSoc Directive], ... that they rely on an interpretation of the directive which allows a fair balance to be struck between the various fundamental rights protected by the European Union legal order”.182

104. Interpretation of the acquis. Of particular interest are those decisions in which the CJEU has itself relied more explicitly on the fair balance of rights and interests to choose (or in other cases: avoid) a certain interpretation of the law. Although the emphasis on the importance of striking a fair balance has the potential to lay bare the fundamental conflict of values which the CJEU often has to resolve, actual balancing or proportionality considerations are typically few and far between. This is certainly true for the early cases in which the CJEU referred to this concept.

In Painer the CJEU eventually concluded in respect of the quotation exception that from the point of view of reconciling the right to freedom of expression with the interests of the author in being able to prevent reproduction, it made no difference whether a quotation was made as part of a protected work or as part of something not protected by copyright. The InfoSoc Directive therefore does not preclude the application of the quotation exception also in the latter case.183 Similarly, in DR & TV2 Danmark, concerning the question whether the conditions in article 5(2)(d) of the InfoSoc Directive that a third party act “on behalf of” and “under the responsibility of” a broadcasting organization are cumulative or are alternative, the Court considered inter alia that an approach that considered those conditions as alternative ensures

180 Case C-145/10 Painer ECLI:EU:C:2011:798, para 114.
181 Case C-160/15 GS Media ECLI:EU:C:2016:644, para 31; Case C-469/17 Funke Medien NRW (Afghanistan Papers) ECLI:EU:C:2019:623, para 57; Case C-476/17 Pelham and Others (Metall auf Metall) ECLI:EU:C:2019:624, para 32 and Case C-516/17 Spiegel Online ECLI:EU:C:2019:625, para 42. Cf. also Case C-161/17 Renckhoff ECLI:EU:C:2018:634, para 41.
182 Case C-469/17 Funke Medien NRW (Afghanistan Papers) ECLI:EU:C:2019:623, para 53; and Case C-516/17 Spiegel Online ECLI:EU:C:2019:625, para 38.
183 Case C-145/10 Painer ECLI:EU:C:2011:798, paras 134-137.
greater freedom to conduct a business “while at the same time not adversely affecting the substance of copyright”.\textsuperscript{184}

In \textit{Ulmer} the Court held that a work is “subject to purchase or licensing terms” within the meaning of article 5(3)(n) InfoSoc Directive\textsuperscript{185} only when an actual licensing agreement in respect of that work has been concluded, and not if the right holder has merely offered to enter into such an agreement.\textsuperscript{186} The CJEU considered among other things that such an interpretation would run counter to the fair balance between the rights and interests of right holders and those of users which the exception seeks to maintain.\textsuperscript{187} The Court did not elaborate on which rights and specifically where at stake, nor why in particular the rights and interests of users outweighed those of right holders in this case. AG Jääskinen had gone slightly more into detail, indicating that the general interest objective underlying the exception, the promotion of learning and culture, required that the user be able to rely on the exception. That interest would be undermined, he suggested, if the right holder could unilaterally rule out the application of the exception by offering a license.\textsuperscript{188} Notably, both the Court and its AG left undiscussed the argument that not just any offer by the right holder should be able to preclude the applicability of the exception, but only reasonable offers.\textsuperscript{189}

By contrast to these earlier decisions, \textit{GS Media} and \textit{Renckhoff} did not concern the interpretation of a limitation or exception, but of the exclusive right of communication to the public. In \textit{GS Media} the Court concluded that placing a hyperlink to a copyright-protected work, made available on another website without proper authorization, does not constitute a communication to the public if the user has no (constructive) knowledge of the illegality.\textsuperscript{190} It did so after apparently agreeing with the argument submitted by one of the parties to the national proceedings, several Member State governments as well as the Commission, that qualifying all links to freely available, illegal content as a communication to the public would not be consistent with the

\textsuperscript{184} Case C-510/10 DR and TV2 Danmark ECLI:EU:C:2012:244, para 57. On this case, see also, supra, § 33.
\textsuperscript{185} Art. 5(3)(n) allows for a limitation or exception for “use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of [publicly accessible libraries, educational establishments or museums, or of archives] of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections”.
\textsuperscript{186} On this case, see also, supra, § 53.
\textsuperscript{187} Case C-117/13 TU Darmstadt v Eugen Ulmer ECLI:EU:C:2014:2196, para 31.
\textsuperscript{188} Opinion of AG Jääskinen in Case C-117/13 TU Darmstadt v Eugen Ulmer ECLI:EU:C:2014:1795, para 24.
\textsuperscript{189} The German Federal Supreme Court, the referring court, had considered this option in its order for reference. See German Federal Supreme Court (First Civil Senate), 20 September 2012, I ZR 69/11 – Elektronische Leseplätze, para 13 \textit{et seq}. See also, supra, Chapter 2, n 259 and accompanying text.
\textsuperscript{190} On this case, see also, supra, § 41.
“right balance”, since that would be highly restrictive of the right to freedom of expression and information. The Court added to this that the Internet is “of particular importance to freedom of expression and of information” and that hyperlinks “contribute to its sound operation as well as to the exchange of opinions and information” on the Internet.¹⁹¹ Moreover, in what seems like a further act of balancing, in order to safeguard the rights of authors, the Court added that knowledge on the part of the user must be presumed when it is acting for profit.

In Renckhoff, the CJEU concluded that “the posting on one website of a photograph which has been previously published without restriction and with the consent of the copyright holder on another website” nevertheless constitutes a communication to the public, in part because a decision otherwise “would fail to have regard to the fair balance” between the “interest” of right holders in the protection of their intellectual property, guaranteed by article 17(2) EU Charter, and the interests and fundamental rights of users, in particular the right to freedom of expression and information, and the public interest. The comparison with GS Media failed, because the independent posting of a work to a website did not contribute to the sound operation of the Internet in a similar way as hyperlinks do. The CJEU also rejected as immaterial the argument that the communication to the public in question was made on a school website as part of a student presentation and therefore supported by the right to education. In that regard the Court pointed out that such use might be covered by the optional exemption of article 5(3)(a) of the InfoSoc Directive.¹⁹²

¹⁰⁵. Three German references. The CJEU was given the opportunity to further clarify how fundamental rights guide the interpretation of rights and exemptions in three references by the German Federal Supreme Court from the summer of 2017. In all three cases the referring court asked, in fairly general terms, in which way fundamental rights are to be taken into account when determining the scope of exclusive rights and of the limitations and exceptions to those rights as harmonized by the InfoSoc Directive.¹⁹³ The CJEU, which handed down three Grand Chamber

¹⁹¹ Case C-160/15 GS Media ECLI:EU:C:2016:644, para 45.
¹⁹² Case C-161/17 Renckhoff ECLI:EU:C:2018:634, paras 40-43. On this case, see also, supra, § 42.
¹⁹³ See the second question in both Case C-469/17 Funke Medien NRW (Afghanistan Papers) ECLI:EU:C:2019:623 and Case C-516/17 Spiegel Online ECLI:EU:C:2019:624 and the sixth question in Case C-476/17 Pelham and Others (Metall auf Metall) ECLI:EU:C:2019:624. There was a minor variation in the scope of the questions. In Spiegel Online the national court limited the question to the interpretation of the limitations and exceptions in art. 5(3) InfoSoc Directive. The reference in Afghanistan Papers also asked about the impact of fundamental rights on the interpretation of the limitations on the interpretations and exceptions in art. 5(2) InfoSoc Directive. The reference in Metall auf Metall was the broadest, also asking about the interpretation of art. 2(c) InfoSoc Directive (the exclusive reproduction right for phonogram producers) and art. 9(1)(b) and art. 10(2) Rental and Lending Rights Directive (respectively containing the
judgements on 29 July 2019, reformulated this question in all three cases. In Afghanistan Papers and Spiegel Online, also addressed in § 54, it considered that the referring court, in essence, wished to know whether “a national court may depart from a restrictive interpretation of [limitations and exceptions] in favour of an interpretation which takes full account of the need to respect freedom of expression and freedom of information, enshrined in Article 11 of the Charter” (emphasis added). The CJEU answered this question in the affirmative, concluding that in striking the balance “which is incumbent on a national court” between the exclusive rights of right holders and the “rights of users” referred to in the limitations and exceptions under consideration “a national court must, having regard to all the circumstances of the case before it, rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter”.

In that vein, the CJEU itself in Afghanistan Papers and in Spiegel Online settled on a liberal interpretation of article 5(3)(c), second case, which permits a limitation or exception for use in connection with the reporting on current events. In the Afghanistan Papers proceedings, the German state is attempting to enforce the copyright in confidential military reports in order to prevent them from being communicated to the public, in this case on a newspaper website. The newspaper had published these reports on its website, as the CJEU points out, “in a structured form in conjunction with an introductory note, further links and a space for comments”. It therefore held that such use must be held to qualify as being made “in connection with ... reporting”. It reached this conclusion within the context of its more general reply as to the obligation of national courts to balance the rights of authors and of users, but did not elaborate why this interpretation strikes such a balance. Arguably this balance must be more specifically struck when ascertaining whether the use in question is “justified by the informatory purpose”, as article 5(3)(c) requires, as well as within the context of “striking the balance which is incumbent on a national court ...
between the exclusive rights ... and ... the rights of users”. In this regard a broad interpretation of what constitutes “use ... in connection with ... reporting” makes sense, because the rights and interests of authors can be adequately safeguarded by the subsequent proportionality analysis, whereas a narrow interpretation of that text would substantially limit the freedom of the media and the right to freedom of information of the public, without providing substantial additional protection to the rights of authors.

The CJEU similarly opted for a broad interpretation of both article 5(3)(c), second case and article 5(3)(d) of the InfoSoc Directive in *Spiegel Online*. These proceedings concern the publication on a newspaper website of articles written by a national politician without his authorization, in order to substantiate allegations elsewhere on that website that the politician in question has misled the public. The national court wanted to know whether national law may limit the application of the exception to cases in which it cannot be reasonably expected of the user that they seek permission. The CJEU answered this question in the negative. The CJEU emphasized, in particular, that “it is necessary ... for the information relating to [a current] event to be diffused rapidly”, that the purpose of the provision is “to contribute to the exercise of the freedom of information and the freedom of the media” and that the press should be able to inform the public “without restrictions other than those that are strictly necessary”. Arguably, the CJEU must be understood as meaning that the application of the exception may not be limited to cases in which practical considerations (e.g. lack of time) hinder the obtaining of authorization, and that the exception ought to also apply in other cases in which the use is “to the extent justified by the informatory purpose”. This entails a proportionality analysis, as admitted by the Court. In *Spiegel Online* the CJEU also concluded, with regard to the quotation exception, that an interpretation that holds that the concept of “quotations” covers quotations made by means of linking to a file which can be downloaded independently is not contrary to the fair balance which must be struck. Like the broad interpretation of article 5(3)(c), second case, in *Afghanistan Papers*, such a broad interpretation is justified because the interests of authors are sufficiently guaranteed by the

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197 Case C-469/17 *Funke Medien NRW (Afghanistan Papers)* ECLI:EU:C:2019:623, paras 75-76.
198 Cf. the similar ruling *DR & TV2 Danmark*, supra, n 184 and accompanying text.
199 Case C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, paras 71-72.
200 Ibid., para 68. The outcome of this proportionality analysis can just as well be cast in terms of reasonableness: if the use is justified by the informatory purpose, it is not reasonable to require the user to seek authorization. Following the Opinion of AG Szpunar in Case C-469/17 *Funke Medien NRW (Afghanistan Papers)* ECLI:EU:C:2018:870, paras 27-29, I defended an interpretation of art. 5(3)(c), second case, to that effect elsewhere. See Jongsma 2019, p. 11-12.
subsequent, overarching balancing exercise which must be carried out within the context of the application of that provision.202

Finally, in *Metall auf Metall* the CJEU considered the question in which way fundamental rights are to be taken into account when determining the scope of exclusive rights and of the limitations and exceptions to those rights as harmonized by the InfoSoc Directive within the context of the question whether the use in a phonogram of a sample taken from another phonogram constitutes a reproduction. The CJEU concluded that it does not if that sample is no longer recognizable. The Court’s reasoning in this regard was already discussed in § 37. It is probably the clearest occurrence of proportionality analysis: permitting a phonogram producer to invoke their exclusive reproduction right against such use would interfere with the freedom of arts, while it would not fulfil the exclusive right’s purpose of permitting that producer to realize a satisfactory return on their investment.203 Nevertheless, the precise nature of the use of proportionality is unclear. On the one hand, one could understand the Court as suggesting that such protection would not be suitable/necessary to achieve the purpose. On the other hand, the addition of the adjective “satisfactory” may imply instead that the hypothetical degree of interference created with the freedom of arts if the use was prohibited outweighed the hypothetical degree of fulfilment of the objective to guarantee a return on investment.204 The Court’s conclusion can be contrasted with that reached by AG Szpunar in his Opinion in this case. He considered that fundamental rights could not justify a departure from the wording “except in cases of gross violation of the essence of a fundamental right” and, moreover, that “it seems fair that phonogram producers should share in the revenue derived from the exploitation of works created using their phonogram”.205

106. Application by national courts. The decisions discussed in the previous paragraphs principally concerned the interpretation by the CJEU of the scope of provisions of EU law in light of their purpose to safeguard a fair balance. However, as was pointed out, it is also incumbent on Member States, including national courts, to ensure that a fair balance is struck when transposing exclusive rights and the limitations and exceptions thereto and when applying those norms in specific cases.206 The duty of a national court to ensure that the application of a particular

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202 Case C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, paras 82-83.
203 Case C-476/17 *Pelham and Others (Metall auf Metall)* ECLI:EU:C:2019:624, para 38.
204 See further, infra, § 161.
205 Opinion of AG Szpunar in Case C-476/17 *Pelham and Others (Metall auf Metall)* ECLI:EU:C:2018:1002, paras 97-98.
206 Although technically this duty has been recognized only specifically with regard to (specific provisions in) the InfoSoc Directive, there is little reason to believe that it does not exist in respect of exclusive rights and limitations and exceptions in the *acquis communautaire* generally.
exemption preserve a fair balance was more specifically outlined in the *Deckmyn* decision.

*Deckmyn* concerned the interpretation of the parody exception. The CJEU was asked about the scope of the concept of parody and whether it requires certain conditions to be fulfilled. After concluding that the concept of parody is an autonomous concept of EU law, the Court held that a parody should merely “evoke an existing work while being noticeably different from it, and ... constitute an expression of humour or mockery”. It rejected other conditions as not being required by either wording, context or the objective of the provision. As regards the latter, the Court noted once more that the exemptions in the InfoSoc Directive are intended to strike a fair balance between the rights and interests of “authors” and those of “users”. Therefore, the “application, in a particular case, of the exception for parody ... must strike a fair balance between ... the interests and rights of persons referred to in Articles 2 and 3 [of the InfoSoc Directive], and ... the freedom of expression of the user”. The parody under consideration in *Deckmyn* conveyed a discriminatory message. The Court held that “holders of rights provided for in Articles 2 and 3” of the InfoSoc Directive have “a legitimate interest in ensuring that the work protected by copyright is not associated with such a message”, to be taken into account by the national court when striking a fair balance. The Court thus made it clear that it is willing to recognize interests without a particular basis in European law, since the “legitimate interest” it recognized does not belong to just the author, which could be justified as emanating from their moral rights (even if these have been explicitly left outside the scope of harmonization), but also to any “holder of rights”.

107. **The fundamental rights defence.** Courts must thus ensure that the interpretation and application of copyright law “strikes a fair balance” and “fully adheres to fundamental rights”. The question is whether, if copyright law itself cannot be interpreted or applied in a manner that preserves a fair balance, certain uses ought to nevertheless be permitted in order to adequately safeguard the exercise of a particular fundamental right. That is, can fundamental rights act as external restrictions on the rights of authors? This question has been the subject of much debate over the last few decades. In *Afghanistan Papers* and in *Spiegel Online* the 

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208 Case C-201/13 *Deckmyn and Vrijheidsfonds* ECLI:EU:C:2014:2132, para 20.
212 See more elaborately Chapter 7.
German Federal Supreme Court appeared to ask a question to this effect, namely whether the fundamental rights of freedom of information and freedom of the media as guaranteed by the EU Charter can justify exceptions or limitations to the exclusive rights granted to authors in the InfoSoc Directive beyond the limitations and exceptions explicitly provided in article 5(2) and (3). This was relevant, because in both cases the referring court doubted whether the use in question was covered by any of the statutory exemptions.

The CJEU simply answered the referring court’s question in the negative, pointing out that permitting a Member State to introduce a limitation or exception beyond those enumerated in the InfoSoc Directive would undermine the exhaustive nature of the harmonization effected by that directive. The CJEU emphasized that that harmonization aims to strike a fair balance and pointed out that “[t]he mechanisms allowing those different rights and interests to be balanced are contained in [the InfoSoc Directive] itself”. This answer was unsurprising, given the general and broad nature of the question referred. Strictly speaking, the CJEU did not address the question whether users themselves can rely on fundamental rights directly, leaving unanswered the thorny question of whether fundamental rights can act as external constraints on copyright.

Note should be made of the Opinions given by AG Szpunar in both proceedings, who did substantively engage with the question concerning the potential external constraints placed on copyright by fundamental rights. He reached contrasting conclusions in both cases. In Afghanistan Papers, the AG considered that the enforcement of copyright interferes with the right to freedom of expression and consequently that this interference must pursue a legitimate purpose and be proportionate. In the first place, the AG considered that state enforcement does not pursue a legitimate purpose. According to the AG such a legitimate purpose can be found in neither an objective of general interest (safeguarding confidentiality could not qualify as such because copyright is not granted for that purpose), nor in the protection of the rights of others (the German state is not a beneficiary of fundamental rights protection and can therefore not invoke the right to property, nor can it rely on civil right of ownership because that would result in “the destruction of those fundamental rights”). In the alternative, the AG also argued that, even if the enforcement of copyright were considered to pursue a legitimate purpose, it is not

214 His Opinions, as well as the one in Metall auf Metall, are the subject of a more elaborate critical discussion in Jongsm 2019.
suitable to attain any of the objectives pursued by copyright. The German state’s enforcement in this case is neither aimed at the protection of moral rights, nor at economic exploitation. Finally, the AG concluded with a balancing of some sorts, pointing out that the restriction of freedom of expression would be “highly damaging” which could not be justified by the enforcement of “copyright over any document whatsoever”. The German state, therefore, should be precluded from invoking its copyright.

The highly methodical analysis pursued in Afghanistan Papers stands in sharp contrast with that in Spiegel Online, perhaps as a result of “a slightly horrified response to a full realisation of the potential consequences of the structure of reasoning employed in [Afghanistan Papers]”. The AG proceeds from the premise that, in principle, the balance as struck by the legislature must be respected and that, consequently, the protection of a fundamental right can only justify deviation from that legislatively struck balance “in the event of an infringement of the essential content of a fundamental right”. The case must be distinguished from Afghanistan Papers, according to the AG. First, the claimant is a natural person and not a state, meaning he enjoys the protection of the fundamental right to property. Second, the claimant acted completely transparently by publishing the articles on his own website meaning the newspaper could have referred to them by means of a hyperlink. Third, it should not matter that the claimant did not exploit the articles himself. The act of enforcement against a third party itself constitutes an act of exploitation. Moreover, the AG implies the author should be entitled to enforce his economic rights in order to protect his moral rights interests, including the right to change one’s beliefs. Consequently, the limitation of the right to freedom of expression could not be considered “unjustified”, as the claimant protects his own (fundamental rights) interests “within the limits of the law” and therefore does not abuse his rights. The AG thus concluded with a different standard (operation within limits of the law) than with which he started (no violation of the essence of a fundamental right).

(iii) Fair balance and enforcement against intermediaries

108. Intermediaries. Finally, the concept of fair balance has also been used extensively in the context of enforcement, notably in proceedings between right holders and Internet service providers in their capacity as intermediaries. These cases

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216 Ibid., paras 58-62.
217 Ibid., para 64.
218 Griffiths 2019, p. 47.
219 Opinion of AG Szpunar in Case C-516/17 Spiegel Online ECLI:EU:C:2019:16, para 62
220 Ibid., paras 68-79.
221 Ibid., para 80.
can be roughly divided into two categories: cases in which right holders request an injunction to obtain the identity of the person who infringed their rights and cases in which right holders request an injunction to prevent (further) infringements. Although not directly relating to the research question, they are discussed for their comparative value, in particular as they shine light on the standard of review used by the CJEU.

109. **Identity of infringers.** In *Promusicae* the CJEU was asked whether Community law allowed or even required the communication of personal data (i.e. the identities) of customers of an internet access provider to holders of intellectual property rights for the (alleged) infringement of their rights. The Court concluded that although the applicable directives did not preclude Member States from introducing an obligation to that effect, it did not require that Member States introduce such an obligation either. It was at this point that the Court introduced the concept of fair balance. It noted – somewhat enigmatically – that, even though the applicable directives did not oblige Member States to introduce an obligation to divulge personal data to right holders in order to guarantee them effective protection of their rights, in transposing those directives Member States should “rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order”. Moreover, national authorities and courts should likewise interpret the national implementations of those directives in a manner that does not violate those fundamental rights. In this case, the affected fundamental rights to be balanced, as identified by the Court, were the right to protection of property and the right to effective judicial protection on the one hand, and the right to protection of private life on the other.

The Court did not specify what the result of the fair balance assessment ought to be in the case at hand, leaving it to the discretion of the national court. In a subsequent case, the Court emphasized this discretion by sanctioning a national provision that enabled the national court to weigh the different interests involved, thus ensuring a

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222 See, supra, § 11
223 Case C-275/06 *Promusicae* ECLI:EU:C:2008:54.
225 Case C-275/06 *Promusicae* ECLI:EU:C:2008:54, para 68.
226 See also, similarly, the order in Case C-557/07 *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten* ECLI:EU:C:2009:107.
decision respectful of a fair balance in the specific circumstances of every case. In *Bonnier Audio* the Court was principally faced with the question whether Union law precluded a (particular) national provision of Swedish law that permitted an internet service provider to be ordered to divulge the identity of one of its customers to a copyright holder whose rights that customer allegedly had infringed.\(^{227}\) In other words, the Court was faced with the question as to the legality of the manner in which the Member State had availed itself of the possibility to lay down an obligation to communicate personal data as recognized by the Court in *Promusicae*.\(^{228}\) The Court emphasized the fact that the national legislation required the national court to take account of various factors, including the presence of a clear infringement, whether divulging the identity of the customer facilitated the investigation into an infringement or impairment of copyright and whether the reasons for ordering such a divulgation outweighed “the nuisance or other harm which the measure may entail for the person affected by it or for some other conflicting interest”.\(^{229}\) Since the provision of national law at issue enabled the conflicting interests to be weighed by the national court, the Court concluded that it had to be regarded as likely to maintain a fair balance.\(^{230}\)

By contrast, in *Coty Germany* the Court found fault with a provision of national law allowing banks to unconditionally invoke banking secrecy to refuse to provide a right holder with the name and address of an account holder who had allegedly infringed that person’s intellectual property rights.\(^{231}\) In other words, under no circumstances could banks be obliged to facilitate the enforcement of intellectual property by a court order requiring them to communicate the name and address of the infringing party to the right holder. The case principally concerned the relationship between article 8(1) of the Enforcement Directive, which grants right holders a right to information of sorts,\(^ {232}\) and article 8(3)(e) of the same, which specifies that article 8(1) “shall apply

\(^{227}\) Case C-461/10 *Bonnier Audio and Others* ECLI:EU:C:2012:219

\(^{228}\) The Court was asked to rule about the compatibility of the national provision with Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, which directive was not at issue in *Promusicae*. The Court, however, ruled that the Swedish legislation under consideration was not covered by the material scope of the Directive and proceeded to examine the legislation against the framework set out in *Promusicae*.

\(^{229}\) Case C-461/10 *Bonnier Audio and Others* ECLI:EU:C:2012:219, para 58.


\(^{231}\) The national proceedings concerned trademark infringement, but the question submitted to the CJEU related more generally the right to such information of any intellectual property holder under the Enforcement Directive.

\(^{232}\) Art. 8(1)(c): “Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the
without prejudice to other statutory provisions which … govern the protection of processing or personal data”. The CJEU noted that the case concerned the reconciliation of the fundamental rights to an effective remedy and to intellectual property and the right to protection of personal data, although the subsequent analysis was first and foremost focused on the requirements following from the Enforcement Directive.233 It considered, first, that article 8(1)(c) of the Enforcement Directive requires that Member States ensure that the competent judicial authority may order the provider of commercial services to an infringer to disclose information identifying that infringer.234 The provision at issue shielded banks from such an order in an unlimited manner, meaning the “right to information” provided in article 8(1) is frustrated and preventing the national court “from taking due account of the specific characteristics of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement”.235 Put otherwise, unlike in Bonnier Audio, the national court would therefore not be able to weigh the different interests involved and determine whether in the particular circumstances of the present case a disclosure of information is warranted. An “unlimited and unconditional authorization to invoke banking secrecy” is therefore “capable of seriously impairing, in the context of Article 8 of [the Enforcement Directive], the effective exercise of the fundamental right to intellectual property”.236 The Court therefore concluded that such a national provision to that effect does not fulfil the requirement to ensure a fair balance between the various affected fundamental rights, having considered earlier in the judgement that “a measure which results in serious infringement of a right protected by the Charter is to be regarded as not respecting the requirement that such a fair balance be struck between the fundamental rights which must be reconciled”.237

origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who: ... was found to be providing on a commercial scale services used in infringing activities”.

233 Case C-580/13 Coty Germany ECLI:EU:C:2015:485, para 33.
234 Ibid., para 36.
235 Ibid., paras 37-39. The Court appeared particularly inspired by recital 17 in the preamble to the Enforcement Directive, which similarly specifies: “The measures, procedures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement.”
236 Ibid., paras 39-40.
237 Ibid., para 35. Unlike Husovec 2016, p. 257 I do not believe the Court in Coty Germany substantially deviated from its course in Promusicae. According to Husovec Coty Germany overturned the Court’s holding in Promusicae that Member States are not required to lay down an obligation to communicate personal data for internet service providers (or in this case: banks). He maintains that after Coty Germany laying down such an obligation is no longer
Finally, in Bastei Lübbe the Court had to consider German legislation which permitted the owner of an Internet connection to escape liability for infringements carried out using that connection, if they could name another family member who had access to that connection, without having to specify how and when the Internet connection was used by that family member. Specifically, under the German law, as interpreted by the German Federal Supreme Court, the owner of an Internet connection used for the infringement of copyright was presumed to be the infringer, unless that connection was not sufficiently secure or knowingly made available to others and the owner explains who else had access to that connection, without having to specify the time and nature of such access if that other person concerns a family member, having regard to the right to respect for family life. The CJEU recalled that it follows from article 8(1) of the InfoSoc Directive and articles 3(1) and 3(2) of the Enforcement Directive that Member States are required to provide for appropriate remedies in respect of copyright infringements and that such measures must be “effective, proportionate and dissuasive”. It then considered that the question at issue concerns the reconciliation of conflicting fundamental rights, namely the right to an effective remedy and the right to intellectual property versus the right to respect for private and family life, and that any interpretation and application of the law must strike a fair balance between those rights. In a fairly one-sided determination, the Court held that if national legislation “has the effect of creating an obstacle to [compelling] the providing and obtaining of evidence relating to the opposing party’s family members, proving the alleged infringement of copyright and who was responsible for that infringement are rendered impossible, and, consequently, the fundamental rights to an effective remedy and to intellectual property … are seriously infringed”. Having repeated its consideration from Coty Germany that a serious infringement of a right equates to disproportionality, it concluded that “an almost

optional. I believe this is based on an incorrect reading of both decisions. The Court recognized already in Promusicae that the Enforcement Directive requires that the competent judicial authorities may order that an intermediary discloses certain information identifying an infringer to right holders. It merely added that Member States were not required to lay down an obligation to communicate personal data (see Case C-275/06 Promusicae ECLI:EU:C:2008:54, para 58). To put it differently, national courts should be in the position to give an order requiring the communication of personal data, but Member States are not required to implement a rule that a Court must give such an order every time it is requested. In Coty Germany the national provision at issue prevented national courts from giving such an order aimed at banks altogether. It was for that reason that the Court concluded that a national provision to that effect was contrary to EU law. It does not follow from the Court’s ruling that Member States are now required to lay down an obligation for an intermediary to communicate personal data of an alleged infringer to the right holder, merely that courts are in a position to give an order to that effect if the circumstances of the case at hand call for it.

238 Case C-147/17 Bastei Lübbe ECLI:EU:C:2018:841, para 37.
239 Ibid., paras 44-45.
240 Ibid., para 51.
absolute protection for the family members of the owner of an internet connection ...
cannot ... be considered to be sufficiently effective and capable of ultimately leading
to effective and dissuasive sanctions” within the meaning of article 8(1) of the InfoSoc
Directive. Nevertheless, the CJEU made two caveats, which can both be related to
the necessity of requiring the disclosure of the information sought. If right holders
have access to another effective remedy, “allowing them, in particular ... to have the
owner of the internet connection in question held liable in tort”, such an absolute
protection seems permitted “for the purposes of preventing what was regarded as an
unacceptable interference with family life”. Secondly, the CJEU pointed out that there
might exist other means for the right holder to obtain the information sought, which
it was for the referring court to determine.

110. **Prevention of further infringements.** In a number of other judgments,
the CJEU considered the lawfulness in light of fundamental rights of certain remedies
aimed at preventing (further) infringements of copyright. In *Scarlet Extended* and
*SABAM v Netlog* the question was whether a national court could order
intermediaries, an internet access provider in *Scarlet Extended* and the operator of a
social networking platform in *Netlog*, to filter all communications passing through its
network for an unlimited time and at its own expense, to check for infringing content.
First, the CJEU concluded that such a measure was not compatible with the applicable
directives. On top of that, the Court also ascertained whether that outcome would
strike a fair balance between the fundamental rights affected. The Court started by
pointing out that the right to protection of property is not “inviolable”, nor that it must
“be absolutely protected”, but that it must be balanced against the protection of other
fundamental rights. The Court primarily focused on the potential interference with
the freedom to conduct a business of the intermediary. It concluded that the proposed
filtering measure would “result in a serious infringement of the freedom” of the
intermediary to conduct its business due to its broad scope, requiring a monitoring of
all communication passing through its networks and having no limitation in time.
For that reason such an order would not respect the requirement that a fair balance

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of individuals with regard to the processing of personal data and on the free movement of such
concerning the processing of personal data and the protection of privacy in the electronic
communications sector.
244 Case C-70/10 *Scarlet Extended v SABAM* ECLI:EU:C:2011:771, paras 43-4 and Case C-
360/10 *SABAM v Netlog* ECLI:EU:C:2012:85, paras 41-2.
245 Case C-70/10 *Scarlet Extended v SABAM* ECLI:EU:C:2011:771, para 48 and Case C-360/10
*SABAM v Netlog* ECLI:EU:C:2012:85, para 46.
be struck, although the Court did not determine the impact of the lack of such a measure on the right to property, nor the proportionality of the proposed measure in light of alternative measures. These decisions form the origin of the rule, formulated more explicitly in *Coty Germany*, that a measure creating a serious infringement of a particular right is to be regarded as not respecting the requirement that a fair balance be struck. Almost as an aside the Court noted that the proposed filtering mechanism “may” also infringe the right to protect personal data and the right to receive or impart information.246 However, the Court did not clarify what the impact of those rights on the fair balance assessment was, having already held that the freedom to conduct a business was seriously infringed.247 Interestingly, the Court did mention that the freedom of information could be undermined because the filtering mechanism might not be able to distinguish between lawful and unlawful content, implying a filtering mechanism that would solely target unlawful communications would not undermine the freedom of information.

In *Telekabel* the Court was confronted with the question whether EU fundamental rights precluded a so-called outcome prohibition, that is an injunction prohibiting an internet service provider from allowing its customers to access an infringing website, but which does not specify the measures the provider must take. The Court concluded that such an injunction was not precluded. First of all, the Court held that such an injunction does not infringe the freedom to conduct a business of the provider. It did so in a rather limited assessment, merely concluding that it “such an injunction does not seem to infringe the very substance of the freedom [to conduct a business] of an internet service provider”.248 It reached this conclusion mainly because the provider could avoid liability vis-à-vis the right holder by showing that it had taken all reasonable measures. However, at the same time the Court maintained that those measures must not be such as to infringe the right to freedom of information of the customers of the internet service providers. It is in this regard that the duty to balance conflicting right is shifted to the provider. It must ensure that its measure at the same time does not unnecessarily deprive internet users of the possibility of lawfully accessing information by being “strictly targeted” (that is, without affecting lawful access), while it prevents or at least makes it difficult to achieve and seriously discourages unauthorized access to protected subject-matter. Because of the uncertainty this entails, creating the risk of a dispute with either the right holder or

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246 Case C-70/10 *Scarlet Extended v SABAM* ECLI:EU:C:2011:771, para 50 and Case C-360/10 *SABAM v Netlog* ECLI:EU:C:2012:85, para 48.

247 As suggested by Mylly 2015, p. 115-116, this lack of guidance may be problematic for instance in the event that an intermediary chooses not to invoke his freedom to conduct a business and acquiesces to a measure similar to the one at issue.

248 Case C-314/12 *UPC Telekabel Wien* ECLI:EU:C:2014:192, para 51.
with its customers if its measures are too lenient in the first case or too severe in the
second, AG Cruz Villalón had concluded, contrary to the Court, that an outcome
prohibition itself did not strike a fair balance.\footnote{Opinion of AG Cruz Villalón in Case C-314/12 UPC Telekabel Wien ECLI:EU:C:2013:781, paras 85 et seq.} Importantly, the Court held that “the
national procedural rules” must enable users to oppose measures taken by an Internet
service provider if these create an “unjustified” interference with their right to
freedom of information.\footnote{Case C-314/12 UPC Telekabel Wien ECLI:EU:C:2014:192, paras 56-57.}

Finally, in \textit{McFadden} the Court was confronted with the question whether a national
court may grant an injunction requiring the operator of a public Wi-Fi network to
prevent copyright infringement by way of peer-to-peer sharing, if the only measures
that operator may in practice adopt are to password-protect the network, to terminate
it entirely or to filter all communications. It quickly discarded the latter two options
as unlawful.\footnote{A filtering mechanism would amount to a general obligation to monitor, prohibited by art. 15(1) E-Commerce Directive, while termination of the network would constitute a serious infringement of the freedom to conduct a business (Case C-484/14 \textit{McFadden} ECLI:EU:C:2016:689, paras 87-88).} However, the Court concluded that the third option, to force the
operator to password-protect their network and require their customers to reveal
their identities in order to obtain the password, strikes a fair balance between the right
to protection of property and the freedom to conduct a business and the right to
freedom of information. It reached that conclusion based on the following
considerations.\footnote{Case C-484/14 \textit{McFadden} ECLI:EU:C:2016:689, paras 91-99.}

First, the CJEU held that such a measure would not damage the
essence of the freedom to conduct a business or the right to freedom of information.
Second, the Court considered that such a measure is suitable to dissuade users from
infringing copyright but would not prevent lawful access to information. Third, there
are no other potential measures that the operator could take, while the absence of any
measure would “deprive the fundamental right to intellectual property of any
protection”. Therefore, the measure was “necessary in order to ensure the effective
protection of the fundamental right to protection of intellectual property”. Important
to note is that the ultimate conclusion was that EU law did not “preclude” such an
injunction, although the preceding language (“deprive ... of any protection”) could be
understood as suggesting that the right to property \textit{required} it if one reads that
language as meaning that there would otherwise exist a serious infringement with that
right. “Necessary” in this case can therefore be understood in two ways. Either as
being necessary \textit{as a matter of EU law} in order to provide effective protection of the
right to property, or as an expression of proportionality: the suggested remedy was
necessary as no less restrictive means where available. In the latter case it must be
noted that any true balancing (as in: proportionality in the narrow sense) was absent. Notably, AG Szpunar had rejected also the third alternative measure, considering, *inter alia*, that it could prevent businesses from offering free Wi-Fi and users from making use of it, because of the administrative burdens involved for both parties, that it imposes “clearly disproportionate” costs on operators who merely offer Internet access as an auxiliary service, and that such a measure “would not in itself be effective” and “does not necessarily prevent infringements of protected works”. He also added that a general obligation to make a Wi-Fi network secure “could be a disadvantage for society as a whole and one that could outweigh the potential benefits for rightholders”.

### 4.4 Evaluation

111. **Recapitulation.** This chapter has illustrated the use of proportionality analysis and balancing by the European Court of Human Rights and the Court of Justice of the European Union, both in general and in the context of copyright. Although both courts do not always approach questions of proportionality by neatly distinguishing its constituent elements, those elements are definitely present. As far as the ECtHR is concerned, the Court has shown a considerable degree of deference and restraint in its review of decision-making by national authorities, including courts, in cases concerning copyright. It may be that the Court will require an interference with political expression before it will seriously question a finding of copyright infringement in national proceedings. Beyond that, the quest for balance will take place before national courts and the CJEU. In this regard, it must be once more emphasized that the margin of appreciation that the ECtHR offers to national authorities in this regard can inspire, but should not determine, the margin of discretion offered by national courts to national legislatures. The same is true, for that matter, for the CJEU when it reviews acts of the EU legislature.

In the case of the CJEU, the greatest impact of proportionality analysis/balancing has not been in the context of review of EU legislation. Instead, this impact is arguably felt strongest when the CJEU defines the rights and obligations of right holders and users, and those of certain intermediaries, in the context of interpretation of EU law, through the use of the concept of “fair balance”. In the remainder of this chapter I discuss two specific problematic features of the CJEU’s case law: first, the assessment of the intensity of interference by the CJEU and in particular its use of the concepts of essence and very substance (Section 4.4.1) and, second, the nature of the balance.

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253 Opinion of AG Szpunar in Case C-484/14 McFadden ECLI:EU:C:2016:170, paras 137-147.
struck by the Court (Section 4.4.2). Finally, I consider the more general weaknesses of the CJEU’s use of balancing (Section 4.4.3).

4.4.1 The essence of rights

I observed that the concept of essence or, in its prior incarnation, of “very substance” has played a progressively increasing role in the case law of the CJEU. Although arguably initially used as a reflection of restraint on the part of the Court, it has gradually transformed into an independent test, performed prior to a proportionality analysis. This practice has been embraced by article 52 of the EU Charter. This in spite of doubts of the usefulness of the concept, as it is questionable whether a “core” of rights can really be independently identified. Without entering into this debate too much, the idea of essence can probably be best defined as a protection against violations so serious that no reasons can justify it, which is ultimately a relative position, even if there will probably be little substantive difference with an absolute conception of essence. The only reason for having a determination whether the essence thus conceived has been harmed prior to a comprehensive proportionality analysis is that such an analysis is not needed because the interference is so egregious that the outcome is evident from the outset. In other words, there is no reason to give full reasons for the conclusion of the judgement. This is only acceptable if there can be no reasonable disagreement about the outcome. If, however, such disagreement is possible as to the answer to the question whether the interference is serious enough that we can speak of a violation of the essence, a court cannot escape a more thorough analysis justifying a finding of a disproportionate interference, which a violation of the essence ultimately entails. If a court would skip such an analysis, and simply conclude that a particular measure is unacceptable because it violates the essence despite reasonable disagreement on the issue, the rationality, transparency and ultimately acceptance of its judgment may suffer. In light of these considerations, the use of the concept of essence by the CJEU can be criticized, as will be explained in the remainder of this section.

Generally speaking, the CJEU appears to work with a very broad concept of essence. For instance, in Sky Österreich the CJEU held that the measure under consideration did not affect the “core content” of the freedom to conduct a business because it “does not prevent a business activity from being carried out as such by the holder of exclusive broadcasting rights” and “does not prevent the holder of those

\begin{footnotesize}
\begin{itemize}
\item Cf. Brkan 2018, p. 363, who defends an absolute conception of essence but includes as part of its definition the similar characteristic that “overriding reasons for such interference do not exist”.
\item See, supra, § 87.
\end{itemize}
\end{footnotesize}
[exclusive broadcasting] rights from making use of them”, e.g. by broadcasting the event themselves.257 These are, properly speaking, balancing considerations. More importantly, it is questionable whether this ostensibly subjective definition of essence really captures violations of the freedom to conduct a business that can never be justified. Would Member States where prostitution is currently legal, for instance, not be permitted to prohibit it and close brothels, even though it prevents “a business activity from being carried out as such”?258

A broad concept of essence increases the risk, just identified, that a court decides an issue without giving full reasons and thus without proper justification. Some of these risks can be identified in the copyright case law of the CJEU discussed in the previous section, notably when dealing with questions concerning the lawfulness of granting certain remedies against intermediaries.

113. “Serious infringement” and essence. In Scarlet Extended and Netlog the Court found a “serious infringement” with the freedom to conduct a business if the requested injunction was granted. This, at first glance, is a balancing consideration, suggesting that the degree of fulfilment of the right to (intellectual) property in case the injunction were granted would be less than “serious”. Nevertheless, the Court made no explicit considerations to that effect. This, in itself also undermines the transparency and rationality benefits of balancing. However, in Coty Germany and Bastei Lübbe we can witness a transformation of this standard. There, the CJEU suggested that a serious infringement of a right always leads to disproportionality. Moreover, it appears to be, together with the essence test, the only standard applied. This creates a system in which a degree of interference is either serious and disproportionate (regardless of the impact on the countervailing right or interest) or not serious and proportionate.

Without further qualification this position is difficult to justify. It either treats rights as minimum norms, or it represents an inconsistent use of a dyadic scale. The former is true if the “serious infringement” test is viewed as an incarnation of the essence test and no further proportionality analysis is conducted. It would permit considerable limitations of rights that only negligibly contribute to the protection of the countervailing principle.259 The “serious infringement” test, may also indicate the (inconsistent) use of a dyadic scale. That is to say, the degree of interference is

257 Case C-283/11 Sky Österreich ECLI:EU:C:2013:28, para 49.
258 On the problem of a subjective definition of the essence, which looks to the (non-) enjoyment of the right by the particular right holder, see Tridimas & Gentile 2019, p. 804.
measured as either light/not serious or serious.\footnote{This is because the Court appears to only check for a serious infringement/interference. If it applied a scale with more graduations, such as the triadic light/moderate/serious scale, a moderate interference might equally lead to a finding of disproportionality where the degree of fulfilment of the countervailing right can only be qualified as light.} If it is serious, it outweighs the countervailing right or interest. This is not likely. It would not explain why a serious infringement immediately leads to disproportionality, without regard to the hypothetical degree of fulfilment of the countervailing right or interest if the contested measure is adopted. That degree may also be serious, resulting in a stalemate. There is no reason, in a case of judicial review, to not grant discretion in those cases if the conflict is between two fundamental rights of equal rank, as was arguably the case in Scarlet Extended and in Netlog. And if the CJEU itself intends to strike an optimal balance, it would in such a stalemate case need to move to finer scales. Moreover, if a serious infringement leads to disproportionality, regardless whether the impact on the countervailing right or interest may equally be qualified as serious, a consistent application of this position should entail that a light infringement also leads to disproportionality if the impact on the countervailing right or interest is also only light. The “serious infringement” test should therefore be viewed as equivalent to the essence test, reflecting a minimum level of protection.

Use of Charter rights as minimum norms was apparent in UPC Telekabel, in which the CJEU simply considered that the outcome prohibition did not violate the essence of the freedom to conduct a business and left it at that, concluding that it was not contrary to EU law. This is not necessarily problematic if the national court is permitted to subsequently conduct a full proportionality assessment, to ensure that the burdens imposed on the intermediary are really commensurate with the benefits, although given the fact that the outcome prohibition seems to be a conventional procedural measure of Austrian law such a further assessment seemed unlikely.\footnote{Also critical is Angelopoulos 2014, p. 818 noting that “for all its postulating about the importance of a ‘fair balance’, in its judgment, the court does not establish one, or even provide guidance on how to reach one”.} As a matter of principle, a mere check whether the “essence” of rights is not violated does not take rights seriously as human rights ideals that deserve the greatest protection possible. This does become problematic where and when the CJEU itself purports to conduct a final determination of the conformity of a certain measure with fundamental right norms. Moreover, it hurts the persuasiveness of judgments, if an interference with a right that may be perceived as serious by some is simply dismissed as not violating the essence of those rights. In this regard one can find fault with judgements such as McFadden and Bastei Lübbe, in which the CJEU appears to suggest a particular enforcement measure is required in order to avoid a serious
infringement of the right to property, without proper regard for the countervailing rights. In *McFadden* the Court simply dismissed concerns as to the interference with the freedom to conduct a business and the right to freedom of information as not affecting the essence of those rights nor preventing lawful access. More egregious, in *Bastei Lübbe* the Court almost completely ignored the potential effect on the right to respect for private and family life. It did recognize, at the very end, that requiring the owner of an Internet connection to disclose information about their close family members might be regarded as an “unacceptable interference with family life”, but suggested this may only stand in the way of requiring the owner of an Internet connection to disclose private information about the Internet use of a family member if right holders have access to another effective remedy. Thus, without further explanation, the Court suggests the serious infringement of the rights to an effective remedy and to intellectual property will otherwise outweigh what may be regarded as an unacceptable interference with family life.

On a final note, it is not unlikely that the Court uses the language of essence and “serious infringement” to justify the conclusion it deems right or just, increasing the scope of the essence where necessary. However, by foregoing a proper balancing exercise, also in cases like *Scarlet Extended* and *Netlog*, where many may have agreed with the outcome, it undermines the rationalizing power of a proper proportionality analysis and ultimately the persuasiveness and predictability of its judgements.

### 4.4.2 The nature of balancing: review or optimization?

**114. Review and optimization** Balancing, I have argued, may take two forms. When creating a norm, or defining its content, the norm maker, which can be a court, will seek to strike an optimal balance between the interests to be reconciled in the norm. This was called optimization balancing. By contrast, when reviewing such a norm created by a primary decision-maker courts will typically not ask whether the balance struck really represents an optimal balance, but will show deference and restraint. This was called review balancing.262

The character of proportionality analysis by courts, that is whether it is review balancing or optimization balancing, has an important consequence. Review balancing typically focuses on the conformity of a norm with a higher-order norm, such as a constitution or a fundamental rights charter. If the outcome is that a (hypothetical) measure is or would be disproportionate, it precludes the primary decision-maker, often the legislature, from adopting it. Optimization balancing, as conducted by courts, does not have this consequence. It typically does not concern

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262 See, *supra*, § 57.
conformity with a higher norm, but a process of interpretation in the spirit of that (or another) norm. A court, for instance, may have to consider the scope of a standard in a specific provision of a sub-constitutional law, such as “fair practice”, “fair and equitable” or “proportionate”. In this regard it might pursue an interpretation that, in its opinion, does most justice to the fundamental rights affected (as well as the other relevant considerations to the standard). That is, the court must decide which right or interest has priority over the other; it strikes the “optimal” balance given the circumstances of the case. Similarly, a court may rely on an interpretation in conformity with fundamental rights to determine the scope of an open textured rule. In neither case does it mean that the legislature would be precluded from overturning the balance thus struck by the court by laying down a norm to the contrary. The court has merely given meaning to a norm where no explicit legislative choice had yet been made. Such interpretations therefore do not entail a “lock-in” or “petrification” of the law by creating a fundamental rights barrier to the overturning of that decision by the legislature. An important difference with optimization balancing as carried out by legislatures is that courts normally have no policy discretion, i.e. they cannot choose to pursue certain aims, nor the means to pursue them, or to what precise degree. Instead courts are typically presented with a binary option: a certain state of affairs falls within the scope of application of a norm, or it does not. The answer is still one of optimization, that is one answer may be more optimal than the other, even if it will be a rougher approximation of optimality than can be achieved by the legislature.

In EU law, a certain norm may be precluded or prescribed by primary law, including the Charter, which means that neither the EU legislature nor Member State authorities can deviate from it. Alternatively, that norm may be precluded or prescribed by secondary law, meaning only Member State authorities cannot deviate from it. As a rule, a proportionality analysis aimed at determining the conformity of a norm with primary law is a matter of review. The use of proportionality analysis to determine the scope of a norm laid down in secondary law will often be a matter of optimization, but can also have the nature of review, for instance if a particular interpretation is precluded entirely for creating a disproportionate interference with a fundamental right. To complicate matters further, in many preliminary proceedings about the compatibility of a certain (national) rule with both primary and secondary law, it is not always obvious whether it is ultimately primary or secondary law that precludes or permits that rule. This means it is often not clear whether the use of balancing concerns merely the determination of the scope of a norm of secondary law

263 Cf. art. 5(3)(d) InfoSoc Directive and art. 3(1) and art. 3(2) of the Enforcement Directive, respectively.
264 On this risk, see Husovec 2016, p. 268 and Mylly 2015, p. 127-128.
in the spirit of higher norms, only binding Member States, or the review for conformity with primary law, notably the Charter. A final complicating factor is that in some instances the CJEU delegates the proportionality analysis to national courts without clarifying the nature of their obligations:

115. **Interpretation of substantive copyright norms.** Most cases concerning the interpretation of exclusive rights and the limitations and exceptions thereto are clear acts of optimization within the context of the interpretation of norms of secondary EU law. In several of the cases discussed in § 104 and 105, the Court took into account whether the negative effects of a certain interpretation are assuaged by a more specific norm. Thus, in *Renckhoff*, it recognized that broad interpretation of exclusive rights does not significantly interfere with a specific fundamental right, if the use in question is (or may be) exempt by a limitation or exception. Similarly, the CJEU will choose a broad interpretation of the terms of limitations and exceptions, if such an interpretation achieves a greater degree of fulfilment of a particular fundamental right, while not significantly interfering with the “substance of copyright”, as the CJEU put it in *DR & TV2 Danmark*. In essence, it took such an approach also in *Painer, Afghanistan Papers, and Metall auf Metall*.

Some cases are less clear. For instance, the role played by the concept of fair balance in *GS Media* is extremely opaque. On the one hand, one could conclude that granting exclusive control over hyperlinks to websites containing copyright protected subject-matter disproportionately interferes with the right to freedom of expression and of information. On the other hand, its reference to the concept of fair balance and to fundamental rights can be considered independent arguments serving to support an unorthodox conclusion, which arguably tries to reconcile the conflicting rights and interests as well as possible. Similarly, its reliance on the concept of fair balance to exclude certain interpretations in *Ulmer* and in *Renckhoff* is unclear. In both cases, the fair balancing argument is left undeveloped and merely presented as a form of conclusion. It is therefore unlikely either can be qualified as an instance of fundamental rights review.

116. **The role of national courts.** The precise nature of the task imposed by the CJEU on national courts in *Deckmyn* to ensure that the application of the parody exception preserve a fair balance is also unclear.\(^{265}\) That task could be one of review, meaning national courts merely have to ascertain whether their judgements create a disproportionate interference with fundamental rights that are potentially affected by it. Some commentators have interpreted *Deckmyn* in this way and argue that it means

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\(^{265}\) Discussed in § 106.
that national courts in Member States that have chosen not to implement the parody exception may nevertheless have to permit the parody in question if not doing so would disproportionately restrict the right to freedom of expression.\(^{266}\) Alternatively, the task the CJEU intended to impose on national courts could be one of optimization. In that case, national courts, on top of verifying that the (use of the) purported parody in question fulfils the constituent conditions of the concept of parody as identified by the CJEU, merely have to decide whether, given the circumstances of the case, the rights and interests of the user outweigh those of the right holder. An instruction to “optimize” arguably follows from the fact that the Court transformed the prohibition of discrimination into an interest of the right holder not to be associated with a parody with a discriminatory message, which interest itself must be weighed against the right to freedom of expression. Consequently, national courts must determine, “in the light of all the circumstances of the case”, whether this interest outweighs the right to freedom of expression.\(^{267}\)

### 117. Enforcement and intermediaries.

Greater uncertainty exists about the character of balancing or proportionality analysis conducted by the CJEU in the cases concerning the appropriateness of certain enforcement measures against intermediaries, discussed in Section 4.3.2.3(iii). Typically, those cases principally concern the interpretation of the Enforcement Directive and article 8 of the InfoSoc Directive. The first paragraph of that article 8, as well as article 3(2) Enforcement Directive, requires remedies to be “proportionate”. Moreover, article 3(1) requires remedies to be “fair and equitable”. This raises the question whether decisions such as Scarlet Extended, Netlog, Coty Germany and Bastei Lübbe ultimately concern the mere concretization of those open norms, albeit couched in fundamental rights language, and therefore are only binding on the Member States. This is, in essence, what Martin Husovec and Lisa van Dongen argue in a not yet published paper. They suggest that the CJEU in these cases “optimizes the fairness outcome” within the context of the interpretation of secondary law and makes no pronouncement concerning the constitutionality of the measures under consideration.\(^{268}\)


\(^{267}\) Case C-201/13 Deckmyn and Vrijheidsfonds ECLI:EU:C:2014:2132, para 32. Cf., in this sense, the Opinion of AG Szpunar in Case C-469/17 Funke Medien NRW (Afghanistan Papers) ECLI:EU:C:2018:870, para 69, who notes that “[t]he course of action taken in the case giving rise to the Deckmyn and Vrijheidsfonds judgment was based on the presumption of the applicability of the exception in question (for parody). At issue was whether it was possible for that exception not to be applied, because the legitimate interests of the relevant copyright holders opposed that application” (footnote omitted). This cannot be a question of fundamental rights review, simply because the right holders’ interest is not protected as such.

\(^{268}\) Husovec & Van Dongen (draft on file with the author).
For instance, in *Coty Germany* the CJEU found a “serious infringement” of the rights to an effective remedy and to intellectual property, but did so explicitly “in the context of Article 8 [of the Enforcement Directive].” This may indicate that the scope of protection of the fundamental right to intellectual property vis-à-vis a Member State is (partially) determined by the availability of enforcement measures prescribed by EU law, principally the Enforcement Directive and article 8 of the InfoSoc Directive. Fundamental rights are thus used to reinforce the conclusion reached on the basis of the interpretation of the Directive, rather than as a truly independent interpretive tool or argument. Such a use of fundamental rights can be compared to that in *Luksan*, in which the CJEU similarly concluded that a Member State which does not offer the principal director of a cinematographic work the rights to exploit it which it must grant them in accordance with the applicable EU directives simultaneously violates the right to intellectual property of article 17(2) EU Charter.

Similarly, one could argue that the CJEU merely concretized what can be considered a proportionate remedy within the meaning of the Enforcement and InfoSoc Directives in judgements such as those in *Scarlet Extended* and *Netlog*. This may be unlikely, however, given that the Court conducts the proportionality analysis entirely independently from and in addition to its interpretation of the applicable directives. Moreover, even if this balancing took place within the context of interpretation of secondary law, this does not necessarily mean it cannot have the character of review. That is to say, the Court can consider that a certain interpretation of secondary law is precluded because it would constitute a per se disproportionate interference with a fundamental right. In this regard it must be recalled that the Court held that the proposed injunctions would lead to a “serious infringement” of the freedom to conduct a business. It was suggested in the previous subsection that this is akin to finding a violation of the essence of the right, that is to say a degree of interference which cannot be justified. This means that this interpretation of the limitations imposed on the available remedies by fundamental rights has a clear proscriptive character, also vis-à-vis the (EU) legislature. The same may be true for other judgements in which the CJEU concludes that (the lack of) a certain measure would result in a serious infringement or a violation of the essence of a fundamental right, even if the Court connects such findings to the requirements of a specific directive. One can consider this a further indictment of the Court’s loose qualifications of certain states of affairs as a “serious infringement” or as a violation of the essence of a right.

269 Case C-580/13 *Coty Germany* ECLI:EU:C:2015:485, para 40.
270 See for a similar (questionable) relationship between the scope of protection under the EU Charter and secondary law, *infra*, Chapter 6, n 60 and accompanying text.
271 Case C-277/10 *Luksan* ECLI:EU:C:2012:65, paras 68-70. See also, *infra*, § 130.
Other times the force of the fundamental rights arguments is unclear for other reasons. In *McFadden* the CJEU concluded that EU law does not “preclude” an injunction requiring an operator of a public Wi-Fi network to password protect its network and require its users to disclose their identities. The Court did not hold that a national court, so requested, *must* grant such an injunction if it is the only way to prevent the illegal communication to the public of copyright protected subject-matter. Nevertheless, the CJEU considered that if such an injunction is not granted right holders would be deprived of “any protection” and that such a measure is therefore “necessary in order to ensure effective protection”. The lack of “any protection” appeared to lead to a finding of a “serious infringement” in *Coty Germany* and *Bastei Lübbe*. Thus, one may wonder whether the grant of such an injunction really is optional for Member States.

118. *The importance of conceptual clarity.* The fact that the qualification of the nature of the proportionality analysis can be of immediate relevance to the legislative process is illustrated by the adoption of the DSM Directive. Article 13 of the original proposal would have required (after Member State implementation) at least certain “information society service providers” to implement a filtering system very much similar to the one scrutinized by the CJEU in *Scarlet Extended* and *Netlog*. It appears the EU legislature has attempted to mitigate the risk for incompatibility with the EU Charter in this regard by instead adopting a vague obligation for “online content-sharing service providers” to make “best efforts” to avoid the availability of copyright protected subject-matter. One could argue that the uncertainty of the scope of the obligation being thrust upon providers to avoid liability for works uploaded to their services by users in itself may constitute a disproportionate burden, similar to the conclusion of AG Cruz Villalón in *UPC Telekabel* that an outcome prohibition was disproportionate. The compatibility of the DSM Directive with

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273 For a criticism in light of Scarlet Extended and Netlog, see Angelopoulos 2017b, p. 38-40.
274 Art. 17(4)(b) of the DSM Directive specifies that “online content-sharing service providers” can avoid liability if they have demonstrate that they have “made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information”. Art. 17(5) adds that this obligation should be construed in light of the principle of proportionality as well as a variety of other factors, such the size of the service and the cost for service providers. Moreover, recital 66 in the preamble to that directive adds that this obligation may not lead to a general obligation to monitor and recognizes that in certain cases a provider will have made its “best efforts” if it removes infringing content upon notification of right holders.
fundamental rights will not be discussed further, lying outside the scope of this study.275

4.4.3 **The (lack of a) CJEU methodology**

119. **General criticism.** This section concludes this chapter with some more general observations about the CJEU’s inconsistent use of balancing. The use of balancing rhetoric in copyright, both generally and by the CJEU, has been sharply criticized. This criticism mirrors that aimed at balancing generally, discussed in Section 3.3. Principally, conceptualizing copyright as a balance, in general or specifically between fundamental rights, has been rejected for its arguable vagueness. The criticism asserts that the balancing paradigm is incapable of explaining how the “correct” balance in a concrete case should be established. Alexander Peukert, for instance, has lamented the lack of “normative criteria [according to which] a conflict between fundamental rights is to be resolved”276 and Robert Burrell and Allison Coleman have argued that “[the notion of balance] tells us very little about how to proceed in practice[...] how weight is to be attributed to differing interests or even as to which interests are to enjoy a place on the scales”. 277 In the words of Abraham Drassinower: “[T]he concept of balance cannot support the weight it is asked to bear in copyright jurisprudence.”278 Tom Bell and Tuomas Mylly have voiced the familiar incommensurability objection to balancing.279 Finally, Helfer, reviewing the intellectual property case law of the ECtHR, has argued that that the existing European positive legal framework does not provide a “coherent blueprint” to allow courts to impose both lower and upper limits on intellectual property protection based on a balancing of different rights, meaning balancing decisions will inevitably be ad hoc decisions.280

Insofar as these arguments do not differ from the general criticism levelled at balancing, they need no separate rebuttal. However, insofar as the vagueness objection is more directly aimed at the concrete use made of balancing by the CJEU, the previous sections have hopefully illustrated the Court’s approach is hardly free from criticism. One must agree with Jonathan Griffiths when he states concerning its

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275 Poland has announced that it will challenge article 17, although has at the time of writing not made the text of the complaint public. See Targosz 2019.

276 Peukert 2015, p. 135


278 Drassinower 2009, p. 992. He wrote in particular about the rejection, in the name of balance, of the Canadian Supreme Court of the sweat of the brow doctrine in favour of the skill and judgement standard in CCH Canadian Ltd. v. Law Soc’y of Upper Can., [2004] 1 S.C.R. 339. See, in particular, p. 995-999. See also, infra, Section 6.3.


280 Helfer 2008, p. 49.
use by the CJEU in copyright cases that “the concept of the ‘fair balance’ is, without further elucidation, vacuous and unhelpful”. 281 Similarly, Tuomas Mylly has added that if the CJEU does not go beyond merely emphasizing that a fair balance must be struck, “‘balancing’ remains an empty slogan merely giving fundamental rights gloss to the CJEU case law”. 282 These objections reiterate the need for the CJEU to develop and use consistently, in those situations that call for it, a balancing framework that ensures rational decision-making, spelling out the normative arguments at stake and the reasons for giving those arguments a particular weight.

120. **Methodological problems.** Generally speaking, the CJEU appears to have a fairly well-developed approach to proportionality analysis. However, when it comes to the application thereof in copyright cases there is a noticeable lack of transparency and consistency. This was, first of all, apparent in *Metronome* and *Laserdisken*, concerning the review of the validity of EU secondary law. 283 Arguably more problematic, however, is the CJEU’s use (and non-use) of the concept of fair balance in in cases which essentially concern the horizontal (indirect) effect of fundamental rights, discussed in Section 4.3.2.3, as well as those in which the CJEU seems to try to strike a fair balance without doing so explicitly, discussed in Chapter 2.

Balancing has been defined as a process by which the relative weight of various, competing normative arguments is determined in order to decide which of those arguments should prevail. The predominant problem with the CJEU’s use of the concept of fair balance is a lack of a consistent definition of the normative arguments that compete for priority. This is particularly evident in those rulings dealing with the scope of exclusive rights and limitations and exceptions thereto. The CJEU’s starting point is often Recital 31 in the preamble to the InfoSoc Directive, which itself merely notes that “[a] fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded”, without specifically clarifying the content of those “rights and interests”. In particular the normative content of the “rights and interests” of right holders is not clearly defined. Sometimes, they are not defined at all, as in *Ulmer*. In *DR & TV2 Danmark* the CJEU simply referred to the “substance of copyright”. In *Painer* it referred to the author’s reproduction right. In its more recent cases, including *GS Media*, *Renckhoff* and the three judgements from 29 July 2019, the CJEU has started to refer to the “interest” of authors and related rights holders in the protection of their intellectual property guaranteed by article

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281 Griffiths 2013a, p. 74.
282 Mylly 2015, p. 130.
283 See, *supra*, § 99 & 100.
17(2), although in the latter three judgements the CJEU also noted that national courts must balance the “exclusive rights of the author”.\textsuperscript{284}

Somewhat more consistent and less contentious are the references to the right to an effective remedy and to intellectual property in cases concerning the availability of certain enforcement measures against intermediaries. However, the assessment of the degree of fulfilment/interference with these rights is often problematic, in particular where the CJEU limits itself to a (non-)finding of a serious interference or an interference with the essence. Similarly, there is often a notable lack of full consideration for the competing fundamental rights affected. Sometimes affected rights are not mentioned at all.\textsuperscript{285} This invites the suggestion that the Court’s assessment proceeds from a certain bias.\textsuperscript{286}

If balancing is to guide decision-making, it should be first and foremost clear what is being balanced. Moreover, judges must consider both sides of the balance and adduce good reasons why they decide like they do, taking into account the intrinsic importance of the principles they balance, the degrees of fulfilment and interference created with the respective principles, and the possible uncertainties of the underlying premises. If balancing is used in this manner, it can in principle play a role at two stages in the course of interpretation and application of norms that determine the scope of protection. First, during the interpretation and application of exclusive rights and of the limitations and exceptions to those rights and, second, when determining whether to grant a particular remedy.

These general observations will be further explored in the following part of this dissertation.

\textsuperscript{284} For specific references, see Section 4.3.2.3(ii).
\textsuperscript{285} Cf. Mylly 2015, p. 126-127 and Teunissen 2018, p. 592, who specifically points to the lack of concern by the CJEU for the rights to privacy and data protection in McFadden.
\textsuperscript{286} Cf. Mylly 2019, p. 276.
PART III – STRIKING A FAIR BALANCE IN EU COPYRIGHT LAW

Part I concerned the use of discretion inherent in the *acquis communautaire* by the CJEU in determining the scope of copyright protection. I concluded that, often implicitly, the CJEU appears to balance the objective of ensuring a reward to right holders with competing considerations without making this process obvious. Part II took a closer look at the concept of balancing, both from a theoretical perspective and as used by the ECtHR and the CJEU. It concluded with the observation that even when the CJEU explicitly refers to the concept of fair balance it is not clear why its decision necessarily is in the interest of a fair balance. It is nevertheless clear that balancing, in particular of fundamental rights, plays an important role in determining the scope of the rights and obligations of right holders and of users. In particular, the CJEU has clarified that as a matter of principle both the interpretation and application of substantive copyright norms must aim at striking a fair balance of rights and interests. This part of the dissertation zeroes in on how this may take place in practice. It commences, in Chapter 5 with an elaborate discussion of the principles and objectives that form the basis of EU copyright law. Chapters 6 and 7 discuss, respectively, how fundamental rights may, first, impact the interpretation and application of norms of copyright itself and, second, act as independent external constraints on (the enforcement of) copyright.
5  THE PRINCIPLES UNDERLYING EU COPYRIGHT LAW

5.1  Introduction

121.  Introduction. Balancing, as I have defined it, is principally concerned with establishing the priority between different normative arguments or “principles”. This entire process is nonsensical if one does not have a clear understanding of which principles are placed on the balance. Often it will be clear which rights on the user side are affected, such as the right to freedom of expression and of information, the right to education, the right to respect for private and family life and the freedom to conduct a business. Less clear, however, is which principles undergird the protection of authors and holders of rights related to copyright and how their relative weight is determined.

This chapter focuses on the question which “rights and interests” of authors and other right holders should influence the determination of the “fair balance of rights and interests” during the interpretation and application of exclusive rights and of limitations and exceptions, and how their relative weight should be determined. In essence, this is the question as to the legitimate purpose of copyright law. The chapter starts with a discussion of the constitutional foundations of copyright (Section 5.2). It then shifts focus to the intention of the EU legislature, in order to identify the objectives underlying modern EU copyright law (Section 5.3). Based on an identification of three categories of objectives, this chapter continues with the identification of the relevant factors for determining the degree of fulfilment of these objectives (Section 5.4). It concludes with a brief discussion of the question which further rights and interests might affect the balancing determination (Section 5.5) and a synthesis of the findings of this chapter (Section 5.6).

5.2  The constitutional foundations of copyright

122.  Outline. This section first discusses the right to property as a foundation for the protection of authors and related right holders (Section 5.2.1) and then the specific right of the author to receive protection of the moral and material interests in their creation (Section 5.2.2).

5.2.1 Copyright as (constitutional) property

123.  Protection of possessions. Everyone is entitled to protection of their possessions. This follows from article 1 of the First Protocol to the ECHR (“1P1”). Similar protection is afforded by article 17(1) of the EU Charter. The central question of this sub-section is whether the constitutional right to property can serve as a useful
basis for determining the content of the rights and obligations of right holders and of users. Article 1P1 and article 17 are discussed in turn.

5.2.1.1 Article 1P1 ECHR

124. **1P1.** Article 1P1 provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

The ECtHR has derived three rules from article 1P1. First, in general, it guarantees a peaceful enjoyment of property (first sentence). Second, it protects against deprivations of possessions (second sentence). Third, it permits states to regulate the use of property in the general interest (third sentence). These rules are connected and often the ECtHR does not distinguish clearly between them. Any interference will in principle be evaluated on the basis of the fair balance test. Nevertheless, whether an interference may qualify as a deprivation or as a control of use, may be important, as the ECtHR has held that without the payment of compensation a deprivation can in principle not be justified. A deprivation typically implies a formal transfer of ownership has taken place but can also consist of a de facto expropriation amounting to the same. Such is not the case if the owner retains some economic interest in his possession, meaning that the “deprivation” of only certain elements of the rights will typically be categorized as a control of use.

125. ** Existing possessions.** Article 1P1 does not give a right to acquire property. In principle, it only protects existing possessions or, in certain circumstances, legitimate expectations to obtaining such possessions. The latter may be the case only if there is “a sufficient basis for the interest in national law, for example where there is settled case-law of the domestic courts confirming its existence”.

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5 E.g. Decision of the European Court of Human Rights (Grand Chamber), in the case of Anheuser-Busch Inc. v. Portugal, Appl. No. 73049/01, of 11 January 2007, para 64.
6 Ibid., para 65.
within the meaning of article 1P1 are not only physical goods, but also other “assets”. Such assets must be “sufficiently established to be enforceable”. Economic rights granted by national copyright law to authors and holders of related rights certainly qualify as possessions. Right holders are entitled to protection of such rights as recognized by the law. Accordingly, the ECtHR had no trouble to find an interference with a possession in Bălan v. Moldova and in SIA AKKA/LAA, discussed in § 83. In the latter the ECtHR considered that “[i]n the case of non-physical assets” the Court considered “in particular, whether the legal position in question gave rise to financial rights and interests and thus had an economic value”.

126. **Foundation in law.** The possession or the legitimate expectation to obtain a possession must have an existing foundation in national law. As far as authors and holders of related rights are concerned, it therefore appears unlikely that article 1P1 can serve as a basis for an argument for the introduction of new rights or that the existing level of protection is too low. In the words of the ECtHR: “[T]he hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a ‘possession’”.

Support for the conclusion that article 1P1 cannot be used to argue for more extensive copyright protection than currently provided for by law can be found in Dima v. Romania. Dima had created a concept for new Romanian national emblem after participating in a public competition in 1990. A revised design, made by Dima after consulting with an historian and a heraldry expert was adopted in 1992 by the Romanian Parliament as the emblem and seal of Romania. Never having been remunerated for his work, Dima sought to enforce copyright in the emblem. The Romanian Supreme Court ultimately rejected his claim, asserting that the law in force at the time of creation of the emblem did not recognize such subject-matter as the object of copyright protection and that, moreover, the Parliament would be recognized as the author of the work. Since the law was ambiguous as to whether emblems were protected by copyright, the ECtHR held that Dima had neither a possession protected by article 1P1, nor a legitimate expectation to acquire such a possession. The Court denied the existence of a legitimate expectation if there is a

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8 E.g. Decision of the European Court of Human Rights (Chamber), in the case of Stran Greek Refineries and Stratis Andreadis v. Greece, Appl. No. 13427/87, of 9 December 1994, para 59
9 Decision of the European Court of Human Rights (Fifth Section), in the case of SIA AKKA/LAA v. Latvia, Appl. No. 562/05, of 12 July 2016, para 54.
10 Decision of the European Court of Human Rights (Fourth Section), in the case of Bălan v. Moldova, Appl. No. 19247/03, of 29 January 2008.
dispute as to the correct interpretation and application of national law. As already noted, there must be “a sufficient basis ... in national law” for that expectation to be legitimate.

National courts are thus left largely unconstrained by article 1P1 when they are giving shape to the law. Only if the courts’ determinations are arbitrary or manifestly unreasonable may the ECtHR decide to step in and consider whether such determinations nonetheless constitute a deprivation of a possession. Thus, when courts consider that the interpretation of a norm, such as an exclusive right, strikes a fair balance, they need not take account of article 1P1, because that provision does not safeguard a legal position that does not exist yet. Only once the interpretation of a norm has been settled, can it form the basis for possessions (or legitimate expectations). Similarly, the application of open norms will typically not interfere with any (legitimate expectation to acquire a) possession.

However, once the meaning of a norm has been sufficiently fleshed out, courts can in principle not refuse to apply that norm or refuse to enforce the rights contained in that norm in the way prescribed by law without interfering with the right to peaceful enjoyment of one’s possessions. Such an interference would arguably not be outright prohibited, but would need to be justified by a legitimate general interest (arguably including the protection of the rights of others). Importantly, this interference must maintain a fair balance between the right to peaceful enjoyment and countervailing interest, in that no “excessive burden” may be placed on the right holder. That a refusal to enforce, in the absence of a sufficient justification, constitutes a violation of article 1P1 was also the ultimate conclusion in the aforementioned decision Bălan v. Moldova. It is also in this context that one should understand references to article 1P1 in Ashby Donald and Neij and Sunde Kolmesoppi, discussed in § 84. The ECtHR granted the states in question a particularly wide margin of appreciation in part because they had to balance both the right to freedom of expression and the right to protection of property. All this means, and can mean, is that states must consider possessions and legitimate expectations thereto that have an existing basis in national law. Arguably, such a basis existed in both cases.

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11 Decision of the European Court of Human Rights (First Section), in the case of Dima v. Romania, Appl. No. 58472/00 of 26 May 2005.
12 See e.g. Decision of the European Court of Human Rights (Second Section), in the case of Melnychuk v. Ukraine, Appl. No. 28743/03, of 5 July 2005.
13 One could argue that the scope of the exception on which the defendants relied in Ashby Donald was contested and that therefore no legitimate expectation worthy of protection under art. 1P1 existed. However, the exception was introduced after the infringing acts had occurred, meaning at that time there was an interference with a possession.
To conclude, article 1P1 cannot serve as a useful basis for determining the content of the rights and obligations of right holders and of users. It can, however, affect the enforcement stage, since article 1P1 not only requires states abstain, in principle, from interfering in the peaceful enjoyment of possessions, it also imposes a positive obligation on them to provide a system that enables the enforcement of property. This issue will be more generally addressed in Chapter 7. Finally, article 1P1 also covers the legislative abolition of rights or a reduction in scope. This will not be addressed further.

5.2.1.2 Article 17 EU Charter

127. Article 17 vs. 1P1. Article 17 provides:

“1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.”

It should be noted that recognition of the right to property as a general principle of EU law predates the Charter. In Nold and, more explicitly, Hauer the CJEU recognized this right as a fundamental right that is part of the constitutional traditions common the Member States.

Article 52(3) EU Charter specifies the relationship between Charter rights and ECHR rights: “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.” AG Bot suggested in Sky Österreich that article 17(1) corresponds to article 1P1 and that therefore “the right of property protected by Article 17 of the Charter has the same meaning and scope as under the ECHR”. Does this mean that, like under article 1P1, the article 17 similarly does not elevate copyright itself to a fundamental right, but merely protects existing entitlements under law? This conclusion does not necessarily follow. The second sentence of article 52(3) explicitly permits that protection offered by the Charter may exceed that offered by the ECHR. This may in particular be the case if the EU already offered a higher level of protection.

17 Case C-283/11 Sky Österreich ECLI:EU:C:2013:28, para 28
at the time of promulgation of the Charter. More important in regard to the protection of intellectual property, however, is that article 17(2) EU Charter somewhat enigmatically declares that “Intellectual property shall be protected”.

(i) Article 17(1) of the EU Charter

**128. Article 17(1).** Does the protection offered by the EU right to property deviate from that of article 1P1? As to the general protection offered by article 17(1), this is not very likely. Although the CJEU did consider in Metronome and Laserdisken that the interference with the fundamental rights in question caused by an increase in the level of copyright protection was justified by the need to protect (industrial and commercial/intellectual) property, one should understand these considerations within the context in which they were made, that is the Court’s woefully inadequate argumentation as to the proportionality of the contested measures. In *Sky Österreich* the CJEU aligned article 17(1) with article 1P1 by considering that the protection granted by the former “applies to rights with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit.” Consequently, the contested provision of EU law on the basis of which broadcasters are free to make short news reports on events of high interest to the public that are subject to exclusive broadcasting rights, without the licensee having a right to demand compensation beyond the cost of access, does not constitute an interference with a possession if the license was obtained after that provision took effect. In other words, article 17(1) does not offer a basis for protection of immaterial rights beyond the protection offered by law.

Article 17(1) EU Charter thus protects “established legal positions” with an asset value under copyright law. In line with the protection offered by the ECHR, this entails protection of exclusive rights whose scope is clear and to the extent as their exercise is not subject to limitations and exceptions. As long as the scope of rights (or the limitations or exceptions thereto) is unclear as regards a particular use there can be no legitimate expectations to have a property right and hence no protection of “the right to property”. In delineating the scope of exclusive rights and limitations and exceptions article 17(1) thus has no role to play.

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19 See, supra, Section 4.3.2.2.
20 Case C-283/11 *Sky Österreich* ECLI:EU:C:2013:28, para 34.
22 On *Sky Österreich*, see also, supra, § 87.
(ii) Article 17(2) of the EU Charter

129. **Article 17(2).** The introduction of article 17(2) does raise the question whether the EU Charter requires, as a fundamental right of the author and the addressees of related rights, a certain level of protection. This was likely not the intent of the drafters of the Charter. The explanation on article 17 explains that intellectual property as an object of protection of the right to property is explicitly mentioned “because of its growing importance”. Accordingly, the explanation adds, “[t]he guarantee laid down in paragraph 1 shall apply as appropriate to intellectual property”. Nevertheless, even if it was not the intention to create an obligation to provide a certain level of intellectual property protection, the provision is open to interpretation by the CJEU, which could read in it precisely such an obligation due to its open texture.

130. **IP as a possession.** The CJEU typically refers to article 17(2) in the context of enforcement proceedings. The reference to the right to property in this context is not surprising, since this will often concern the protection of (the legitimate expectation to having) a possession. Appropriately, but unsurprisingly, the CJEU has pointed out that there is “nothing whatsoever in the wording of [article 17(2)] or in the Court’s case-law to suggest that that right is inviolable and must for that reason be absolutely protected”.

In *Luksan* the CJEU appeared to confirm the protection of intellectual property under the Charter is like other forms of property. The Court was confronted with the question whether the Austrian law that allocated certain exploitation rights to the producer of a cinematographic work, instead of to its director, was in conformity with EU law. The Court concluded that EU law designated the director as the author of a cinematographic work and that the director in his capacity of author is entitled to the exploitation rights at issue. It further bolstered its conclusion with a reference to article 17 of the EU Charter. The Court held that since the director was granted

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23 Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), explanation on article 17.
24 Ibid.
26 See the case law discussed, supra, in Section 4.3.2.3(iii).
27 Cf. Mylly 2015, p. 124: “Could the Court have said anything less? In *Scarlet*, could it have said that the wording of Article 17(2) suggests that that right is inviolable and must for that reason be absolutely protected?”
28 Case C-70/10 Scarlet Extended v SABAM ECLI:EU:C:2011:771, para 43; Case C-360/10 SABAM v Netlog ECLI:EU:C:2012:85, para 41 and Case C-314/12 UPC Telekabel Wien ECLI:EU:C:2014:192, para 61. See also, Case C-469/17 Funke Medien NRW (Afghanistan Papers) ECLI:EU:C:2019:623, para 72; Case C-476/17 Pelham and Others (Metall auf Metall) ECLI:EU:C:2019:624, para 33 and Case C-516/17 Spiegel Online ECLI:EU:C:2019:625, para 56.
exploitation rights by EU law, a national law denying them those rights would constitute a deprivation of property. The Court referred to article 17(2) in the context of its discussion of the right to protection of property as provided for by article 17(1). This indicates that the CJEU may view paragraph 2 merely as the explicit confirmation that possessions arising under intellectual property legislation are to be protected as property under paragraph 1. However, the CJEU’s conclusion that the Austrian law constituted a deprivation of property is not without issues. First, there was considerable uncertainty whether EU law indeed did allot the exploitation rights at issue to the director. Arguably, no director could thus have had the reasonable expectation to possess those rights. The ruling therefore suggests that national law may violate the fundamental right to property even if the scope of the EU provision on which it is based, and hence the scope of the Member States’ obligations, is unclear. Second, even if one accepts the finding that national law interfered with the right to property, a pertinent question is whether that interference is justified. Unlike the AG, who considered that such an intrusion might be justified if the director was guaranteed fair compensation, the CJEU wholly glossed over the issue. Perhaps the cursory examination of the compatibility of the Austrian law with article 17 by the CJEU is best understood as a rhetorical reinforcement of its conclusion that the exploitation rights belonged to the director, as has been suggested by some commentators. Had the CJEU reached the same conclusion regarding the violation of article 17(2) without also considering that secondary law had been violated, it would have been an indication that article 17(2) indeed requires a certain level of protection.

131. A guarantee to IP protection? If Luksan can be seen as an indication that protection of intellectual property under the Charter is no different from that of other property, a number of more recent decisions somewhat muddied the waters. In these decisions the CJEU, in the context of determining the scope of copyright, referred to the fair balance to be struck between the “interests” of holders of copyright and of related rights in the protection of their intellectual property, guaranteed by article 17(2) of the EU Charter, and the interests and fundamental rights of users and the general interest. In three decisions of 29 July 2019 the Court added the familiar

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29 Case C-277/10 Luksan ECLI:EU:C:2012:65, paras 68-70.
31 Cf. Mylly 2015, p. 120-121.
33 Cf. Opinion of AG Trstenjak in Case C-277/10 Luksan ECLI:EU:C:2011:545, paras 131-133.
34 Griffiths 2013a, p. 77 and Oliver & Stothers 2017, p. 544. See also, supra, §29.
36 Case C-160/15 GS Media ECLI:EU:C:2016:644, para 31; Case C-161/17 Renckhoff ECLI:EU:C:2018:634, para 41; Case C-469/17 Funke Medien NRW (Afghanistan Papers)
“comforting” words that intellectual property is not inviolable and need not be protected as absolute rights. The reference to article 17(2) in the context of determining the scope of copyright could be understood to imply that the protection offered by article 17(2) not only extends to established legal positions, but also has something to say about the content of those legal positions. It is nevertheless questionable whether the CJEU should be understood in that way.

Ultimately, in none of these decisions does the CJEU give any indication that article 17(2) would guarantee a particular level of protection. In Renckhoff the CJEU does consider that excluding the use in question from the scope of the communication right would not strike a fair balance, taking into account the right to protection of intellectual property guaranteed by article 17(2). However, this consideration must be understood in the context of its earlier consideration in the same judgement that it is the specific purpose of intellectual property “to ensure for the rightholders concerned protection of the right to exploit commercially the marketing or the making available of the protected subject matter, by the grant of licences in return for payment of an appropriate reward for each use of the protected subject matter”. On this teleological basis the Court had already concluded that the use in question should fall within the scope of the communication right, because to hold otherwise “would deprive the copyright holder of the opportunity to claim an appropriate reward for the use of his work”. Only thereafter did the CJEU refer to article 17(2) when rejecting a challenge to that interpretation on fundamental rights grounds. The Court did not explain why the right to protection of intellectual property would be negatively affected if the right to communication to the public were to be construed narrowly. Without any further explanation regarding the degree of interference with the right to intellectual property caused by such a hypothetical interpretation, that reference is probably better understood as emphasizing that a narrow interpretation would unduly undermine the aforementioned legislative purpose to ensure the right to exploit the work in order to obtain an appropriate reward. Similarly, in Metall auf Metall, following a number a general considerations in which it pointed to the fair balance to be struck between article 17(2) and the rights of users, the CJEU adopted a narrow interpretation of the reproduction right granted to phonogram producers, because a broader interpretation would interfere with the freedom of the arts while it...

37 Case C-469/17 Funke Medien NRW (Afghanistan Papers) ECLI:EU:C:2019:623, para 57; Case C-476/17 Pelham and Others (Metall auf Metall) ECLI:EU:C:2019:624, para 32 and Case C-516/17 Spiegel Online ECLI:EU:C:2019:625, para 42.
38 Case C-161/17 Renckhoff ECLI:EU:C:2018:634, para 34.
39 Ibid.
would not interfere with the legislative purpose to protect a phonogram producer’s investment. Finally, in its Cofemel judgement, concerning the protection by copyright of works of applied art, the CJEU considered that it follows from article 17(2) that objects of intellectual property enjoy protection by EU law, but that this does not mean that different objects must receive the same protection. Although one could argue that this implies that these objects must as a matter of article 17(2) receive at least some protection, it appears this somewhat puzzling reference to the Charter must rather be understood to emphasize the role of the legislature to create and shape the scope of protection of immaterial objects.

If article 17(2) is to play a role in determining the scope of rights and limitations and exceptions it cannot be in form of protection of property understood as protection of the peaceful enjoyment of possessions. As already pointed out, the right to a peaceful enjoyment of possessions cannot determine the content of the possession one has to begin with. Moreover, the right to protection of property should not be viewed as treating property as an end in itself, but look towards the underlying justifications. Nevertheless, it is not completely unthinkable that the right to (intellectual) property, in particular as guaranteed by article 17(2), is interpreted as not merely a protection of existing possessions with a basis in positive law, but also as an obligation on the legislature to create and maintain a system that facilitates private ownership. Such is, in essence, the case in Germany. Article 14 of the German Basic Law not merely protects against interferences but also guarantees the institution of property. This property guarantee in the German constitution “is primarily aimed at securing to the holder of the basic right a personal freedom in property matters through granting and insuring the rights of control, utilization and disposition, and thereby enabling the development and independent arrangement of his life”. The institutional guarantee is characterized by the right to private use and to dispose of the property. This means that, although it is the task of the legislature to shape property rights, it is not entirely free in this. As regards the rights of authors, it has to take account of the “constitutionally protected essence of copyright”, which includes “the attribution in principle of the property-like result of the creative activity to the author by way of a statutory civil law regulation as well as the author’s freedom to be able to dispose of this result under his own responsibility”.

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40 Case C-476/17 Pelham and Others (Metall auf Metall) ECLI:EU:C:2019:624, paras 30-38. See also, supra, § 37 and, infra, § 157.
41 Case C-683/17 Cofemel ECLI:EU:C:2019:721, para 36 et seq.
43 German Federal Constitutional Court (First Senate), 7 July 1971, 1 BvR 765/66 – Schulbuchprivileg, published in IIC 1972, p. 394, at p. 396.
44 Ibid., at 397.
implies that the author, when all is said and done, must be ensured at least an appropriate remuneration for their efforts, but not “that thereby every conceivable way of exploitation is constitutionally secured”.  

Alternatively, as suggested by Tuomas Mylly, one could read in article 17(2) a “principle” within the meaning of article 52(5) of the EU Charter. Such provisions “may be implemented by legislative and executive acts” and “shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality”. However, as he points out, this must not lead to a transformation of the stated purpose of copyright directives to provide a “high level of protection” into a fundamental right. Instead, the content of such a principle itself would equally be itself the subject of interpretation. In any case, its intrinsic importance cannot be very strong, seeing as their implementation is fully left to the discretion of the legislature.

132. Conclusion. Although the open texture of article 17(2) does not entirely preclude a reading understanding it as guaranteeing some degree of copyright protection, it should arguably be merely viewed as a clarification that intellectual property assets receive the same protection as other assets in accordance with the general scheme of the first paragraph of article 17 of the Charter. First, such a reading does justice to the structure of article 17 as a whole. Treating article 17(2) as operating in isolation would create ill-defined obligations. For instance, what constitutes “intellectual property”, which “shall be protected”? What about subject-

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45 Ibid. Cf. also German Federal Constitutional Court (First Senate), 25 October 1978, 1 BvR 352/71 – Kirchenmusik, published in GRUR 1980, p. 44, at p. 48 and German Federal Constitutional Court (First Senate), 11 October 1988, 1 BvR 743/86 & 1 BvL 80/86 – Vollzugsanstalten, published in GRUR 1989, 193, at 196. Similarly, concerning the related right of phonogram producers, German Federal Constitutional Court (First Senate), 31 May 2016, 1 BvR 1585/13 – Metall auf Metall, English translation published in IIC 2017, p. 343, para 74. Nevertheless, the requirement that the author be free “to be able to dispose of this result under his own responsibility” implies that the author should in principle be granted exclusive rights over their creation. Cf. Schack 2015, para 93 and, regarding the Swiss property guarantee, Macciacchini 2000, p. 685.


47 Geiger 2009b, p. 116, Griffiths 2013a, p. 69-70, Griffiths & McDonagh 2013, p. 80-81, Mylly 2005, p. 207 and Ohly 2013, p. 151. See, however, Griffiths 2017, p. 20-22, who suggests that following Coty Germany the CJEU may be willing to read a positive obligation into article 17(2) requiring the implementation of a general adaptation right. However, as Griffiths acknowledges, Coty Germany concerned the enforcement of established legal positions. The recognition of a positive obligation to offer a particular level of intellectual property protection would be another issue entirely, although one must agree with him that “the absence of a clearly disciplined framework of principle in the Court’s fundamental rights jurisprudence and the expansionist tendency in its copyright case-law” mean it is not “impossible that the Court would be willing to take such a step”. If one agrees that article 17 EU Charter does not entail a positive obligation to offer a particular level of protection, there can, a fortiori, also be no debate about the lack of protection violating the essence or “core” of that right. I therefore disagree with Sganga 2019, p. 695, who appears to plead for the identification of such an essence. Arguing that the CJEU has so far not recognized such an essence is Husovec 2019.
matter whose protectability may be contentious, such as football matches, whose organisers may have a strong interest in specific protection? Would such organisers be able to invoke the specific fundamental rights protection of article 17(2)? Similarly, it is unclear what kind of protection article 17(2) would require. Second, an interpretation linking the second paragraph of article 17 to the first paragraph would also do justice to the intention behind the provision as evinced by its drafting history, as already discussed. Third, such an interpretation also aligns the scope of article 17 closely with the scope of article 1P1, after which it is modelled. Finally, its references to article 17(2) when considering questions concerning the scope of copyright protection notwithstanding, the CJEU itself also appears to understand article 17(2) as a *lex specialis* of article 17(1).

5.2.2 The rights of authors as protected by international human rights conventions

133. *“Moral and material interests”*. So far it has been argued that the right to property, neither as protected by article 1P1 nor as by article 17 EU Charter, has anything to say about the content of the rights that are granted to authors and related right holders. In so far as the interpretation and/or application of a norm of EU copyright law seeks to maintain a fair balance of rights and interests, those rights and interests must thus be unrelated to the right to property.

As far as authors are concerned, there may be another fundamental right that forms part of the “rights and interests” of authors that can impact the fair balance to be struck when interpreting and applying copyright law. Both article 27(2) UDHR and article 15(1)(c) ICESCR recognise the right to “the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”. The EU is not a signatory to the ICESCR, but all its Member States are. The CJEU has repeatedly held that, for the purpose of identifying fundamental rights which are part of the general principles of EU law, it “draws inspiration from

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50 Unless that norm has a settled interpretation capable of giving rise to legitimate expectations, in which case those expectations may give rise to a protected possession.
the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories.\textsuperscript{51} For that reason, the EU should take account of the protection offered by, at least, article 15(1)(c) ICESCR.

\textbf{134. Scope of state obligations.} Both article 27(2) UDHR and article 15(1)(c) ICESCR, the latter having been modelled after the former, undeniably provide a certain fundamental rights basis for authors’ rights.\textsuperscript{52} Nevertheless, the scope of the protection offered by those provisions is unclear. Many commentators recognise that since article 27(2) UDHR and article 15(1)(c) ICESCR do not prescribe the level of protection that should be granted to authors, they leave a large margin of appreciation to states.\textsuperscript{53}

An attempt can nevertheless be made to identify some core obligations concerning the protection of both the moral and material interests. The moral interests protected are arguably similar to the main moral rights protected in the Berne Convention, that is to be recognized as author and to be protected against distortions that are prejudicial to honour or reputation. Such was also the conclusion of the Committee on Economic, Social and Cultural Rights (“CESCR”) in its General Comment No. 17 from 2006.\textsuperscript{54} Because moral rights are not included within the scope of this study, this is not further discussed.\textsuperscript{55}

The question what protection of “material interests” entails is more complicated and, within the context of this dissertation, more interesting. The wording of both article 27(2) UDHR and article 15(1)(c) ICESCR

\textsuperscript{51} E.g. Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v Council and Commission ECLI:EU:C:2008:461, para 283 (emphasis added). Several AGs have already suggested the CJEU should take account of the ICESCR in interpreting EU law. See the Opinion of AG Sharpston in Case C-73/08 Bressol and Others ECLI:EU:C:2009:396, para 136, the Opinion of AG Tanchev in Case C-214/16 King ECLI:EU:C:2017:439, paras 40-41, the Opinion of AG Wathelet in Case C-266/16 Western Sahara Campaign UK ECLI:EU:C:2018:1, paras 101-102 and the Opinion of AG Campos Sánchez-Bordoná in Case C-161/17 Renckhoff ECLI:EU:C:2018:279, para 115, n 80. Implicitly, the potential applicability of the ICESCR seemed to also have been accepted by the CJEU in Case C-73/08 Bressol and Others ECLI:EU:C:2010:181, paras 83-88.

\textsuperscript{52} There is an extensive literature on the subject. See, e.g., Dessemontet 1998, Geiger 2004a, paras 40-42, Geiger 2006b, Kéréver 1999, Östergard 1999 and Strowel 1993, paras 122-123, as well as the literature cited, infra, n 53.

\textsuperscript{53} E.g. Chapman 2001, p. 15, Derclaye 2008, p. 139, et seq, Mylly 2005, p. 197, Torremans 2008b, p. 203-204 and Torremans 2014, para 17(2).25. Implicitly also, recognizing that a system of (mainly) exclusive rights is not the only way by which states can fulfil their obligations under art. 27 and art. 15: Plomer 2013, p. 175 and Yu 2007, p. 1083.

\textsuperscript{54} Comm. on Econ., Soc. & Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Art. 15(1)(c), of the Covenant) (E/C.12/GC/17, 12 January 2006), para 13.

\textsuperscript{55} See, supra, § 13.
27(2) and article 15(1)(c) ICESCR is ambiguous, as is their drafting history, which focused mainly on the question whether the respective provisions should be included at all, which proved controversial, rather than on the scope of obligations thereunder.\(^56\) Moreover, no unique motive for the inclusion of these provisions can be identified, further obscuring the provision’s meaning. Divergent reasons were adduced in support of explicit protection of the interests of authors. Interestingly, these reasons related both to the protection of the human dignity of the individual – which is not surprising for human rights instruments – but also to functional considerations. For instance, the protection of material interests was believed to be necessary to provide authors with a remuneration for their labour, but also to encourage creative activity and the development of culture.\(^57\) The latter justification sought to connect the right of the author with the rights of others to take part in cultural life, to enjoy the arts and the benefits of scientific progress, themselves protected by article 27(1) UDHR and article 15(1)(a) and (b) ICESCR. Protection of authors was deemed necessary to ensure there would be a cultural life to take part in and progress or arts to enjoy. At the same time, the right to take part in cultural life inherently limits the right of authors. For these reasons, Tuomas Mylly has even gone so far as to suggest that this interrelationship between the various provisions of article 27 and article 15 militates against reading in article 27(2) and article 15(1)(c) any kind of minimum level of protection for authors.\(^58\)

Nevertheless, even if the right of authors is to be balanced against the rights of others and the needs of society at large, one needs to have at least an idea of what that right \textit{prima facie} requires as a matter of principle. Arguably, the protection afforded by the UDHR and ICESCR is narrow. A systemic interpretation, in light of the separately protected rights of the worker to remuneration and of everyone to an adequate standard of living,\(^59\) points to a right for the author to a just or fair remuneration for their work enabling them to enjoy an adequate standard of living. Such a limited right to just remuneration is also in line with one of the main reasons advanced in support of the inclusion of article 27(2) UDHR, namely that the intellectual labourer should receive protection similar to that of the wage earner. Peter Yu has pointed out that support for this interpretation can also be found in the original text of article 27(2),

\(^{56}\) Cf. Chapman 2001, p. 13. For a discussion of the drafting history of both provisions, see e.g. Green 2000, Plomer 2013 and Yu 2007, p. 1050 \textit{et seq.}

\(^{57}\) Cf. Chapman 2001, p. 10-12 and Green 2000, p. 12. For an extensive overview of the various motives, see the literature cited in the previous footnote.

\(^{58}\) Cf. Mylly 2005, p. 197.

\(^{59}\) Art.25 UDHR and art. 7 & 11 ICESCR.
which provided for protection of moral rights of authors “in addition to just remuneration for their labour”.\textsuperscript{60}

Article 27(2) and article 15(1)(c) ICESCR thus hardly enshrine as a fundamental right the broad exclusionary protection nowadays typically granted to authors. Several authors have rightfully suggested that states can also fulfil their obligations by granting remuneration rights or even by creating prize funds.\textsuperscript{61} So while it is true that copyright laws protect moral and material interests, one should be careful to state that, conversely, copyright itself is a human right.\textsuperscript{62} This overrates the constitutional foundations of copyright law. Moreover, it is important to keep in mind that in principle only authors benefit from the protection of Article 27(2) UDHR and article 15(1)(c) ICESCR,\textsuperscript{63} although one could argue that to the extent that a performer gives their own interpretation to the work they perform, they are also “authors” of an “artistic production” within the meaning of those provisions. The fundamental rights entitlement to the rights granted under modern day copyright legislation is thus weak (authors, performers) or non-existent ((other) related right holders), meaning their (constitutional) foundations perhaps should be sought elsewhere.

135. \textit{Normative uncertainty.} Finally, one can also explain the weak obligations of signatory states under articles 27 UDHR and 15 ICESCR with reference to normative uncertainty. Authors are only entitled to protection of their material interests insofar as it does not unduly interfere with the rights of others. The relative weight of a particular level of protection of the authors’ material interests depends to a large extent on the intrinsic importance one accords to the fundamental right to protection of those interests and on the degree of fulfilment of that right that is achieved by the chosen level of legal protection. Questions of intrinsic importance and degree of fulfilment are not morally neutral.\textsuperscript{64} However, as will be further discussed in Section 5.4.2.2, the moral justification of the rights of authors is highly contentious, meaning both the intrinsic importance attached to the fundamental right of authors and the weight attached to the degree of fulfilment is subject to considerable normative uncertainty. In this light, the obligations of signatory states vis-à-vis authors cannot be strictly defined, leading to a large margin of discretion. Meanwhile, a court like the CJEU or national courts can take account of articles 27 UDHR and 15

\textsuperscript{60} Yu 2007, p. 1087-1088.
\textsuperscript{61} Cf. Mylly 2009, p. 202 & Yu 2007, p. 1090-1091. See also General Comment No. 17 (\textit{supra}, n 54), para 16.
\textsuperscript{62} E.g. Torremans 2014, para 17(2).17.
\textsuperscript{63} Cf. Opinion of AG Tesauro in Case C-200/96 \textit{Metronome Musik v Music Point Hokamp} ECLI:EU:C:1998:18, footnotes 6 & 18.
\textsuperscript{64} Cf., \textit{supra}, § 72.
ICESCR when interpreting and applying copyright norms, but should acknowledge this normative uncertainty.

5.3 The objectives of EU copyright law

136. An instrumental view. The previous section outlined the (narrow) constitutional basis of the rights of authors, found in the international obligations of the individual Member States. The right to property has little to say about the scope of copyright protection, neither with respect to authors nor holders of related rights. But in order to be justified copyright need not be founded on a principled protection of fundamental rights of authors per se. Copyright can also be construed as an instrument in the public interest to pursue policy objectives such as the incentivization and rewarding of creation and the dissemination of culture. This section is aimed at identifying the core objectives of EU copyright law. To that end, it first briefly describes the focus of the EU legislature, before discerning three categories of objectives.

5.3.1 The focus of the EU legislature

137. Legislative focus. From the outset the EU legislature has recognized that legislating on copyright entails striking a balance between divergent interests. Most prominently, this recognition features in a number of preambles to the various directives in relation to copyright where the legislature emphasizes that a fair balance of rights and interests between right holders and users must be safeguarded.65 But already before that the idea of copyright as a balance had been espoused in the 1988 Green Paper on Copyright and the Challenge of Technology. On the first page it is stated:

The development of copyright laws in the Community and elsewhere reveals a continual re-examination of those laws to achieve an appropriate balance, in the light of conditions prevailing at the time, between important objectives that are partially in tension. Protection of the economic interests of the author and other creators, the promotion of ready access to information, and the pursuit of cultural goals have all had to be pursued and reconciled.66

Nevertheless, EU copyright policy has always had a predominant focus on the importance of the copyright dependent industry to the European economy and the related right holder interests, which is not necessarily surprising in an environment focused on market integration. This is already evident in the 1988 Green Paper, which

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65 In chronological order: Recital 31 in the preamble to the InfoSoc Directive, recital 1 in the preamble to the Directive implementing the Marrakesh Treaty and recitals 6 & 70 in the preamble to the DSM Directive.
Outlined three particular challenges facing the (then) European Economic Community: (i) the proper functioning of the internal market, which would be threatened by divergent approaches to piracy, (ii) improvement of the competitiveness of the economy by ensuring at least equal protection as enjoyed by competitors in their home markets and (iii) protection of European creators against misappropriation by parties outside the Community.67 This primary concern for the economic importance of the copyright industry can also be discerned in later policy documents.68 For instance, the 1995 Green Paper on Copyright and Related Rights in the Information Society not only stressed the importance of copyright protection for the promotion of the development of European cultural heritage in general, but also the “economic value” of that heritage and the related need “for the economic recovery to benefit the cultural sector of the Community”.69 Copyright was described as “fundamental” in that regard.70 The Green Paper went on to emphasize the key role of the incentive to invest provided by copyright protection to “added value and competitiveness in European industry”, and the importance of copyright and related rights to job creation.71 The 1996 follow-up to that Green Paper similarly noted that “ensuring a high and comparable level of copyright protection across Member States, has created a positive climate for innovation and creativity”.72 The importance of

67 See *ibid.*, p. 3-5. Interestingly, the Commission noted as its fourth concern that the restrictions created by copyright law should not disproportionately affect competition, meaning certain limits should be placed on protection to avoid “genuine monopolies”. This concern, however, was limited to certain new areas which had recently developed, such as in respect of the potential application of copyright to computer programs. So, although the Commission recognised the need for limitations on copyright protection, its concern, at least early on, was not with the more conventional boundaries of copyright created by traditional limitations and exceptions, but with avoiding economic monopolies in certain newly developing industries. The importance of copyright as an “economic and cultural asset” was also stressed in the follow-up to the Green Paper. See Communication from the Commission. Follow-Up to the Green Paper. Working Programme of the Commission in the Field of Copyright and Neighbouring Rights (Brussels, 17 January 1991, COM(90) 548 final), p. 2-3.

68 This was also noted by The European Commission Legal Advisory Board, *General Reaction to the Green Paper on Copyright and Related Rights in the Information Society*, retrieved from <http://www.echo.lu/le gal/en/ipr/reply/general.html> accessed on 27 June 2019, which “observes that the Green Paper has been written with the clear purpose of strengthening the protection of intellectual property in the emerging digital networked environment ... However, in the opinion of the LAB it is not sufficient to look at the present and future of intellectual property rights solely from a right holder’s perspective. Even though society in general may benefit from increasing, to a certain degree, the level of protection currently awarded to right holders, the interests of right holders, society and the economy as a whole have to be carefully balanced.”


copyright to the global competitiveness of European industry has remained a central
tenet of the Commission’s activities during the most recent copyright reforms, while
reiterating that a “high level of protection” is the basis of that competitiveness. In a
2015 resolution the European Parliament echoed these sentiments, by emphasizing
that “any reform of the copyright framework should be based on a high level of
protection, since rights are crucial to intellectual creation and provide a stable, clear
and flexible legal base that fosters investment and growth in the creative and cultural
sector”.74

A similar image, revealing a strong focus on the economic importance of copyright,
can be obtained from the preambles to the various directives. Case in point is the 2001
InfoSoc Directive, which followed the rhetoric that pervaded the 1995 Green Paper
and its 1996 follow-up by stressing, in its preamble, that a harmonized, high level of
protection will lead to substantial investment in creativity and innovation, increased
competitiveness and job creation. Copyright was described as “crucial to intellectual
creation” and as necessary to provide “satisfactory returns” on investment.75
Similarly, other directives have stressed that copyright is “of fundamental importance
for the economic and cultural development of the Community” and “fundamental to
intellectual creation” and that copyright “stimulates innovation, creativity and
investment”.76

The grant of broad economic rights has not only been anchored to their incentivizing
function and the general economic importance of copyright. Although to a lesser
extent, the EU legislature has also stressed the importance of rewarding authors and
performers for their creative efforts. Partially, this reward has a utilitarian purpose as

73 Communication from the Commission to the European Parliament, the Council, the
European Economic and Social Committee and the Committee of the Regions. Towards a
modern, more European copyright framework (Brussels, 9 December 2015, COM(2015) 626
final), p. 2. See also Communication from the Commission to the European Parliament, the
Council, the European Economic and Social Committee and the Committee of the Regions,
Promoting a fair, efficient and competitive European copyright-based economy in the Digital
emphasizing “the ability of the European copyright industries to innovate in the digital
environment is a prerequisite for their success and their ability to compete globally”.
74 European Parliament resolution of 9 July 2015 on the implementation of Directive
harmonisation of certain aspects of copyright and related rights in the information society
(2014/2256(INI)), para 19. The European Parliament also pointed out the importance to
employment of the “copyright-intensive industries” (para 21).
75 Recital 4 in the Preamble to the InfoSoc Directive.
76 Ibid., recitals 9-10.
77 Recital 3 in the preamble to the Rental and Lending Rights Directive.
78 Recital 11 in preamble to the Term Directive.
79 Recital 2 in the preamble to the DSM Directive. See, similarly, recital 5 in the preamble to
the Orphan Works Directive, recital 1 in the preamble to the CRM Directive and recital 1 in the
preamble to the Directive implementing the Marrakesh Treaty.
it is intended to ensure that authors and performers can “continue their artistic and creative work”. 80 But it appears that this reward is awarded not just with a view to the future, but also with a view to the past, that is as a reward for past creativity. In this regard it has a certain deontological connotation. Accordingly, the preamble to the Orphan Works Directive notes, in general, that “[c]opyright is an important tool for ensuring that the creative sector is rewarded for its work”. 81 Similarly, the Commission wrote in a 2015 communication that “[c]opyright rewards creativity and investment in creative content”. 82 Finally, and importantly, the preamble to the InfoSoc Directive states that copyright protection is one of the main ways of “safeguarding the independence and dignity of artistic creators and performers”. 83 One could read into this last statement a reference to the fundamental right of authors to protection of their moral and material interests. EU copyright can thus also be viewed as an explicit mechanism to reward creativity, simply as a form of societal appreciation and recognition of creative endeavors or even as a matter of desert.

138. Legislative bias. On a final note, it can be argued that, despite the acknowledgement that copyright should strike a fair balance of rights and interests, the EU legislature has shown a consistent bias towards right holder interests. This is evident when reading the various directives in relation to copyright. Subjecting the directives up to and including the CRM Directive to content analysis, Ana Ramalho found 88 references to protection of content industries and 79 references to the protection of authors and performers in their preambles. By contrast, end user interests were referenced less than 25 times and intermediary industries less than 20. 84 Examples of less than full consideration for countervailing (fundamental) rights and interests are plentiful. The “harmonization” of limitations and exceptions achieved by the InfoSoc Directive is notorious and can hardly be said to be the result of a conscious consideration as to the proper protection of user interests and other public policy objectives. 85 It led to well-known proclamation by Bernt Hugenholtz that the Directive was “possibly invalid”. 86 Similarly, the extensive protection given to technological protection measures by article 6 of the InfoSoc Directive offers little protection for users relying on exemptions. 87 One could argue the situation has

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80 Recital 10 in the Preamble to the InfoSoc Directive.
81 Recital 5 in the preamble to the Orphan Works Directive.
82 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards a modern, more European copyright framework (Brussels, 9 December 2015 COM(2015) 626 final), p. 2.
83 Recital 11 in the Preamble to the InfoSoc Directive.
84 Ramalho 2016, p. 54.
86 Hugenholtz 2000.
87 See, e.g., the critical analysis by Mazziotti 2008, p. 94 et seq.
improved with the adoption of the DSM Directive. After all, the Directive mandates the implementation of several specific limitations and exceptions. Nevertheless, despite the fact that the initial impact assessment accompanying the proposal included an analysis of the impact of the proposals on consumers as an interest group and fundamental rights in general, it also showed a patent disregard for the potential impact on various fundamental rights of certain measures intended to strengthen the position of right holders. The potential negative impact on the right to freedom of expression and freedom to information of the exclusive press publisher right was completely ignored. 88 Similarly, the impact on the right to protection of personal data of the new obligations imposed on “online content-sharing service providers” by article 17 of the DSM Directive was not discussed. 89

5.3.2 The primary, secondary and tertiary objectives of EU copyright law

139. General interest and the rights of others. As the brief overview of EU copyright policy illustrates, that policy pursues a number of different objectives, from rewarding creation in itself to stimulation of creative and artistic endeavours, the protection and dissemination of European cultural heritage, and the promotion of investment in creative industries and the associated job creation. As an instrument in the public interest, copyright does not directly have a constitutional basis in individual rights. Rather, it can conversely be construed as a limitation of the freedoms of others in the public interest. 90 However, even the public interest objectives of copyright can be linked to rights of others, such as the right to work, the right to access to cultural life and the right to freedom of expression, constituting a reward that allows authors to work independently. 91, 92

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88 See for a critical analysis of exactly this issue, Van Eechoud 2017, p. 18 et seq. She notes: “The crucial question here is whether the new [intellectual property right for publishers of press publications] actually would meaningfully promote the sustainability of the (press) publishing industry and media pluralism, and if so, at what cost. The Impact Assessment that accompanies the proposal does not contain even the beginning of an answer.”


90 Cf. art. 52(1) EU Charter: “Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”


92 For an extensive discussion of various justifications of copyright, see, e.g., Grosheide 1986, p. 125-145.
140. Copyright’s primary, secondary and tertiary objectives. The analysis in the previous section allows a distinction between three (categories of) objectives that form the bedrock of EU copyright law.

The primary objective of EU copyright is to guarantee the independence and dignity of authors and performers, as well as to provide a reward for past creativity. As noted in the previous subsection, this objective has both an consequentialist and deontological connotation. It can be viewed as consequentialist insofar as it aims to create an independent cultural sector, which can sustain itself free from patronage.\(^93\) On the other hand, this objective also reflects the idea of copyright as a reward, not to achieve some other objective, but as an aim in itself. In this regard, it can be said to implement the fundamental right of “authors” to protection of their moral and material interests within the meaning of the UDHR and the ICESCR.\(^94\) Moreover, protection can more generally be grounded in the right to human dignity. This European foundation of copyright law in a way mirrors the obligation of the legislature read by the German Federal Constitutional Court in article 14 of the German Basic Law, discussed in § 131. It also links copyright to its (alleged) natural right origins. In the German context, this was illustrated by the reference of the German Court to the importance of property rights to both “enabling the development and independent arrangement” of one’s life and the protection of things of economic value gained through labour.\(^95\) As such, the protection of authors and performers has a relatively great intrinsic importance compared to the secondary and tertiary objectives. However, as noted already in § 135, the questions of intrinsic importance and degree of fulfilment are not morally neutral. The contentious nature of the moral justification of these rights arguably must ultimately impact the relative weight one can assign to this objective when confronted with countervailing rights and interests. This is further discussed, infra, in Section 5.4.2.2.

The secondary objective of EU copyright is to incentivize creation of both authorial works and subject-matter protected by related rights. This is a purely instrumental view of copyright: copyright is intended to improve market efficiency by granting temporary exclusionary rights. Without this ability to exclude, competitors may be able to undercut creators by selling their creations for a price that approaches the marginal cost. As a result, creators may not be able to recoup their initial investment, leading to underproduction of cultural artefacts. This, very briefly, is the theory. It is

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\(^93\) On this, e.g., Netanel 1996.
\(^94\) See, supra, Section 5.2.2
far from clear, however, what level of protection is necessary to optimize efficiency. Some promote the idea of limited control primarily intended to incentivize initial creation,\textsuperscript{96} while others have suggested that, except perhaps in cases of market failure, protection should extend to every possible use made of the work.\textsuperscript{97} Evidence for the optimal amount of protection is thin, with some research suggesting in some instances the incentives provided by law are not necessary to spur creation.\textsuperscript{98} This is further addressed in Section 5.4.2.1.

Finally, the tertiary objective underlying EU copyright law approaches copyright not as a way to protect the interests of the creators of the subject-matter protected by it, nor as a means to incentivize the creation of that subject-matter, but as an instrument to spur investment and job creation in the industries that exploit the subject-matter protected by copyright. The direct connection between actual investment and resulting job-creation and specific copyright norms is weak. Arguably, given this weak connection, the intrinsic importance of this objective is relatively low, even if the aim of furthering job creation can be said to pursue the fundamental right to work. Moreover, it can reasonably be assumed that any increase in copyright protection will only marginally impact the degree of fulfilment of this particular fundamental right, despite the size of the copyright dependent industries.

5.4 The reward as the overarching objective of EU copyright law

141. Outline. The main objectives of EU copyright identified in the previous section are pursued by ensuring that authors and holders of related rights have the opportunity to obtain a reward through the grant of economic rights enabling effective commercial exploitation. Together, these objectives are unified in what can be called the (overarching) remuneration objective of EU copyright law. The reward granted is both an end in itself as well as a means to an end (incentivization, investment, job-creation). Insofar as (the enforcement of) copyright limits the attainment of conflicting (fundamental) rights or (general) interests in the pursuit of these objectives, it must be proportionate. This is reflected in the idea that right holders are

\textsuperscript{96} E.g., Lemley 2005, Netanel 1996 and Rognstadt & Poort 2018.
\textsuperscript{97} E.g. Goldstein 1994, p. 178-179 and Bell 1998. See also, in regard to patents, Kitch and Kieff. Landes & Posner 1989, although proceeding from the understanding that [s]triking the correct balance between access and incentives is the central problem in copyright law" (p. 326), nevertheless contend that right holders should have broad control over (derivative) use of the work (p. 353 et seq.). See also Landes & Posner 2003, suggesting a system of short terms of protection that can be renewed indefinitely combined with a broad scope of protection. Approaches that draw the borders of copyright protection along instances of market failure trace back to the seminal article of Wendy Gordon on “Fair Use as Market Failure” (Gordon 1982), even if Gordon herself did not intend to argue in favour of a restrictive, exclusively market failure-based interpretation of fair use (see Gordon 2002).
\textsuperscript{98} For an overview see, e.g., Bechtold 2018, p. 63-65 and Lemley 2015, p. 1334.
only entitled to an “appropriate” reward, as the CJEU has emphasized in cases like \textit{FAPL} and \textit{Usedsoft}.\footnote{See, \textit{supra}, § 97.} The reward granted to right holder can be deemed appropriate to the extent that it necessarily contributes to the remuneration objective and that it does not disproportionately interferes with other considerations. First, granting a reward (typically in the form of control) must be suitable and necessary to achieve (one of) the underlying objectives. Second, the degree of fulfilment of these objectives must be capable of outweighing countervailing rights and interests.

This section focuses on the question of establishing the degree of fulfilment of the remuneration objective. The greater the contribution to the underlying objectives (as attenuated by their respective intrinsic importance) and the greater the reliability of the underlying premises, the greater will be the relative weight of this remuneration objective vis-à-vis those rights and interests. However, there is considerable uncertainty as to the extent to which rewarding right holders is necessary and justified to attain the objectives set forth in the previous section. This should impact to what extent the overarching remuneration objective can outweigh other rights and interests. This complication is addressed in Section 5.4.2. First, however, I briefly discuss the utility of two other concepts, those of exploitation and of harm, to delineate the scope of copyright protection. I conclude with some general observations on how to determine the degree of fulfilment of the remuneration objective in “typical” cases.

\section*{5.4.1 The concepts of exploitation and harm as tools to delineate the scope of protection}

\subsection*{5.4.1.1 The concept of exploitation}

\textbf{142. Exploitation as specific subject-matter.} In Section 4.3.2.1 it was suggested that the CJEU views the specific subject-matter of copyright as the right to authorize independent and repeatable acts of exploitation. This begs the question as to the functionality of the concept of exploitation in delineating the scope of rights and limitations and exceptions, and ultimately the level of reward due to authors. Copyright laws traditionally solely focused on those acts necessary for commercial exploitation of the work. Since over the years, in particular due to the impact of digital technology, this connection between exploitation and copyright protection has been weakened, several authors have suggested reconnecting copyright to this underlying purpose of ensuring control over the exploitation of the work.\footnote{Depreeuw 2014, ch. 3, Dusollier 2018, Rognstad 2015, Rognstad & Poort 2018 and Strowel 2018, p. 206-207. Cf. also Ohly 2018a, p. 107 \textit{et seq.} and Pihlajarinne 2017 who similarly suggest a return to first principles.}

\footnote{99 See, \textit{supra}, § 97.}
Can exploitation serve as a proxy for determining the level of the reward due to authors? This is unlikely. By itself exploitation is an incomplete notion. Since in the digital sphere (almost) any use of a work can in theory be subjected to right holder control, every such use can be viewed as a possibility for the author to exploit the work. Those who have suggested to return the concept of exploitation to the centre of copyright therefore typically qualify that concept, for instance by limiting it to acts of exploitation that result in the circulation of works in the public sphere, or by considering that the exploitation must be “reasonable”. Consequently, authorial control over acts of exploitation is made conditional on that control being necessary for copyright to attain its purpose (however that purpose is understood). The CJEU has recognized the inherent limits of the right of the author to control the exploitation of their work, by explicitly considering that this control is intended to ensure a reward, but that right holders are only entitled to an appropriate reward. Giving control over exploitation is merely a means to ensure right holders can obtain a reward (which in turn is itself at least partially a means to reach certain objectives). Nevertheless, thinking of copyright in terms of giving control over exploitation may be helpful when determining to what extent a certain action impacts on the ability to generate a reward. If a certain act cannot be considered an act of exploitation, understood as an act that can generate an independents economic benefit, it is unlikely to affect the ability of the author to obtain a reward.

5.4.1.2 The degree of fulfilment of the remuneration objective and the concept of harm

The concept of harm. Striking a balance in the course of the interpretation or application of copyright law necessitates taking account of the degree of fulfilment of the remuneration objective that results from subjecting a particular use to right holder control. One can also ask, conversely, what the degree of interference with that objective would be if the use were not subject to right holder control. The latter can

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101 Cf. Bohannan 2010, p. 1099, talking about the notion of cognizable harm in copyright and noting that “there is a potential for circularity in the definition: a copyright holder can always argue that the defendant’s use caused her harm (and therefore is not fair) because the defendant could have paid her a license fee for any unauthorized use; yet, if the use is deemed fair, then no payment is required”.

102 Dusollier 2018.

103 Rognstad 2015, although what is “reasonable” is left largely undefined. In a later (co-authored) paper, Rognstad principally links what is reasonable to efficiency considerations. See Rognstad & Poort 2018.

104 See, principally, Section 4.3.2.1. See also Chapter 2.

105 Cf. Depreeuw 2014, p. 533, who goes on to point out that consumptive uses requiring reproductions, such as streaming media online, are not acts of exploitation, unlike the communication to the public which makes such uses possible (p. 536).
also be conceptualized as a question of harm. The concept of harm is a known device for delineating the boundaries of copyright.

A narrow approach to harm claims that copyright protection is justified because unauthorized use harms the individual of the author. Such an argument from harm is one of the deontological considerations that one could consider part of the primary objective pursued by EU copyright. A broader approach to harm looks at this concept not principally as harm to the author, but as harm to the extent copyright can attain its purpose. In particular in the USA, several authors have concerned themselves with the question what should count as cognizable harm in this sense. The principal objective of the majority of these enquiries appears to be to reduce the scope of copyright and to bring it closer in line with the primarily utilitarian purpose attributed to it in the USA. It has been suggested, for instance, that copyright should only protect against “any use that threatens to suppress author incentives significantly below the optimal level”\textsuperscript{106} or against use “that the copyright owner ... could have reasonably foreseen at the time the work was created”\textsuperscript{107}. These approaches thus tie the scope of copyright to its incentivizing function.\textsuperscript{108} A broader understanding of the purposes of copyright, such as arguably the case in the EU, also requires a broader understanding of the concept of harm. This notion is reflected in Thomas Cotter’s definition of cognizable harm as harm which “the copyright laws were intended to prevent”.\textsuperscript{109} He pointed out that determining harm thus “involves consideration of the purposes of copyright, the relationship of copyright to freedom of speech, and the policies underlying the fair use privilege”.\textsuperscript{110} Thus conceptualized, harm and reward are two sides of the same coin.

\textbf{144. The CJEU in Padawan.} Before moving on, it must be noted that in one particular context the CJEU itself has made a reference to the criterion of harm. It has done so in the course of setting out the principles for calculating the amount of fair compensation due to right holders under articles 5(2)(a) and (b) of the InfoSoc Directive (the reprography and the private copying exception, resp.). In \textit{Padawan}, the CJEU was asked if the fair compensation due to authors under the private copying exception should be calculated on the basis of the principle of harm. In a sensible Opinion, AG Trstenjak concluded that the compensation must constitute an appropriate reward for the use of the work.\textsuperscript{111} By contrast, the CJEU held that the compensation due to authors under the private copying exception should be calculated on the basis of other considerations.\textsuperscript{112}

\textsuperscript{106} Springman 2009, p. 320.
\textsuperscript{107} Balganesh 2009, p. 1574-1575.
\textsuperscript{108} Cf. also Bohannan 2007 and Bohannan 2010.
\textsuperscript{109} Cotter 2010, p. 727.
\textsuperscript{110} Cotter 2010, p. 705. Cf. also Gordon 2013, p. 16-17.
\textsuperscript{111} Opinion of AG Trstenjak in Case C-467/08 \textit{Padawan} ECLI:EU:C:2010:264, paras 78-84.
calculated on the basis of the criterion of harm. The CJEU has not been entirely consistent as to where it considers that harm to originate. In *Padawan* the CJEU first suggests that this harm is caused by the introduction of the private copying exception, without which the author could have enforced their exclusive right.\(^{112}\) This is nonsensical. This conclusion presupposes an entitlement to exclusive control. This entitlement does not exist prior to the legislation granting copyright protection. In particular for works created after the introduction of the exception,\(^{113}\) there can be no harm to any prior entitlement. In focusing on the alleged harm done by the introduction of the exception, the Court appears to mistakenly take as a baseline the situation in which there is an entitlement to exclusivity without any exception. However, later the Court indicates it is the user, not the legislature introducing the exception, that is causing “harm” by making a private copy.\(^{114}\) Again, looking for harm to a supposed pre-existing right to exclusivity over reproduction would be a mistake. The “harm” to the author should be found somewhere else. The compensation due for the making private copies in the place of exclusive control is best conceptualized as pursuing the same objectives as exclusivity by rewarding the author. It is suggested, therefore, that the concept of harm ultimately must be understood as the obligation to pay an appropriate reward for certain uses by the actual user. Perhaps the use of the term “harm” instead of reward should principally be understood as an indication who is ultimately responsible for paying compensation, that is the person causing “harm”. Indeed, the CJEU typically refers to the concept of harm mainly to emphasize that it is the user that makes the copy who should ultimately bear the burden of the compensation due.\(^{115}\)

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\(^{112}\) Case C-467/08 *Padawan* ECLI:EU:C:2010:620, para 42.

\(^{113}\) In regard to right holders who are confronted with a newly introduced limitation or exception on existing rights the question may arise whether their right to a peaceful enjoyment of their property has been interfered with. This is a separate issue, to be determined in the context of the right to property as previously discussed. It does not appear the CJEU had harm to this particular class of right holders in mind when it held that the amount of compensation should be calculated on the basis of the criterion of harm.

\(^{114}\) Cf. Case C-467/08 *Padawan* ECLI:EU:C:2010:620, para 45. See also Case C-462/09 *Stichting de Thuiskopie* ECLI:EU:C:2011:397, para 26; Joined Cases C-457/11 & C-460/11 *VG Wort and Others* ECLI:EU:C:2013:426, para 49; Case C-572/13 *Hewlett-Packard Belgium v Reprobel* ECLI:EU:C:2015:750, para 48; Case C-470/14 *EGEDA and Others* ECLI:EU:C:2016:418, para 27 and Case C-110/15 *Microsoft Mobile Sales (formerly Nokia Italia) and Others* ECLI:EU:C:2016:717, para 30.

\(^{115}\) Cf. Case C-462/09 *Stichting de Thuiskopie* ECLI:EU:C:2011:397, para 26; Case C-521/11 *Amazon.com International Sales and Others* ECLI:EU:C:2013:515, para 23; Case C-463/12 *Copydan Båndkopi* ECLI:EU:C:2015:144, para 22; Case C-572/13 *Hewlett-Packard Belgium v Reprobel* ECLI:EU:C:2015:750, para 69; Case C-470/14 *EGEDA and Others* ECLI:EU:C:2016:418, para 27 and Case C-110/15 *Microsoft Mobile Sales (formerly Nokia Italia) and Others* ECLI:EU:C:2016:717, para 30.
5.4.2 Rewarding the author: the uncertain premises of EU copyright law

145. Empirical and normative uncertainty. Arguably, the overall importance of granting a reward by means copyright protection will for the most part be determined by the degree to which that reward fulfils either the objective to protect authorial independence and dignity or the objective to incentivize creation (or both). However, assumptions that granting a reward in the form of copyright protection will indeed further those objectives are not always reliable. The degree to which copyright contributes to the incentivizing of creation, or more general: to economic efficiency, is subject to empirical uncertainty. By contrast, to what degree the grant of a reward as an end in itself can be justified is subject to normative uncertainty.

5.4.2.1 Empirical uncertainty: the incentivizing power of copyright

146. Empirical uncertainty. The secondary objective of EU copyright, as here defined, is to incentivize creation. The relative weight of the overarching remuneration objective is partially determined by the degree to which subjecting particular uses to right holder control is necessary to incentivize creation. However, as already touched upon in previous sections, there is uncertainty as to copyright’s incentivizing potential. This is principally a question of suitability and necessity: is granting exclusivity an appropriate and necessary instrument to incentivize creation and dissemination of the protected subject-matter?

The central question is to what extent granting control over a certain use increases the incentivizing function of copyright, and how reliable the assessment that granting control will have that effect is. Assessing the effect of a norm on the incentivizing function of copyright requires courts to consider a number of issues. In essence, the outcome depends on the answer to the question whether economic efficiency is improved. Approaches to this question range from those insisting on the need to only provide strict incentives, that is protection against substitutability only, to broader approaches that stress the importance of broad protection that also covers most derivative uses.116

147. Copyright and economic efficiency. The following steps, roughly inspired by the model suggested by Rognstad and Poort,117 can help clarify to what extent including a certain use within the scope of copyright can be said to serve copyright’s incentivizing purpose. Primarily, efficiency will be improved if without control over access to the work the author will be unable to effectively exploit it. In

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116 Cf. supra, n 96 and n 97 and accompanying text.
117 Rognstad & Poort 2018, p. 133 et seq.
those cases, the initial investment needed for creation may not be made because it may prove impossible to recoup it. This explains why the author should be able to control the first sale of a copy, but not any subsequent sale. Rognstad and Poort further illustrate that, from an incentivizing perspective, the making of a backup copy of a DVD should not be subject to exclusivity or remuneration, because the right holder is able to take this use into account when pricing the DVD.\footnote{Ibid., p. 139.} Although this view seems generally accepted, even the necessity of providing such relatively limited control to incite creation is not uncontroversial. Some subject-matter will be created regardless of any incentive or lack thereof.\footnote{See, supra, n 98 and accompanying text.} Opinions diverge even further as to whether including licensing markets within the scope of protection is necessary to maximize copyright’s incentivizing function. That is, whether copyright should only protect against substitutionary harm or also against loss of revenue. A strict approach excludes such non-substitutionary uses from copyright’s scope, viewing them as non-essential to the incitement of creation.\footnote{Cf. Lemley 2007, p. 187: “Since the purpose of copyright is to encourage new creation by ensuring that creators get paid, copyright law’s logical concern should be primarily, if not exclusively, with infringing uses that deprive creators of revenue they could otherwise have expected to receive.”} Broader approaches suggest that authors should be enabled to capture some of the value in secondary markets, essentially trading access for greater incentives. Some of these approaches rely on (subjective)\footnote{It should be noted that foreseeability has been principally suggested as a condition for enforcement in a particular case in relation to a specific author.} foreseeability.\footnote{See, supra, § 143.} They take into account whether the use under consideration could have been reasonably foreseen at the moment of creation (and therefore have played a role in incentivizing creation). In general, foreseeability arguably should play no role in judicial norm-creation, as it may lead to unjustified unequal treatment. It is difficult to justify why an author who wrote a novel in the 1970s should have less control over certain novel uses of their work on, for instance, the Internet than a contemporary author.\footnote{Strictly speaking, the collection of interests (authorial dignity, incentives etc.) that weigh in favour of protection should weigh less heavily in the case of the earlier author, as one could argue the unforeseeable use played no role in incentivizing creation. However, the principle of equal treatment, as well as the principle of legal certainty (differentiated treatment makes it difficult for users to assess whether unauthorized use is allowed), which themselves also enter into the balancing exercise, are in my eyes capable of justifying giving earlier authors the same protection as contemporary authors. That principle compensates for the reduced weight to the lack of incentives, so to speak.} More generally speaking, the theoretical basis for the approaches promoting control over secondary markets is weak. As Oren Bracha and Talha Syed have pointed out, such control will often be unnecessary to incite the creation of works for which secondary markets can be expected to generate significant income.
Those will typically be successful works which will generate sufficient income in their primary market. For other works, control over secondary markets will often be *inconsequential*, that is to say the expected return from secondary markets will not be large enough to make a difference as an incentivizing factor. This suggests that the increased cost of access may not be set off by the added incentives.\(^{124}\) Another reason to be wary of extending protection to secondary markets is that extending already substantial protection has diminishing marginal benefits while further increasing costs of access.\(^{125}\) Finally, the broadest approaches promote the idea that any use of the work should, in principle, be subject to control by the author. They view copyright not merely as an incentivizing instrument, but also as a mechanism to promote optimal use, the idea being that lack of control leads to wasteful duplicative efforts and “congestion externalities”.\(^{126}\) The theoretical and empirical foundation for this position is arguably the weakest. Opponents of this line of thought have pointed out that when it comes to secondary markets there is no good reason to treat intellectual creations different from other goods,\(^{127}\) that such broad protection may lead to a bias against minority tastes and that there is little evidence that such protection leads to optimal efficiency while creating substantial social costs,\(^{128}\) and that centralized control may actually prevent optimal uses of works.\(^{129}\)

Finally, it must be noted that although granting control over a certain use may at first glance appear to improve efficiency, other factors may suggest that control must nonetheless be withheld to ultimately increase overall efficiency. In those instances, control is not “necessary” from the perspective of efficiency. In the first place, transaction costs may prevent that a certain use will be made of the work by a third party, the user, even though that user attaches greater value to the use than the author, meaning that in the absence of transaction costs they would be able to agree on a license.\(^{130}\) This may, for example, be the case with a non-commercial use of a sample of a song in a derivative work to be shared with friends online. In the second place, deadweight losses and potential positive externalities may be larger than the added incentive by providing control over a certain use. For instance, even though a certain

\(^{124}\) Bracha & Syed 2014, p. 289-269, noting that accounting for product differentiation does not significantly alter the analysis.

\(^{125}\) Cf. Lemley 2005, p. 1057.

\(^{126}\) See the literature cited, supra, n 97.


\(^{129}\) Bracha & Syed 2014, p. 272-273 (”the most effective way of finding out what works best is to let many minds try”), citing Lemley 1997, p. 1068, who adds due to the large number of potential user-authors it will be very difficult for the right holder to identify who of them will improve the use of the work.

use may be valued higher by the author than by the user, the overall social value may be even larger. Whether such uses should be free or nevertheless subject to an ex post obligation to pay damages (but without the element of control in the form of an injunction), may be a question of choosing between different “necessary” alternatives and therefore one of balancing.

148. **Taking account of uncertainty.** There is thus empirical uncertainty concerning the answer to the question what level of protection best achieves the incentivizing function of copyright. The foregoing distinguished between three approaches, ranging from limited control over initial marketing to broad control over any use. As the suggested level of control over copyright protected subject-matter increases, the reliability of the underlying premises decreases. This should impact the answer to the question whether the interpretation or application of a norm “strikes a fair balance”. This is first and foremost an evidentiary issue: the greater the interference with the opposing right, the more a court will need to be convinced that granting exclusive control over a particular use is really necessary. Even if this evidentiary burden is met, any remaining uncertainty that the proposed scope of protection is indeed necessary to promote creation and dissemination should be taken into account when balancing this legislative purpose against competing rights and interests.

5.4.2.2 **Normative uncertainty: the reward as a matter of fairness**

149. **Normative uncertainty and fairness.** Whereas the incentivizing objective is hampered by empirical uncertainty, the degree of fulfilment achieved by increased protection of the primary objective is principally clouded by normative uncertainty. The primary objective of EU copyright has been defined as rewarding past creation generally, and as the protection of the independence and dignity of authors and performers specifically. Even if one concludes that a certain form of copyright protection is not justified by the incentivizing objective, it may be justified by reference to this desire to reward creation and protect authorial dignity. The legislature ought not to be categorically precluded to act upon perceived moral obligations, for instance founded on the general right to human dignity, or simply decide to reward authors as a matter of appreciation and recognition. Insofar as this limits the rights of others and therefore needs a legal justification, such a

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131 Cf. Cotter 2008, p. 1280-1283 and Cotter 2010, p. 733-735. The principal reason that the user may nonetheless value the use less is that they may be unable to internalize these positive externalities. An example may be certain educational uses.

132 Insofar as the primary objective of EU copyright law has a utilitarian element, it can be considered subject to a similar empirical uncertainty as the secondary objective.

133 Lemley 2015 has strongly rejected this position as “faith-based”.
justification can be found in either the protection of human dignity generally, either as an individual human right or as a matter of general interest, or specifically in the right to protection of “material interests resulting from any scientific, literary or artistic production of which he is the author”.134

Whether and to what extent a certain level of protection justifiably contributes to this purpose of rewarding the author is, arguably, normatively uncertain. It should be recalled that determining the relative weight of a principle is typically not morally neutral. In this case, moral evaluations will define the intrinsic importance and the degree of fulfilment of the principle to reward creation. Ultimately the answer to such questions may depend largely on one’s conception of fairness, that is whether one believes that the author is due control over a certain use regardless of the answer to the question whether that control promotes efficiency, and thus about the deontological justifications for copyright law. The does not change if one bases protection on the fundamental right to protection of material interests in the UDHR and the ICESCR. As a matter of international law, I argued that these conventions do not require very broad protection by means of copyright laws. However, even if once claims, for instance, that that protection “orders the fundamental allocation of the economic value to the creator”,135 the weight of that principle is at least in part determined by reference to moral considerations. It is for this reason that conceptualizing copyright in terms of a fundamental rights conflict cannot isolate it from the contentious debate about the deontological justifications of copyright.

Deontological theories in support of the “rights” of authors are all highly contentious. None of those theories, whether basing the claim to copyright protection on labour, the link between work and personality, or protection of personal autonomy, is fully convincing.136 In principle, it is important to make a distinction between the questions such as whether authors have inviolable (natural) rights in their works from the question whether the legislature may grant protection by way of exclusive (and remuneration) rights based on considerations of fairness. It has been argued in the preceding sections that the constitutional provisions discussed above do not create a hard, legal obligation for the EU legislature to grant authors broad rights in their creations. However, they do provide the legislature with a legal basis for the introduction of such rights to the detriment (to a certain level) of other rights and interests, that is to define the material interests and to create and define the boundaries of property rights. If society deems it fair to provide authors with

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134 Art. 27(2) UDHR and art. 15(1)(c) ICESCR.
135 Geiger 2006b, p. 405, although speaking specifically about the “right to property”.
protection beyond what is economically efficient it should in principle be permitted to do so, as long as that protection does not disproportionately interfere with other rights. Because the role the CJEU plays in protecting individual rights, it is ultimately its task to further define the protection granted by copyright in accordance with the spirit of that grant. It is at this stage that deontological considerations come back into play. As noted, the “constitutionalization” of copyright law cannot isolate it from contentious natural rights arguments. The ambiguity intrinsic to the constitutional norms at play necessitates an engagement precisely with such arguments. The CJEU is thus confronted with the ostensibly difficult task of determining to what extent including certain uses within the scope of protection can be justified as a mere reward for past creation.

In this regard, when interpreting or applying copyright law in light of the “fair balance” to be achieved, it is not sufficient for the CJEU (nor for national courts) to simply affirm that the objective of the legislature is to grant authors a high level of protection to allow them to obtain an appropriate reward. Whether ultimately a high level of protection is necessary to guarantee an appropriate reward can only be the outcome of the balancing exercise, not the starting point. The Court may thus have to explicitly grapple with questions of fairness. This is illustrated by the Opinion of AG Szpunar in Metall auf Metall, who considered that “it seems fair that phonogram producers should share in the revenue derived from the exploitation of works created using their phonogram”. Unfortunately, the AG did not substantiate this conclusion in any way. This is, however, essential if proportionality analysis is capable of achieving its rationalizing potential. Moreover, if such protection is to be justified in terms of fairness, one ought to consider both the strength of the argument in favour of protection as well as countervailing considerations.

The different deontological arguments that may support protection of authors (and to a lesser extent holders of related rights) will not be elaborately discussed here. Such discussions can be found elsewhere in abundance. I do, however, want to draw a parallel with the empirical uncertainties that surround the degree to which greater copyright protection is capable of fulfilling the secondary objective. It was suggested that as the level of protection increases, the reliability of the supposition that the secondary objective is fulfilled to a greater degree decreases. Arguably, the same is true for the strength of the normative argument in support of protection. The greater the protection one seeks to justify by reference to deontological arguments, the less persuasive those arguments generally are. That is to say, it is easier to justify

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137 Opinion of AG Szpunar in Case C-476/17 Pelham and Others (Metall auf Metall) ECLI:EU:C:2018:1002, para 97.
protection against purely substitutionary uses based on the idea that the author is entitled to a reward for their labour or in order to ensure their personal autonomy, than it is to justify full protection covering all possible uses.\textsuperscript{138} Courts should therefore be sceptical of the suggestion that greater protection necessarily leads to a proportionally greater attainment of copyright’s objective to provide the author with an appropriate reward and they must keep in mind that the greater the protection granted, the better must be the reasons adduced to justify it.

5.4.3 \textit{The importance of protection to the overarching objective of rewarding right holders}

\textbf{150. A simplified approach.} At the beginning of this section it was suggested that the greater the contribution of a certain level of protection to the objectives underlying copyright law, the greater will be the relative weight of the overarching objective to provide right holders with remuneration vis-à-vis countervailing rights and interests. Given the multitude of different objectives pursued by copyright, and the uncertainties surrounding them, determining the relative weight of this overarching objective may be a daunting task. In most cases, however, the degree of fulfilment of the remuneration objective can be approximated by looking at the commercial importance of a particular use to authors or holders of related right. That is, the greater the commercial importance of a particular use, the greater its importance for the fulfilment of the remuneration objective.

The degree of fulfilment of the remuneration objective will be most strongly impacted if without control over the use under consideration the author will be unable to effectively exploit it, primarily if the use creates substitutionary harm. This is the case, for instance, with substantially similar reproductions that aim to offer a substitute for the original. Such uses may divert customers from existing primary markets and thus impair copyright’s basic functions. In those instances, lack of protection would substantially harm the remuneration objective. The same is true for an inability to control the initial access to the work. Accordingly, the CJEU held in \textit{Renckhoff} that to permit the posting of a work to a publicly available webpage, even if it has been previously communicated on a different website with right holder consent, “would deprive the copyright holder of the opportunity to claim an appropriate reward for the use of his work”.\textsuperscript{139}

The assessment may be different if the use merely concerns a licensing market for non-substitutionary uses. Typically, one may assume that such licensing markets are

\textsuperscript{138} Cf. Gordon 2004, p. 126
\textsuperscript{139} Case C-161/17 \textit{Renckhoff} ECLI:EU:C:2018:634, para 34. See also, \textit{supra}, § 131.
of lesser importance to the level of reward than those uses which substitute for offerings made by the author and thus divert customers away.\textsuperscript{140} The size of the (potential) licensing market will play a crucial role in determining the importance of the use to the level of reward. This size should be determined relative to the overall commercialization of the work. That is to say, a potentially large licensing market in an absolute sense, for instance the repeated use of a single still of a blockbuster movie as a meme on social media, may be small compared to the overall commercialization of the work.\textsuperscript{141} In those cases the importance of those uses to the level of reward should not be considered of the same weight as typical substitutionary uses that constitute the primary source of revenue. One can therefore largely agree with the German Federal Constitutional Court in \textit{Germania 3} when it qualified the reproduction of lengthy parts from plays by Bertolt Brecht in a second play (called \textit{Germania 3: Gespenster am toten Mann}) as “insubstantial”, considering there was no noticeable commercial disadvantage such as loss of sales.\textsuperscript{142} Similarly, in \textit{Metall auf Metall} the German Federal Constitutional Court considered that permitting the borrowing of 2 seconds from a phonogram only constitutes “a slight encroachment”.\textsuperscript{143} The reproduction of such a small sample did not create a risk of substitutionary harm, nor did the foreclosed licensing opportunity result in “considerable economic harm”. The latter conclusion was based on the fact that the related right granted to phonogram producers is not intended to guarantee revenue from the licensing of excerpts from their recordings, but to protect against piracy.\textsuperscript{144} This kind of “quantification”, which one could qualify as being of light importance to the level of reward, allows a comparison with the competing interest. By contrast, in cases in which a licensing market represents a larger share of revenue, its importance to the level of reward may rise.

\textsuperscript{140} Cf. Gordon 2013, p. 18.
\textsuperscript{141} Cf. Senftleben 2004, p.189-193, who argues that the correct reference point for a determination of the existence of a conflict with the normal exploitation within the meaning of the three-step test should be the overall commercialization of the work. That is, in his opinion, a conflict can only occur if the author is “divested of an actual or potential, typical major source of royalty revenue that carries weight within the overall commercialisation of works of the relevant category” (p. 194).
\textsuperscript{142} German Federal Constitutional Court (First Senate), 29 July 2000, 1 BvR 825/98 – Germania 3, English Translation published in EIPR 2013, p. 646, para 24. Of course, as argued here, the loss of potential licensing revenue should not be entirely disregarded, but merely valued less than loss of sales, at least typically.
\textsuperscript{143} Compare this with the conclusion of the CJEU in the same case that, in essence, the use of a sample from one phonogram into a second phonogram does not fall within the scope of the exclusive reproduction right granted to phonogram producers since such use does not interfere with the purpose of enabling them to realize satisfactory returns on their investment. See, \textit{supra}, § 37 and 105, and, \textit{infra}, § 161.
\textsuperscript{144} German Federal Constitutional Court (First Senate), 31 May 2016, 1 BvR 1585/13 – \textit{Metall auf Metall}, English translation published in IIC 2017, p. 343, paras 101-104.
An additional factor to consider, in particular in respect of licensing markets, is that the reliability of the premise that granting control over specific markets promotes the remuneration objective may be relatively weak. If the degree of fulfilment increases, but the reliability decreases, the relative weight accorded to the remuneration objective vis-à-vis conflicting rights may remain more or less the same. This may especially impact the assessment in those cases where the degree of interference with the countervailing right or interests is particularly strong. It is suggested this has two specific consequences, one evidentiary and one justificatory. The former relates to the potential weak reliability of the empirical premises underlying the secondary objective, the latter to the weak reliability of the normative premises underlying the primary objective. First, as the degree of interference with a countervailing right or interest increases, the standard of proof concerning the importance of a particular market to the overall commercialization of a work should increase. The 2006 Mulholland Drive decision by the French Supreme Court is illustrative of how not to proceed in this regard. In question was whether a user could rely on the (French) private copying exception to require the removal of technological protection measures from a DVD in order to make a private copy on a VHS tape. The Supreme Court concluded that it cannot, because such a use would conflict with the three-step test by creating a conflict with the normal exploitation of the work. Without any evidentiary basis, the Court suggested such a conflict existed due to “the risks related to the new digital environment as well as the safeguard of copyrights and the economic importance that the exploitation of the work in the DVD format may have for the coverage of the costs of cinematographic production”. Similarly, the stronger the degree of interference, the better the normative reasons adduced to justify it must be. The mere statement that “it seems fair” to grant control over a certain use, ought not to be sufficient, certainly when the degree of interference with a conflicting fundamental right is serious.

5.5 Other rights and interests

151. Other issues. Two more issues should briefly be addressed. First, what rights and interests other than those so far discussed should play a role in determining the scope of protection? Second, should related rights, which typically have different

145 About the three-step test see, infra, Section 6.5.4.
147 Cf. Opinion of AG Szpunar in Case C-476/17 Pelham and Others (Metall auf Metall) ECLI:EU:C:2018:1002, para 97. See also, supra, n 137 and accompanying text.
underlying justifications than authors’ rights, be subject to an individualized assessment?

152. **Rights and interests.** Where the CJEU maintains that the interpretation and application of copyright must ensure to “strike a fair balance between rights and interests”, it begs the question which other interests must be considered, in addition to the (general) interest to ensure that authors (and other right holders) are enabled to obtain an appropriate reward. Insofar as it is a question of interpretation of the scope of protection offered by EU specifically, that is by harmonized norms, it is questionable that the CJEU should pay particular attention to interests of authors that neither find recognition in positive law nor which the legislature has intended to protect. For example, authors may have an interest in absolute control over the use of their work, but this is not an interest that a court should concern itself with. Some interests of authors may of course be subject to legal protection. Importantly, moral rights, themselves guaranteed to a certain extent by fundamental rights,\(^{148}\) grant an extra layer of protection in all member states. But it is debatable whether the CJEU, in determining the scope of (harmonized) economic rights and the limitations and exceptions thereto, should take extensive account of the moral rights-interests of authors. One could argue it should not do so for two related reasons, both relating to the lack of harmonization of moral rights. First, the lack of harmonization means it would be difficult to find a single standard along which the CJEU could measure to what extent those interests may be impacted. At most it can take into account the lowest common denominator. Second, an approach by the CJEU that would take account of moral rights might rob Member States of being able to maintain their own approaches to moral rights protection, even though they have explicitly been left outside the scope of harmonization. In spite of the this, it is true that in respect of authors and performers EU law also intends to safeguard their dignity. This does to a certain extent open the door for the consideration of interests other than those strictly related to the exploitation of their creations in order to obtain a remuneration, for instance the exercise of exclusive economic rights to prevent the circulation of works that the author no longer wants in public view.\(^{149}\)

If it is questionable that general “reputational” interests of authors themselves (i.e. moral rights) should play a role in determining the scope of protection, this is also true – even more so – for such interests of right holders other than authors. Nevertheless, in *Deckmyn* the CJEU considered that such interests should be taken

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\(^{148}\) Principally by art. 15 ICESCR. Additionally, protection of moral interests can be based on the right to protection of private life.

\(^{149}\) See, for an example, the discussion of *Afghanistan Papers* and *Spiegel Online*, infra, § 201.
into account when determining whether the application of the parody exception strikes a fair balance. In particular, the Court held that if a parody conveys a discriminatory message right holders “have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message”. Apart for risks of private censorship created by this ruling, it is unclear what the legal basis is for the recognition of this interest as legitimate, in particular in respect of successors in title of the author, who typically will not benefit from moral rights protection.

153. **Related rights.** As to the second question: are different “rights and interests” to be considered when dealing with related rights compared to when dealing with authors’ rights? One could argue that the sole objective of at least some of the related rights is to promote the investment necessary for the creation of the subject matter protected by those rights. That is to say, the purpose for the grant of a bundle of exclusive rights to producers of phonograms and of first fixations of films, to broadcasting organizations, and following the implementation of the DSM Directive also to publishers of press publications, is exclusively a means to an end. If one accepts that the basis for granting these rights is narrower than with respect to the rights of authors and (perhaps) performers – lacking the deontological component – it seems logical that this is reflected in the scope of protection. Although, the difference in scope is principally expressed through a difference in term of protection, the different objectives underlying authors’ and performers’ rights and related rights can certainly play a role when determining the scope of rights and their limitations and exceptions. In particular when applying a limitation or exception to a specific set of circumstances a court may have to assess whether that specific use strikes a fair balance and respects the three-step test in light of their specific rationale. But this difference may also be reflected in the more abstract determination of the scope of exclusive rights, as the CJEU itself illustrated in *Metall auf Metall*, in which it emphasized the specific purpose of the rights granted to phonogram producers in determining the scope of both their reproduction and distribution right.

5.6 **Synthesis**

154. **The right holder side of the balance.** This Chapter focused on the question which “rights and interests” of authors and related rights holders should be

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151 Noted by many commentators. See the references in Jongsma 2017, p. 666, n 71-76.
152 Cf. Rosati 2015, p. 527-528.
153 About the relation between the fair balance assessment and the three-step test, see, *infra*, Section 6.5.4.
154 See, *supra*, § 37 and 46.
considered when striking a fair balance in the context of the interpretation and application of copyright law. I suggested that because the right to property, as it is protected both in the ECHR and the EU Charter, only protects existing possessions (or legitimate expectations thereto) that right does not affect the determination of the scope of protection of copyright. The UDHR and the ICESCR do require a certain degree of protection of authors, but they do not impose strong state obligations. At most they require that the author receive a just or fair remuneration for their work enabling them to enjoy an adequate standard of living. Arguably, the most important interest of authors (and other right holders) to be weighed flows from the legislative objective to grant them an appropriate reward. This reward is granted both as an end in itself, for which the UDHR and ICESCR do provide a certain basis, and to reach certain public policy objectives, notably to incentivize creation. The appropriateness of this reward must be determined in light of these purposes. That means that granting copyright protection must be suitable and necessary to achieve (one of) them, and may not disproportionately interfere with other rights or (public) interests. To what extent rewarding authors indeed contributes to these purposes is uncertain. To what degree granting copyright protection contributes to copyright's instrumental purposes is empirically uncertain. Moreover, the appropriate scope of protection is subject to reasonable (moral) disagreement and therefore normative uncertainty. Generally, it appears true that the greater the scope of protection, the less reliable the empirical and normative assumptions in support of it will be. This must be taken into consideration in the balancing process. In particular in those cases in which the degree of interference with the opposing right is deemed (very) serious, this uncertainty may contribute to a conclusion that the interest of the author in an appropriate reward is not capable of outweighing that opposing right.
6  FUNDAMENTAL RIGHTS BALANCING AND THE INTERPRETATION AND APPLICATION OF THE LAW

6.1 Introduction

155. Introduction. Parts I and II have illustrated that on many occasions the outcome of a particular case in front of the CJEU has hinged on what it considers to be in accordance with a fair balance of rights and interests, in particular when fundamental rights are affected by the decision. Chapter 5 has argued that the main interest of right holders to be weighed in this regard is found in the legislative purpose to enable them to obtain a reward, and not in any fundamental right to intellectual property. This chapter discusses more specifically how proportionality analysis and in particular balancing of fundamental rights can (and should) influence the interpretation and application of rights and of limitations and exceptions in EU copyright law. The CJEU case law that was discussed in Chapter 4, in particular in Section 4.3.2.3, is used as a starting point to develop a framework for such use of fundamental rights arguments. In light of the analysis carried out in Part II, (further) inconsistencies and potential problems of the CJEU approach are identified and methodological improvements suggested.

Particular attention is given to the difficulties that arise due to the incomplete harmonization of the system of exclusive rights and, in particular, limitations and exceptions. The lack of full harmonization implies that the fundamental rights of the EU Charter can be used by the CJEU both as independent interpretative arguments in the course of the determination of the scope of rights and of limitations and exceptions to the extent that they are harmonized, as well as a tool to review the exercise of Member State discretion in the implementation of EU law. The latter may be particularly true in respect of limitations and exceptions, whose harmonization is far from comprehensive.1

This Chapter starts with some general observations (Section 6.2). Subsequently, I discuss the relation between the definition of protected subject-matter and the concept of balance (Section 6.3) and the potential impact of fundamental rights on the scope of exclusive rights (Section 6.4). Finally, and more extensively, I consider the complicated interaction between the concept of fair balance and the interpretation and application of limitations and exceptions in light of their partial EU harmonization (Section 6.5).

1 See, supra, § 50, and, infra, Section 6.5.
6.2 General observations

156. A duty of consistent interpretation. On several occasions the CJEU has identified a general duty to construct EU law in light of fundamental rights. In Promusicae the CJEU recognized a duty for Member States to “rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order”. In Afghanistan Papers and Spiegel Online the Court further specified that national courts must “rely on an interpretation [of the exclusive rights and limitations and exceptions under consideration] which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter”. There is no good reason why the same duty does not equally bind the CJEU. Appropriately, in numerous decisions the CJEU itself has adopted or rejected a particular interpretation for (not) striking a fair balance, although it has not done so within a coherent framework, as I argued in Section 4.4. Such cases can be characterized as instances of indirect horizontal effect of fundamental rights.

157. Interpretation as a balancing exercise. How to conceptualize the taking into account of fundamental rights in the process of interpretation? As explained more elaborately in Chapter 2, the CJEU looks, like most courts, at wording, context and purpose when interpreting legal provisions. This process of judicial norm-making in the context of interpretation is itself similar to the process of balancing in that textual, systemic and teleological arguments are weighed against each other. Arguably, these arguments receive their compelling character from legal principles such as legal certainty, equality, democracy/separation of powers and – importantly – respect for fundamental rights, all originating in the idea of the rule of law. In this regard, the fundamental rights argument is merely one particular type of systemic argument, albeit with an arguably high intrinsic importance. For instance, an interpretation of a norm in accordance with its clear wording is in the interest of legal certainty and respects the separation of powers by following, most probably, the will of the legislature. A relatively weak fundamental rights argument may not be able to outweigh it. Along these lines, the German Federal Constitutional Court has held that “respect for the legislature ... requires an interpretation in conformity with the Basic Law which is consistent with the wording of the statute and preserves the

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2 See, supra, § 105.
3 For a fairly recent monograph on horizontal effect of fundamental rights in the EU in general, see Walkila 2015.
fundamental aim of the legislature” and that “[t]he interpretation may not lead to an essential element of the legislative purpose being missed or distorted”. Accordingly, one can in principle agree with the CJEU’s ruling in Afghanistan Papers and Spiegel Online that an interpretation that favours a particular fundamental right must first of all be permitted by the wording of the provision in question.

Traces of this balancing approach can be found in AG Szpunar’s Opinion in Metall auf Metall. The AG concluded his analysis by remarking that “[i]n the judicial review of the application of the current provisions, fundamental rights play a different role: a sort of ultima ratio which cannot justify departing from the wording of the relevant provisions except in cases of gross violation of the essence of a fundamental right”.7 In his opinion, neither the text of the reproduction right, nor the text of the quotation exception could be interpreted in a way that would permit the use under consideration. Although the AG focused primarily on the question whether fundamental rights itself can constitute a limitation to copyright, his ultimate conclusion nevertheless suggests that, in the course of interpretation, the strength of the textual argument must this be weighed against the degree of interference with a fundamental right. In Metall auf Metall he apparently considered the textual argument so strong that this could only be outweighed in case of a “gross violation of the essence of a fundamental right”.8 Nevertheless, aside from general problems relating to the definition of the essence of rights,9 the use of the essence standard in the course of interpretation as a limit to textual interpretation is problematic, as in those cases the wording is likely to be so strong that the interpretation consistent with fundamental rights is likely to completely distort the provision’s textual meaning. This would also be at odds with the approach suggested by the CJEU in Afghanistan Papers and Spiegel Online, which rejects an interpretative outcome that conflicts with the wording of a provision. In those cases, the fundamental rights conflict is probably better resolved by withholding particular remedies10 or, in cases of a categorical conflict, invalidation of the provision in question.

158. Striking a fair balance. In principle, an interpretation in light of fundamental rights must weigh the degree of interference/fulfilment of that right caused by a particular interpretation against the strength of other arguments. The

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6 German Federal Constitutional Court (First Senate), 30 August 2010, 1 BvR 1631/08 – Drucker und Plotter, para 61.
7 Opinion of AG Szpunar in Case C-476/17 Pelham and Others (Metall auf Metall) ECLI:EU:C:2018:1002, para 98.
8 I am not convinced that the textual argument was indeed that strong. See Jongsma 2019, p. 7-8.
9 See, supra, Section 4.4.1. Cf. also, infra, § 168 and § 190.
10 See, infra, Chapter 7.
concept of fair balance itself, understood as the outcome of a balancing exercise between different rights and interests, is not something that can directly aid in this interpretative process, other than to perhaps exclude certain outcomes as a per se disproportionate interference with a fundamental right. Although at times seemingly presented as such, it is arguably not itself an interpretative argument that can be balanced against other arguments. This would require that the strength of this fair balance argument as such can be approximated, by determining by how much one right or interest outweighs the other, that is the difference between the degree of fulfilment of the one and the degree of interference with the other. However, although balancing is – in my opinion – possible by comparing the strength of arguments on an ordinal scale, the difference in strength of the two arguments that are compared can only be determined if they are commensurable on a cardinal scale. This is questionable, as was discussed in § 71.

Although it would go beyond the scope of this study to develop an abstract and detailed model of legal reasoning in the form of balancing, the use of (fundamental rights) balancing in the course of interpretation can to a certain degree be simplified. Often the interpretation of concepts such as “reproduction” and “quotation” will resolve around the question whether the use in question falls within (broad or inclusive interpretation) or outside (narrow or exclusive interpretation) their scope. If the wording of the provision is ambiguous, permitting either interpretation to a similar degree, and no specific legislative intention can be discerned, the choice between a broad and narrow interpretation will often depend on the balance between the general legislative intention to guarantee authors and related right holders a reward and the rights and interests of users and the public interest. To that effect, the German Federal Constitutional Court has held that only “[i]f several interpretations are possible in the court’s interpretation and application of provisions of the non-constitutional law, the court must give preference to an interpretation that corresponds to the values enshrined in the constitution”.11 In the words of the CJEU: the interpretation must allow a fair balance to be struck. The following sections discuss in more detail the interpretation in light of fundamental rights of copyright’s subject matter, exclusive rights, and limitations and exceptions.

11 E.g. German Federal Constitutional Court (First Senate), 19 July 2011, 1 BvR 1916/09 – Le Corbusier-Möbel, para 86 and German Federal Constitutional Court (First Senate), 31 May 2016, 1 BvR 1585/13 – Metall auf Metall, English translation published in IIC 2017, p. 343, para 82.
6.3 The subject-matter of copyright and the concept of balance

159. Subject-matter and originality. It may be asked whether fundamental rights arguments should affect the determination of the subsistence of copyright. As far as the level of originality is concerned this is questionable, even though the originality requirement undeniably is one element that determines to overall balance struck by copyright law.

Abraham Drassinower has vociferously objected against viewing originality as the outcome of a balancing exercise. He argues – in my opinion correctly – that a choice for a specific originality standard entails a choice for the protection of a certain value: protection of specifically the value of authorship, achieved by adopting a standard of originality focusing on skill and judgement or creativity, or more generally the protection of value generated per se, by following the sweat of the brow doctrine. Proportionality analysis, which ultimately consists of weighing different values against each other, cannot itself determine which values should be balanced. The originality criterion should thus not be approached as a question of balance, but principally as one of teleology. It works as a threshold requirement. How high the threshold is, is principally a question related to the purpose copyright protection is intended to serve. After the threshold is met, the work is in principle protected. It is when determining the precise scope of protection that countervailing interests come into play. In this regard it is generally true that the higher degree of originality, the greater the scope of protection will be.

This is not to say that balancing considerations do not affect the determination of the subsistence of copyright at all. For instance, drawing the line between unprotectable ideas and protected expression reflects a balance between the desire to reward and the freedom of others to engage in follow-on creation. Moreover, the question whether certain subject-matter is capable of attracting copyright protection in the first place can involve similar considerations. For instance, the exclusion from protection by copyright of the taste of a food product in 

Levola Hengelo, can be justified by considering that the interest of the public in legal certainty outweighs the objective of rewarding authors for their creative endeavours.

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12 Drassinower 2009, writing in particular about the rejection, in the name of balance, by the Canadian Supreme Court of the sweat of the brow doctrine in favour of the skill and judgement standard in CCH Canadian Ltd. v. Law Soc’y of Upper Can., [2004] 1 S.C.R. 339. See, in particular, ibid., p. 995-999.
14 Case C-310/17 Levola Hengelo ECLI:EU:C:2018:899, in particular para 40.
6.4 The interpretation of exclusive rights

160. Necessity. What is the specific role of fundamental rights in the interpretation of ambiguous exclusive rights provisions? An interpretation of copyright law that ensures a fair balance depends on taking account of the interaction between exclusive rights and limitations and exceptions. In the case of exclusive rights, a narrow interpretation in order to protect a fundamental right, limiting the degree to which copyright can attain its objectives, must be necessary. Arguably, it is not necessary if the opposing right or interest is safeguarded by another norm. Thus, a narrow interpretation of (a concept in) an exclusive right, limiting the opportunity for right holders to obtain a reward, may be rejected in favour of a broad interpretation if a limitation or exception exists which safeguards the right of the user. Accordingly, the CJEU held in Renckhoff that an interpretation of the right of communication to the public that would bring a particular educational use within its scope need not be rejected to protect the right to education since Member States may introduce a limitation or exception to safeguard precisely that right.15

161. Balancing. In other cases, the scope (broad or narrow) of a concept may depend on balancing the degree of fulfilment a particular interpretation brings to the legislative intention to reward creation and the degree of interference resulting from that interpretation with the opposing right. For instance, the question whether the unrecognizable use of a two second sample from one phonogram in another phonogram constitutes a “reproduction” within the meaning of the exclusive reproduction right may thus boil down to the question whether such use promotes a fair balance of the interest in a reward and the right to freedom of arts. In Metall auf Metall, the CJEU suggested that a narrow interpretation of the concept of reproduction must be adopted, since a broad interpretation would interfere with the freedom of the arts while not interfering “with the opportunity which the producer has of realising satisfactory returns on his or her investment”.16 On the one hand, this

15 Case C-161/17 Renckhoff ECLI:EU:C:2018:634, paras 42-43.
16 See, supra, § 37 and 105. One could well argue that often this concerns, strictly speaking, not an issue of necessity, since adjudicating the use under a limitation or exception often shifts the burden of proof to the defendant. This implies the degree of fulfilment of a fundamental right achieved by excluding the use from the scope of a fundamental right or alternatively by bringing it within the scope of a limitation or exception, may not be the same. Nevertheless, it is arguable that an abstract balancing exercise will as a rule equally favour a broad interpretation of exclusive rights: the degree to which copyright will be able to fulfil its purposes is larger if an issue is resolved under a limitation or exception, instead of solely under exclusive rights, due to the inclusion of additional conditions for the applicability of the former provisions aimed at safeguarding those purposes. It is submitted that generally this degree of fulfilment will be capable of outweighing the arguably minor degree of interference created by the shifting burden of proof. Ultimately, as a matter of systematic interpretation it makes good sense to include uses within the scope of exclusive rights if a limitation or exception exists for that use.
may suggest the rejection of the broad interpretation was a matter of lack of suitability or necessity to achieve the purpose of that right. It would mean that the CJEU is not convinced that the inclusion of such licensing markets is necessary for the incentivizing of the production of phonograms. On the other hand, and perhaps more likely, one can understand the CJEU’s consideration as one of balancing. In that case, a broad interpretation, extending to the creative re-use of short samples, is considered to contribute to the purpose of guaranteeing a reward (or: return on investment) for the phonogram producer, although arguably only in a minor way. This is in essence what the German Federal Constitutional Court held when it considered that permitting the use of the sample would only create “a slight encroachment” on the right of the phonogram producer.\(^{17}\) The CJEU can be understood as implicitly considering that the freedom of arts outweighs the interest of the phonogram producer in a reward, when it considers that a broad interpretation would not contribute to guaranteeing satisfactory returns. However, a proper evaluation of the strength of the opposing principles, as can be found in the decision of the German Federal Constitutional Court, is lacking.

In regard to *Metall auf Metall* I have suggested elsewhere that the use under consideration in that case can be safeguarded by a broad interpretation of the concept of “quotation for purposes such as criticism or review”.\(^{18}\) Had that been accepted outright, the reproduction right could have been interpreted broadly. However, the CJEU rejected such an interpretation insofar as it is not possible to identify the quoted subject-matter in the quoting subject-matter.\(^{19}\) Consequently, presuming no other limitation or exception in the *acquis* applies,\(^{20}\) the CJEU opted for a narrow interpretation of the reproduction right, excluding non-recognizable reproductions from its scope, in order to protect the freedom of the arts.

162. **The problem of partial harmonization.** In principle, it makes good sense to interpret rights and limitations and exceptions holistically, ensuring that the body of rules as a whole preserves a fair balance. However, in the EU context this gives rise to a particular problem. Unlike the exclusive rights that have been the subject of harmonization, most limitations and exceptions in the *acquis* are optional. One can therefore question the wisdom of broadly interpreting (fully harmonized) rights based on the argument that fundamental rights can be protected by a particular limitation

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\(^{17}\) See, supra, Chapter 5, n 144 and accompanying text.

\(^{18}\) Jongsm 2019, p. 10.

\(^{19}\) Case C-476/17 *Pelham and Others (Metall auf Metall)* ECLI:EU:C:2019:624, paras 71-73.

\(^{20}\) A likely candidate might have been the pastiche exception. On its potential scope see, e.g., Hudson 2017, Senftleben 2019a and Senftleben 2019b.
or exception, if that limitation or exception may not be available in one or more Member States.

There is no clear solution to this problem.

First, one could leave the delimitation of the precise scope of exclusive rights to national courts, depending on the implementation of limitations and exceptions in the Member State in question. This approach would eviscerate the harmonization of exclusive rights and can therefore not be seriously considered.

Second, it could be considered that, despite the intentionally optional nature of certain limitations and exceptions in the *acquis*, their implementation is nevertheless necessary if they are intended to safeguard fundamental rights. That is to say, in the absence of an implementation of, for instance, the parody exception a Member State’s copyright law could be deemed incapable of striking a fair balance. This would constitute a far-reaching act of harmonization through interpretation of the Charter. Moreover, it would inevitably lead to the exemption from infringement also of acts whose prohibition might not constitute a disproportionate limitation of the fundamental right in question.

Third, one might suggest that a potential solution to the problem of partial harmonization of limitations and exceptions could be found in ignoring fundamental rights altogether in the course of interpretation of exclusive rights. This, however, may result in a too broad interpretation of exclusive rights where no accommodating limitation or exception exists altogether. Conversely, one could give exclusive rights a narrow interpretation, proceeding from the assumption that Member States have not implemented a limitation or exception. This will inevitably result in an unnecessarily narrow scope of rights, and take away from the freedom of Member States to tailor the scope of protection by providing for a certain limitations or exception or not.

The rejection of this third option ultimately brings us back to the position adopted by the CJEU, outlined above: if the use in question constitutes the exercise of a fundamental right and is not covered by any limitation or exception in the *acquis*, exclusive rights must be interpreted in light of the impact on that right. However, it is not necessary to resort to a narrow interpretation of an exclusive right if the affected fundamental right falls within the (prima facia) scope of one of the limitations or exceptions in the *acquis*. In Member States that have not implemented the provision permitting the introduction of a limitation or exception for the use in question, any consequent limitation of a fundamental right must be assessed on a case-by-case basis. In concrete cases, where the enforcement of copyright would result in a disproportionate interference with that fundamental right, the resulting conflict is
arguably best resolved by refusing to grant particular remedies, as will be defended in in Chapter 7, in particular in Section 7.3.3.

6.5 The interpretation and application of limitations and exceptions

163. **Dual impact.** Due to the partial harmonization of the limitations and exceptions to exclusive rights, Charter rights have a dual impact on the determination of their scope. First, they are to be taken into account by the CJEU when interpreting harmonized, autonomous concepts and by national courts when applying the national implementations. Second, to the extent that Member States have discretion in the transposition of limitations and exceptions into national law, the exercise of this discretion may not exceed the boundaries set by the Charter. Consequently, that exercise is subject to review by the CJEU. The latter is complicated by the fact that the CJEU has been rather enigmatic about the exact margin of discretion of Member States where the implementation of limitations and exceptions is concerned. This means it is also difficult to predict the exact impact of the Charter on the scope of this discretion.

This section starts with a brief discussion of the Member States’ margin of discretion in the transposition of limitations and exceptions (Section 6.5.1). This is followed by a more elaborate discussion of the impact of fundamental rights on the interpretation of specific concepts (Section 6.5.2) and on the implementation and application of open norms (Section 6.5.3), and finally by a discussion of the role of the three-step test (Section 6.5.4).

6.5.1 The Member States’ margin of discretion

164. **A case-by-case assessment.** In Afghanistan Papers and Spiegel Online the CJEU was essentially asked, in general terms, whether “the provisions of EU law on limitations and exceptions [in the InfoSoc Directive Directive] allow any latitude in terms of implementation in national law”. The CJEU answered that the scope of the Member States’ discretion in this regard must be determined on a case-by-case basis, according to the wording of the provision in question and their potential impact on the functioning of the internal market. One can expect the CJEU to adopt a similar approach to the determination of the margin of discretion in respect of limitations and exceptions found in other directives.

On several earlier occasions, the CJEU had been rather prescriptive in terms of defining the scope of limitations and exceptions. For instance, in Deckmyn the CJEU rejected several restrictive criteria for the application of the parody exception that had been suggested to it by the referring Belgian court, as they had been developed over
time by the Belgian courts, as being contrary to a uniform interpretation of the autonomous concept of “parody”. More generally, the CJEU held in Deckmyn that “[a]n interpretation according to which Member States that have introduced that exception are free to determine the limits in an unharmonised manner, which may vary from one Member State to another, would be incompatible with the objective of that directive”.21 In so holding, it reaffirmed what it had already held in its earlier judgements in Padawan, DR & TV2 Danmark and ACI Adam, namely that even though the implementation of a particular exemption is optional, Member States are not free to determine the limits of that exemption.22 This led numerous commentators to conclude that Member States discretion in respect of limitations and exceptions was limited to the choice to implement the optional provisions, and did not extend to defining their scope.23 Nevertheless, in Afghanistan Papers and Spiegel Online the CJEU concluded with regard to the exemptions in article 5(3)(c), second case and article 5(3)(d) of the InfoSoc Directive that they leave Member States “significant discretion”, in particular due to the inclusion in those provisions of the open norms “to the extent justified by the informatory purpose” and “in accordance with fair practice, and to the extent required by the specific purpose”, respectively.

165. The contours of discretion. It thus appears there is a bifurcation in terms of Member State discretion where limitations and exceptions are concerned. Autonomous concepts (those concepts which do not refer to national law for the purpose of determining their meaning and scope) that are specific, such as parody, quotation, reporting of current events et cetera, do not leave Member States any discretion in terms of implementation. On the other hand, where a particular provision includes an open norm, Member States have a certain latitude to tailor the scope of that provision through the concretization of those open norms. Where Member States do possess discretion, they must exercise it within the boundaries set by EU law. Specifically, as the CJEU specified in Afghanistan Papers and Spiegel Online, Member States must (i) comply with all conditions laid down in those

21 Case C-201/13 Deckmyn and Vrijheidsfonds ECLI:EU:C:2014:2132, para 16.
22 See Case C-467/08 Padawan ECLI:EU:C:2010:620, paras 32-36; Case C-510/10 DR and TV2 Danmark ECLI:EU:C:2012:244, paras 33-36 and Case C-435/12 ACI Adam and Others ECLI:EU:C:2014:254, paras 34 and 49. See also Opinion 3/15 Opinion pursuant to Article 218(11) TFEU (Marrakesh Treaty to Facilitate Access to Published Works) ECLI:EU:C:2017:114, para 122.
provisions as well as general principles of EU law, (ii) not undermine the objective of providing a high level of protection and proper function of the internal market, nor the effectiveness of limitations and exceptions, (iii) comply with the three-step test, and (iv) rely on an interpretation which allows a fair balance to be struck.24

Two particular factors further complicate the question of Member State discretion concerning the implementation of the InfoSoc Directive. First, the implementation of every limitation and exception must comply with the three-step test of article 5(5). This is itself an open norm (see Section 6.5.4), which begs the question if Member States are free to also further tailor the scope of limitations and exceptions that are based on provisions which themselves do not include an open norm. For instance, may Member States lay down the further conditions for the applicability of the parody exception in order to protect the normal exploitation of the work or the legitimate interests of right holders? Second, not only must Member States rely on an interpretation which allows a fair balance to be struck, it appears to follow from the Deckmyn decision, as I already suggested in §116, that the application in a particular case of a limitation or exception is subject to an overarching balancing exercise. It is true that the CJEU held so specifically in regard to the parody exception, but it reached this conclusion based on the general consideration with respect to all “exceptions to the rights set out in Articles 2 and 3 [of the InfoSoc Directive], which are provided for under Article 5 thereof, [and which] seek to achieve a ‘fair balance’ between, in particular, the rights and interests of authors on the one hand, and the rights of users of protected subject-matter on the other”.25 The same can undoubtedly be said of the exemptions introduced by other directives. If it is accepted that any application of an exemption must strike a fair balance, one can ask whether this must entirely be a case-by-case assessment, or whether Member States, when they implement limitations and exceptions, are permitted to demarcate (to a certain extent) the boundaries of this fair balance by introducing specific conditions.

It is against this background that the impact of fundamental rights on the scope of limitations and exceptions in the acquis must be understood. This scope is dictated by the combination of the interpretation of specific autonomous concepts and the implementation and application of open norms, which are discussed in the next two sections.

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25 Case C-201/13 Deckmyn and Vrijheidsfonds ECLI:EU:C:2014:2132, paras 26-27. For the explicit consideration that also art. 5(3)(c) InfoSoc Directive must be applied so as ‘to strike a fair balance, see England And Wales Cricket Board Ltd & Anor v Tixdaq Ltd & Anor [2016] EWHC 575 (Ch), para 73.
6.5.2 The interpretation of specific (autonomous) concepts

166. Specific concepts. The system of limitations and exceptions in the acquis communautaire is characterized by its closed nature. The various limitations and exceptions each cover a use for a specifically defined purpose. To that effect, their scope is in the first place determined by specific concepts such as “private use”,26 “use for the sole purpose of illustration for teaching”,27 “use ... in connection with the reporting of current events”28 and “quotations”29. As these concepts typically do not refer to national law for the purpose of determining their meaning or scope, they are autonomous concepts of EU law, which require a uniform interpretation.30

The question may arise whether a specific use is covered by such a particular concept, which often may be open-textured despite their specific nature. As noted in Section 6.2, the impact of fundamental rights on this determination may be particularly felt if wording and intention permit an interpretation either way. Like a narrow interpretation of exclusive rights is not necessary where a particular limitation or exception exists to safeguard the exercise of a fundamental right,31 a narrow or strict interpretation of (a concept in) a limitation or exception must be rejected if it limits the exercise of a fundamental right while the interest of the author is safeguarded by a more specific norm. This is generally the case if the applicability of the limitation or exceptions is conditional on compliance with an open norm which itself requires a proportionality analysis, requiring the determination that the degree of fulfilment of the fundamental right if the use were allowed exceeds the detriment caused to rights and interests of right holders. Appropriately, in Afghanistan Papers the CJEU settled on a liberal interpretation of the concept of “use of works ... in connection with ... reporting” within the meaning of article 5(3)(c), second case, of the InfoSoc Directive, noting that the use in question must still satisfy “the other conditions set out in that provision”, including that it is “justified by the informatory purpose”.32 The latter determination requires a proportionality analysis. The CJEU itself stated as much in its Spiegel Online judgement, which was handed down the same day as the judgement in Afghanistan Papers.33 Similarly, in Spiegel Online the CJEU had no trouble interpreting the concept of quotation broadly as extending to the communication of a work by means of a hyperlink in an online news item. Again, the CJEU added that

27 Art. 5(3)(a) InfoSoc Directive. See also art. 5 DSM Directive.
30 Cf., supra, § 27.
31 See, supra, Section 6.3.
32 Case C-469/17 Funke Medien NRW (Afghanistan Papers) ECLI:EU:C:2019:623, para 75.
33 Case C-516/17 Spiegel Online ECLI:EU:C:2019:625, para 68.
such use must still be “in accordance with fair practice, and to the extent required by the specific purpose”.  

Even if the provision in question does not itself include such an open norm safeguarding the rights and interests of right holders, those rights and interests are arguably appropriately safeguarded by the both the three step-test and the requirement that the application of a limitation or exception strikes a fair balance.  

For instance, in *ACI Adam* the CJEU ultimately determined the scope of the private copying exception by applying the three-step test, albeit on questionable grounds.  

In *Deckmyn*, the CJEU gave a broad definition of the concept of parody, which covers basically all humoristic adaptations, noting that the application of parody exception in the specific circumstances of the case must strike a fair balance.  

The foregoing implies there may often not be a good reason to resort to a narrow or even strict interpretation of specific concepts where both wording and intention are ambiguous. On the contrary, those concepts must in the case of ambiguity be construed broadly to ensure an enjoyment of fundamental rights that is as great as possible. A subsequent proportionality analysis, whether in the form of an exemption-specific open norm, the three-step test, or a general “fair balance” exercise, ensures that the ultimate scope of limitations and exceptions does not become too broad.

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35 Cf., *supra*, § 165.  
38 Another question is whether limitations and exceptions should be applied by analogy to uses which cannot be brought within the textual meaning of the provision in question, not even if interpreted broadly. In its well-known *Dior/Evora* ruling the Dutch Supreme Court accepted such an analogous application (see Dutch Supreme Court, 20 October 1995, ECLI:NL:HR:1995:ZC1845, *Dior v Evora*). There is a lot to be said for such an application where it promotes the enjoyment of a fundamental right without harming the rights and interests of the author/right holder. Generally, however, this avenue appears to be closed off by CJEU’s ruling that Member States may not provide for a limitation or exception to exclusive rights harmonized by the InfoSoc Directive beyond those enumerated in that directive and that they must rely on an interpretation of limitations and exceptions which is consistent with their wording. See, *supra*, § 107 and 156. It is hoped that the CJEU is willing to reconsider this position if it is indeed to be understood as precluding the application by analogy of existing limitations and exceptions.
6.5.3 The implementation and application of open norms

6.5.3.1 The two sides of open norms

Open norms and balancing. Several provisions in the acquis contain open norms. For instance, the quotation exception included in the InfoSoc Directive, in accordance with its sister-provision in the Berne Convention, requires that the use be in accordance with “fair practice, and to the extent required by the specific purpose”. Such open norms hint at the proportional relationship that must exist between the various rights and interests at play for the limitation or exception to apply. As was discussed more in detail in Section 6.5.1, such open norms are a source of discretion for the Member States. The same is likely true, I noted in the same section, in respect of the three-step test and the prerequisite that the application of limitations and exceptions strike a fair balance. These norms permit Member States to further tailor the scope of limitations and exceptions. Accordingly, many Member States have introduced conditions not explicitly found in acquis. For instance, although the provisions of EU law on which they are based contain no such requirements, the French implementation of the quotation exception requires that quotations be “short” and the German implementation of the exception for use for the sole purpose of illustration for teaching limits such use to 15 per cent of the work in question. Alternatively, the open norm can be transposed directly into national law, meaning the determination of proportionality in the specific circumstances of the case is left to the judge. Notably, numerous exemptions found in the national copyright laws of the EU Member States contain open norms even if the parallel provisions in the EU directives, notably the InfoSoc Directive, do not. The most well-known example is probably found in the UK, where many of the exemptions to copyright require that the use in question constitute “fair dealing”. Similarly, in some Member States parodic uses are only allowed if they comply with the “rules of the genre”, “honest practices”, or “with what is regarded as reasonably accepted under rules of social custom”. The application of such open norms typically consists of the weighing of a
number of factors in order to determine whether the use ought to be permitted or not and can therefore be characterized as a form of balancing.

As alluded to already previously, (fundamental rights) balancing therefore must take two forms where the implementation and application of open norms in limitations and exceptions are concerned. First, as a means to review the implementation of specific limitations and exceptions into EU law. Second, to determine whether a particular use should be permitted. The latter form of balancing is more straightforward: does permitting the use, given the particular circumstances of the case, lead to a greater degree of fulfilment of (the) fundamental right(s) that would otherwise be limited, than that it interferes with other rights and interests (notably the interest of right holders in an appropriate reward)? The former concerns the question whether the Member State has exceeded its margin of discretion and is more complicated. It is discussed in the following subsection.

6.5.3.2  Member State implementations

168. Review of Member State implementations. Fundamental rights, specifically Charter rights, set boundaries to the exercise of the discretion that Member States might enjoy in respect of the implementation of limitations and exceptions. The CJEU itself stated as much in Afghanistan Papers and Spiegel Online.47 Specifically, the implementation must “allow a fair balance to be struck”. This implies Member States may not impose conditions that hinder the attainment of this fair balance. The pertinent question is how much leeway the Charter permits Member States and what will be the intensity of review employed by the CJEU. In Section 4.4.1 I discussed that in the course of determining the appropriate remedies vis-à-vis intermediaries the CJEU has laid down the rule that national measures must not harm the essence of a right, including the creation of a serious interference with that right, but that its assessment is often limited to these tests. As I argued in that Section, the determination of proportionality ought not stop with the finding that the essence of rights is not harmed. Instead, the CJEU must ask whether the degree of interference created with a fundamental right, is suitable, necessary and commensurate with the degree of fulfilment of the purposes pursued (in this context often also the increase of legal certainty by laying down specific conditions). Specific conditions that concretize open norms as they have been adopted by Member States may not be very likely to offend Charter rights generally. For instance, it can very well be argued that, in general, the explicit limitation of the exception for illustration in teaching to 15 per cent of works contributes more to legal certainty than it limits

47 See, supra, n 24.
freedom of education. Conversely, however, it does not seem unlikely that the application of such specific conditions in a concrete case may result in a disproportionate limitation of a fundamental right. For instance, the French condition that quotations be “short” is traditionally interpreted as meaning that a quotation must necessarily concern only a part of a work and cannot therefore concern an entire work. Nevertheless, in some cases it may be necessary to quote an entire work in order to achieve the informatory purpose pursued. If that purpose is particularly weighty, for instance due to it concerning political speech or another issue of general interest, the imposition of such a condition might lead to a disproportionate outcome.

169. **Horizontal direct effect?** What is the case if Member States have gone beyond the scope of their discretion and have implemented conditions that are at odds with EU law, specifically for leading to disproportionate limitations of Charter rights? First, where a provision of national law contains conditions that are outside the scope of Member State discretion, that provision must be interpreted, so far as possible, in a manner that avoids the application of those conditions. However, the CJEU has consistently pointed out that the obligation to interpret national law in conformity with a directive is limited by general principles of law and cannot lead to an interpretation *contra legem.* In that regard the Court has emphasized that the duty of consistent interpretation “requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it”. What constitutes an interpretation *contra legem* is therefore, in principle, a question of domestic law/legal methodology. It seems likely that if the wording of the national provision is unambiguous it may not be possible to “interpret away” an impermissible condition, meaning the conflict between the national provision and the EU norm persists.

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49 On the importance, in this regard, of facilitating in particular political speech and speech on matters of general interest, as recognized also in the case law of the ECHR, see Case C-469/17 *Funke Medien NRW (Afghanistan Papers)* ECLI:EU:C:2019:623, para 74 and Case C-516/17 *Spiegel Online* ECLI:EU:C:2019:625, para 58.
50 E.g., in the copyright context, Case C-351/12 *OSA* ECLI:EU:C:2014:110, paras 44-45.
51 E.g. Case C-282/10 *Dominguez* ECLI:EU:C:2012:33, para 27 and the case law cited there.
52 See, e.g., Case C-268/06 *Impact* ECLI:EU:C:2008:223, paras 101-104, holding that a national court is not obligated to apply national law retrospectively where such an interpretation would contravene national interpretative methods. See Brenncke 2016, p. 18 *et seq.*
However, second, if EU law is interpreted as precluding the introduction or application of certain conditions by reason of being contrary to the fair balance of rights and interests, it could be argued that national courts may need to disapply those conditions altogether. The CJEU has held on several occasions since its landmark decision in Mangold that a national court must disapply a particular provision of national law that conflicts with a general principle of law, including fundamental rights, if it is not possible to interpret the national law in conformity with EU law.53 Thus in Kücükdeveci, concerning the compatibility with EU law of a national rule that provided that periods of employment by the employee before reaching the age of 25 are not taken into account for the purposes of calculating the notice period for dismissal of employees, the Court held that the national court must disapply that rule for being contrary to the general principle of equal treatment in employment and occupation as given expression in the directive under consideration54,55. The ruling in Association de médiation sociale56 suggested that it is only the provision of primary law on which can be relied directly, not the provision of the directive.57 This was affirmed more unequivocally in the Grand Chamber judgement in Bauer.58 Of importance is whether the fundamental right relied on is “mandatory and unconditional”, the latter in the sense of “not needing to be given concrete expression by the provisions of EU or national law”.59 If that is the case in can be relied on directly against other individuals. In Egenberger the CJEU clarified that the obligation to “guarantee the full effectiveness” of such mandatory and unconditional fundamental rights by disapplying contrary provisions of national law is not called into question by the fact that the national court may need to strike a balance between those rights and other, countervailing fundamental rights. In such a situation the national court “will have to take into consideration the balance struck between those interests by the EU legislature in [the directive under consideration], in order to determine the obligations deriving from the Charter in circumstances such as those at issue in the main proceedings”.60

170. **A flexible system?** The foregoing leads to the following picture. Where the implementation deviates from the limits set by the directives, as interpreted by the

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53 Case C-144/04 Mangold ECLI:EU:C:2005:709.
55 Case C-555/07 Kücükdeveci ECLI:EU:C:2010:21, paras 50-51.
56 Case C-176/12 Association de médiation sociale EU:C:2014:2.
57 See, to that effect, the Opinion of AG Bot in Joined Cases C-569/16 and C-570/16 Bauer ECLI:EU:C:2018:337, para 75.
58 Joined Cases C-569/16 and C-570/16 Bauer ECLI:EU:C:2018:871, para 92.
59 Ibid., para 85.
60 Case C-414/16 Egenberger ECLI:EU:C:2018:257, paras 79-81.
CJEU, national courts must, first, attempt to interpret the provision of national law in conformity with EU law and, second, in certain cases disapply (elements of) the provision contrary to EU law if a consistent interpretation proves to be impossible. This appears certainly the case for exemptions originating in the InfoSoc Directive. The same is arguably true for exemptions originating in other directives, whose harmonizing objective is not dissimilar from the InfoSoc Directive.

Several of the limitations and exceptions in the *acquis* have a *prima facie* relatively broad scope. They have been fittingly referred to as “prototypes”, rather than precisely defined exemptions. For instance, article 5(3)(k) of the InfoSoc Directive simply permits “use for the purpose of caricature, parody or pastiche”. As the CJEU held in *Deckmyn*, a parody comes with the *prima facie* scope of the parody exception if it evokes an exciting work while being noticeably different and constitutes an expression of humour or mockery. Any humorous adaptation of an existing work thus, in principle, constitutes a parody. It is not entirely clear from the Court’s case law whether Member States may lay down further conditions when implementing such “prototype” provisions, which do not themselves contain open norms, as I discussed in Section 6.5.1. Logically, it seems difficult to deny them such discretion as also these provisions are subject to the open norm of the three-step test. Either way, their application must strike a fair balance, as arguably follows from the *Deckmyn* decision.

However, if the CJEU were to consider that Member States have no discretion to alter the scope of such provisions, it might lead to greater flexibility within the EU system of limitations and exceptions. This would essentially create a system of exemptions with a broad initial scope combined with an open-ended balancing exercise capable of accommodating a great variety of foreseen and unforeseen uses. This was, in essence, already suggested back in 2004 by Martin Senftleben, and further developed by him and Bernt Hugenholtz in a 2011 paper. They suggested that “[t]he most flexible implementation of permissible EU exceptions, however, can be achieved by including literal copies of the prototypes in the Information Society Directive in national law. In combination with the open criteria of the three-step test, this implementation strategy leads to a semi-open norm that comes close to open-ended defences, such as the US fair use doctrine.” I thus propose that such a system may thus already largely be in

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62 See, supra, § 165.
63 Hugenholtz & Senftleben 2011, p. 17 (footnote omitted). See also Senftleben 2004, p. 281.
place, supplemented by a general balancing exercise instead of being subjected to the three-step test.

6.5.4 The role of the three-step test

171. Outline. It ought to have become clear from the previous (sub-)sections that the three-step test plays an important and complicated role in determining the scope of limitations and exceptions in the EU. It mirrors to a large extent the potential impact of fundamental rights in three main ways. First, specific concepts must be interpreted both in light of the three-step test and of fundamental rights.64 Second, insofar as Member States possess discretion, they must exercise it within the boundaries set by both the three-step test and by fundamental (Charter) rights.65 Third, the application of a limitation or exception in a concrete case must both comply with the three-step test and strike a fair balance.66 This begs the question about the relationship between the three-step test and the concept of fair balance. To answer that question, this sub-section discusses, first, the authoritative interpretations of the three-step test by a dispute resolution panel of the World Trade Organization and the CJEU, explaining the resulting friction with the need to strike a fair balance, and, second, possible ways of reconciling the demands of the three-step test with those of the “fair balance of rights and interests”.

6.5.4.1 The debilitating interpretation of the three-step test

172. The WTO Panel decision. With its inclusion in article 13 of the TRIPS Agreement the international three-step test was given teeth, as it now can be the subject of inter-state dispute resolution in a system permitting for retaliatory measures in case of non-compliance. In 2000, article 13 was the subject of interpretation by a WTO panel, which had to scrutinize two exceptions in US copyright law after a complaint by the European Communities. As it is well-known, the panel report will not be exhaustively analysed.67 Instead, I highlight why its construction of the three-step test is problematic in relation to the safeguarding of the exercise of fundamental rights.

With regard to the third step the Panel held that “legitimate interests” are both legal interests and interests “that are justifiable in the light of the objectives that underlie the protection of exclusive rights”.68 Moreover, “prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or

64 Cf., supra, Chapter 2, n 244 and accompanying text and § 156.
65 Cf., supra, n 24 and accompanying text.
66 Cf., supra, Chapter 2, n 245 and accompanying text and § 165.
67 For an extensive discussion see, e.g., Ginsburg 2001.
68 Dispute DS160, United States – Section 110(5) of the US Copyright Act, para 6-224.
has the potential to cause an unreasonable loss of income to the copyright owner”.

This definition of “unreasonable prejudice” as “unreasonable loss of income” is not very illuminating. The “unreasonableness” of the prejudice caused arguably should be assessed with regard to the same “objectives that underlie the protection of exclusive rights”. That is, it arguably ought to be a question of proportionality. This is ultimately lost in the Panel’s definition, which overemphasizes potential loss of income.

The main problem with the Panel’s interpretation, however, concerns its approach to what constitutes normal exploitation. The Panel considered that “conflict with the normal exploitation” arises if uses that would be covered by an exclusive right if not for the exemption, “enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible economical gains”. The assessment must take account of both “those forms of exploitation that currently generate significant or tangible revenue [and] those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance”. As has been pointed out by many authors, extending that concept to every potential considerable source of revenue may lead to pre-empting the exemption of almost any use as long as it is conceivable that appropriate licensing mechanisms are developed. Consequently, the proposed approach risks viewing the rights of right holders as “prima facie hierarchically superior” and may as a result severely limit the extent to which legislatures can strike a fair balance.

173. The CJEU. The CJEU has not extensively interpreted the three-step test. The three decisions (ACI Adam, Filmspeler and PRCA) in which the test impacted the outcome of the case were briefly addressed in § 52. Much like with the Panel’s approach, the CJEU’s embryonic conception of “conflict with the normal exploitation” and “unreasonable prejudice to legitimate interests” endangers a full taking account of countervailing rights and interests. In ACI Adam and Filmspeler the CJEU suggests that any exemption that may lead to a “reducing the volume of sales or of other lawful

69 Ibid., para 6-229.
71 Dispute DS160, United States – Section 110(5) of the US Copyright Act, para 6-183.
72 Ibid., para 6-180.
74 Mylly 2009, p. 354.
75 Cf. the problems identified in the comment accompanying the well-known Declaration on a Balanced Interpretation of the “Three-Step Test” in Copyright Law. See Geiger, Griffiths & Hilty 2008, p. 490.
transactions” conflicts with the normal exploitation. This ties the application of exemptions to situations of market failure. Once that market failure is cured, there would be a conflict with the normal exploitation. This, as noted in the previous paragraph, is problematic, first, because it may mean that eventually any exemption is pre-empted and, second, because it ignores the justifications underlying limitations and exceptions. Important for present purposes is that such an interpretation of the three-step test is moreover difficult to reconcile with the notion that any interpretation must strike a fair balance of rights and interests. The next section discusses a possible reconciliatory approach.

6.5.4.2 A reconciliatory approach

174. **Alternative interpretations.** Several solutions to an overbroad reading of the three-step test have been proposed. The most famous proposal to that effect is undoubtedly the Declaration on a Balanced Interpretation of the “Three-Step Test” in Copyright Law. Notably, the Declaration suggested that the three steps should not be understood as cumulative requirements, but instead as factors that must be considered in one overall assessment. This would permit “the necessary balancing of interests between different classes of rightholders or between rightholders and the larger general public” and mean that “[a]ny contradictory results arising from the application of the individual steps of the test in a particular case must be accommodated within this comprehensive, overall assessment.” The viability of such an interpretation has been questioned on textual grounds. Indeed, it seems hard to read the three-step test, whether in the Berne Convention, TRIPS, the WIPO Copyright Treaties or the InfoSoc Directive, as anything other than requiring a sequential and cumulative analysis of the three steps. Although more permissive interpretations of the individual steps can be supported by a strong teleological approach, as discussed next, such an approach arguably is unable to overcome the strength of the textual argument in this regard.

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76 Case C-435/12 ACL Adam and Others ECLI:EU:C:2014:254, para 39. See also Case C-527/15 Stichting Brein v Wullems (Filmspeler) ECLI:EU:C:2017:300, para 70.
77 See Geiger, Griffiths & Hilty 2008.
78 Ibid., p. 493.
80 See, however, Goold 2017, who argues based on a “Dworkinian” interpretative approach, aimed at finding “the interpretation which shows the law in its ‘best light,’ or which proactively makes the law the best it possibly can be, given the constraints of history” (p. 218), that although the balanced interpretation does not “fit” the text and historical legal sources (p. 220-221) it nevertheless “best ‘justifies’ the three-step test” (p. 221) because it “construes the interrelationship between the steps in a way that allows the ‘public interest’ value to be the most important criterion in assessing a limitation, to which the steps are crucial guides but not themselves the ultimate arbiters” (p. 226).
A more purposive interpretation, proceeding from the view that copyright ultimately aims to serve the public interest, has also been proposed in regard to the interpretation of specifically the first and second steps. The Declaration, for instance, asserted that the “certain special cases” condition merely requires that the scope of limitations and exceptions be “reasonably foreseeable”. As to the interpretation of the second step, many authors have suggested that what constitutes a normal exploitation ought to be interpreted normatively. That is to say, the enquiry should not merely focus on actual or potential markets of the work, but instead ask whether the use in question is the kind of use that the right holder ought to have control over in light of competing rights and interests. This prevents that the second step might (eventually) pre-empt socially valuable uses. Such interpretations are more easily reconciled with the wording of the three-step test, while not offending its drafting history and overall purpose.

A slightly different approach to avoid an overbroad interpretation of the second step has been suggested by Senftleben, who suggests that “normal exploitation” should only concern “an actual and potential, typical major source of royalty revenue that carries weight within the overall commercialisation of works of the relevant category”, and Séverine Dusollier, who argues that it should only cover “the main avenues of the exploitation of the work, those that provide the author with his main sources of revenue”. Christophe Geiger, similarly, has asserted that “an extremely restrictive interpretation” of the second step must be adopted.

Finally, Huaiwen He has proposed that the second and third step must be interpreted as requiring two separate and distinct proportionality analyses. He suggests that the second step ought to focus on “the suitability of exclusivity in the given circumstances of a limitation”. That is, is the harm caused to the copyright holder by relinquishing exclusivity in return for a remuneration right outweighed by competing considerations, taking account of factors known from US fair use? If it is not, the exemption is impermissible. If it is, the assessment moves to the third step, which focuses on the question whether the harm caused to the legitimate interest of the right holder is outweighed by competing considerations.

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81 Geiger, Griffiths & Hilty 2008, p. 495.
86 Geiger 2006c, p. 697.
87 He 2009, p. 295.
88 Ibid., p. 294-297.
holder to obtain “equitable remuneration” is outweighed by competing considerations in favour of free use. If it is not, the use should be subject to compensation. If it is, the use may be free.89

One might argue that these approaches risk rendering either the second or third step redundant. If, on the one hand, one views the second step as merely protecting against “the most gross conflicts with the exploitation of the work”, as Geiger,90 or as an expression of “evident disproportionality”, as Senftleben,91 it loses independent meaning. If, on the other hand, the second step is interpreted as demanding a balance be struck between the right holder’s interest in full exploitation and competing rights and interests, this may largely render the third step redundant as it requires a similar balancing exercise.92 The third step would then only need to deal with non-pecuniary interests as protected by moral rights. Similarly, He’s approach, comparing three alternatives (exclusivity, remuneration, free use) which can all be considered “necessary”, can just as well take place within the context of the third step. Nevertheless, approaching the three-step test as, essentially, requiring a proportionality analysis avoids the problems of a more conservative, right holder-first approach, even if it reduces the independent character of the individual steps.

Importantly, approaching the three-step test in terms of proportionality permits the recognition that states may have a broad discretion with regard to the limitations and exceptions that they choose to adopt. For instance, there may be empirical uncertainty as to the financial impact of replacing exclusivity with remuneration and normative uncertainty as to how such harm should be qualified in light of the purposes pursued. Notably, there must also be considerable “cultural discretion” in light of the diverse underpinnings given to copyright, ranging from that as an instrument to incite creation to an intimately personal right of authors, which may substantially impact how individual states decide to strike a balance.93 Ultimately, a lack of recognition of this element may have been the largest, overarching problem of the analysis of the three-step test by the WTO Panel, which did not review national decision-making, showing deference and restraint where appropriate, but instead imposed its own exhaustive evaluation.94

89 Ibid., p. 300 et seq.
90 Geiger 2006c, p. 697.
91 Senftleben 2004, p. 243-244.
92 To that effect Lucas 2010, p. 280.
93 See, supra, § 63.
94 Cf. Grosse Ruse-Kahn 2016, para 12.45, who noted that “[t]he most problematic aspect of the Report is that the Panel chose to define all relevant terms in Article 13 TRIPS in great detail … [denying] any flexibility in the implementation of the open and vague terms used in the three-step test”.
The three-step test and judicial application. The three-step test, at least as conceived in international law, is less suitable for application on a case-by-case basis to a particular set of circumstances (e.g. should this specific parody be permitted?). This is so for the following reason. It is widely acknowledged, typically within the context of the third step, that the introduction of certain exemptions can be rendered tolerable by the provision of equitable remuneration for the use. The three-step test thus governs the boundaries between situations in which a full guarantee of exclusivity is required, where instead a statutory license as a substitute for exclusivity is permitted and those where national law may completely exempt the use, something which He’s approach elegantly demonstrates. The international three-step test is principally an instrument intended to enable national exceptions and limitations in light of multilateral obligations. Because it is above all aimed at guiding the choice between exclusivity, remuneration and free use, it is generally not an appropriate tool to guide the judicial application of exemptions, because in those situations the decision whether the exempted use is subject to compensation will already have been made by the legislature, meaning the judge is only confronted with one balancing choice (typically exclusivity vs. compensation or exclusivity vs. free use). It that regard it bears pointing out that the three-step test as it was first conceived and adopted during the Stockholm Revision of the Berne Convention was hardly intended for judicial application. This is further illustrated by the fact that the first step requires concretization in the law, reason why it has been suggested that this step can be ignored when the three-step test is applied directly in national law. Jonathan Griffiths has argued that the lack of settled meaning and the fact that the three-step test does not mandate specific solutions means it is particularly unsuited for judicial use, as it is liable to lead to arbitrary results. While I do not necessarily agree with him insofar as he argues that the lack of settled meaning or mandated solutions is a problem, I do agree with the criticism that seems implied in Griffiths’
analysis that the three-step test as traditionally conceived is not the most suitable instrument to act as both a tool for the review of national legislation from a supranational perspective, as well as a heuristic device for courts to determine whether a particular exception should apply in the specific circumstances of a particular case other than as a matter of review. That is to say, national courts can ascertain whether giving a particular exemption a certain scope exceeds the discretion left to states by the three-step test, but it is less suited to determining whether, for instance, the parody exception ought to apply to a particular parody. Assuming the national implementation of the parody exception does not provide for equitable remuneration, that question should be answered by choosing whether a better balance is struck by permitting the use or by subjecting it to right holder authorization. This is not something the international three-step test concerns itself with. It sets boundaries for exemptions at the national level, but does not prescribe which solution states must choose within those boundaries. It might preclude the application of the parody exception to certain parodies in the absence of equitable remuneration, but only where withholding such remuneration would exceed the boundaries set by the three-step test.

176. **The EU three-step test.** There is no reason why the approach should be different in respect of the three-step test in EU law, notably in the InfoSoc Directive. As appears from recital 44 in the preamble to the InfoSoc Directive, the three-step test in that directive is primarily intended to ensure compliance with international obligations. In that regard, when a court evaluates whether a particular application of an exemption is in accordance with the test, it should take note of the discretion inherent in the international three-step test. Insofar as the three-step test is intended as more exacting – although there is no reason to think so – it ought to nevertheless be construed as a norm that is aimed at finding a proportional relationship between the objectives pursued by copyright and competing considerations. Accordingly, proceeding from a right holder-centric point of view would be at odds with the duty to ensure that the application of a particular exemption strike a fair balance. In this regard, the three-step test and the requirement that a fair balance be struck are thus not at odds with each other. In fact, in *Afghanistan Papers*, *Metall auf Metall* and *Spiegel Online* the CJEU itself noted that the three-step test “contributes to the fair balance”. They are two sides of the same coin, ensuring that

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neither the objectives pursued by copyright, nor fundamental rights, are disproportionately restricted.

Having said this, the following critical comments concerning the CJEU’s use of the three-step test so far can be added to those already made.\textsuperscript{101} In \textit{ACI Adam} it simply dismissed the possibility of applying the private copying exception to copies made from “unlawful sources” as conflicting with the normal exploitation because it “inevitably reduces the volume of sales or of other transactions”. The better question would have been whether the harm caused to the financial position of authors (and indirectly the purposes pursued by copyright) by replacing an (unenforceable) exclusive right with a remuneration right in the case of permitting downloads from unlawful sources was justified by reference to competing considerations, such as the undesirability of enforcement with a view to the right to privacy and the fulfilment of the right to access to information. As a matter of review, the position that opting to grant authors a remuneration right instead of an exclusive right that cannot be enforced in practice does not exceed the boundaries set by the international three-step test is not untenable.\textsuperscript{102} However, the CJEU made it into a question of optimization, having also decided Member States ought not to have any discretion in this regard. From this perspective, the lack of explicit consideration of this question of balance seems to me inexcusable. In its act of law-making, when deciding whether or not making private copies from unlawful courses is permitted in those Member States with a private copying exception, the Court ought not to have been so apodictic in dismissing the position adopted in the Netherlands, which was based on a careful consideration of all affected rights and interests, not only those of right holders.\textsuperscript{103} Of course, as I have suggested in Section 6.2, such an optimization argument would not necessarily have been conclusive; other interpretative arguments such as the intention of the EU legislature could still have led to a different conclusion.\textsuperscript{104} Similar criticism can be directed at the conclusion in \textit{Filmspeler} that the temporary copies made during the passive enjoyment of a copyright-protected work are subject to right holder authorization if they are knowingly made when accessing works on websites acting without right holder authorization. That conclusion ought to have only been reached after an extensive reflection on competing considerations instead of being based a right holder centric interpretation of the three-step test. One could well argue that excluding the making of temporary copies from the scope of the mandatory

\textsuperscript{101} See, principally, this Section 6.5.4 and, supra, § 52.
\textsuperscript{102} Cf., to this effect, the Opinion of AG Huydecoper of 11 May 2012, ECLI:NL:PHR:2016:1115, \textit{ACI Adam et al. v Thuiskopie & SONT}, paras 63-70.
\textsuperscript{103} Cf. the extensive analysis by Quintais 2015.
\textsuperscript{104} For the suggestion that the CJEU implicitly argued that the EU legislature could not have reasonably intended to permit private copies from unlawful sources, see Ringnalda 2015, p 3.
exception of article 5(1) InfoSoc Directive constitutes a considerable interference with the right to freedom of information even in those particular circumstances. In that light, the Court ought to have required reliable evidence that excluding such use from the scope of the exception would indeed have contributed to the purposes pursued by copyright, in particular through an increased demand from lawful offerings.

Finally, the following incongruity must be noted. In Ulmer the CJEU considered that Member States may grant publicly accessible libraries the right to digitize works in their collections if that is necessary in order to make those works available in a digital format on computer terminals on their premises. It held that such a “right” falls within the scope of article 5(2)(c) of the InfoSoc Directive, which permits the introduction of a limitation or exception to the exclusive reproduction right “in respect of specific acts of reproduction made by publicly accessible libraries ..., which are not for direct or indirect economic or commercial advantage”. However, it also implied that this right did not violate the three-step test because it was coupled with an obligation to pay adequate remuneration. This suggests that Member States may give a broader scope to certain limitations or exceptions if they make their enjoyment conditional on the payment of compensation. This makes sense from the point of view of the three-step test but appears at first sight at odds with the principle that specific concepts have an autonomous meaning and scope. It does, however, further fortify the argument that those concepts must be interpreted broadly, leaving Member States the option to make full use of that breadth by imposing an obligation to pay compensation. Where they do not, this lack of compensation must be considered when assessing the proportionality of the application of the exception in the specific circumstances of the case.

6.6 Synthesis

177. Synthesis. The interpretation and application of exclusive rights and the limitations and exceptions thereto must “fully adhere to the fundamental rights in the Charter”. Accordingly, fundamental rights balancing may play a significant role at the stage of interpretation and application of those norms.

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105 It is also difficult to square with the consideration that the three-step test is “not intended either to affect the substantive content of the [different exceptions and limitations] or, inter alia, to extend the scope of the different exceptions and limitations”. See, supra, Chapter 2, n 242 and accompanying text.
106 Cf. Senftleben 2019a, p. 14 et seq. and Senftleben 2019b, p. 19 et seq., who suggests that a broad “pastiche privilege”, based on the provision permitting the introduction a limitation or exception for use for the purpose of pastiche (art. 5(3)(k) InfoSoc Directive), coupled with an obligation to pay compensation, may be an appropriate way to facilitate user-generated content on the Internet.
Specific concepts must be interpreted in light of fundamental rights. Broad interpretations of rights and narrow interpretations of exemptions may interfere with the enjoyment of a particular fundamental right. The degree of interference must be weighed against other interpretative arguments, such as those relating to wording and legislative intention. In principle, ambiguous concepts in exclusive rights can be interpreted broadly if a limitation or exception exists whose *prima facie* scope covers the use in question. In other cases one must opt for an interpretation of concepts whose wording and underlying intent are unclear that best reconciles the legislative purpose to grant right holders a reward and the rights and interests of users and the public interest.

The impact of fundamental rights on limitations and exceptions is complicated by their partial harmonization. Specific concepts receive a uniform interpretation and accordingly leave Member States no margin of discretion in terms of implementation. Fundamental rights are safeguarded to the greatest extent by a broad interpretation of such concepts, since the interest of right holders in obtaining a reward can be fully considered when determining the proportionality of applying the limitation or exception in the specific circumstances of the case.

Open norms, on the other hand, create a margin of discretion for Member States to further specify the scope of application of limitations and exceptions. The exercise of this discretion is subject to review: does the Member State implementation create a disproportionate limitation of a fundamental (specifically: Charter) right, either generally or in the specific circumstances of the case? Where this is the case, the condition must arguably be disapplied. At the same time, the application of any limitation or exception must strike a fair balance in the concrete circumstances of the case, meaning it must be assessed whether permitting the use, given the particular circumstances of the case, leads to a greater degree of fulfilment of (the) fundamental right(s) that would otherwise be limited, than that it interferes with other rights and interests.

Finally, as regards the three-step test, it should principally be approached as requiring a proportionality analysis guiding the legislative choice between exclusivity, remuneration and freedom. It is not intended to dictate this choice, but instead leaves legislatures a large margin of discretion. Accordingly, the three-step test should not be used to determine whether a specific use should be permitted or not, other than to ascertain whether allowing that use would exceed the boundaries set by the three-step test.
7 ENFORCEMENT OF COPYRIGHT AGAINST DIRECT INFRINGERS

7.1 Introduction

178. **Introduction.** After rights and the limitations and exceptions thereto have been interpreted and applied, so far as possible, in accordance with fundamental rights, the question may nevertheless remain whether any subsequent enforcement may constitute a disproportionate interference with the defendant’s fundamental rights. Or, otherwise formulated, can fundamental rights function as so-called external constraints on copyright, beyond the exemptions specifically included in the law? This question is old and has been intensively discussed. The answer given typically depends on whether one considers there to be a potential conflict between copyright and (other) fundamental rights in the first place, whether such potential conflicts are sufficiently accommodated by copyright’s internal limits, and the role one is willing to grant to the courts in policing the balance struck by the democratic legislature. I will suggest that the grant of remedies should be context-specific, meaning that in some cases they should be denied to avoid disproportionate incursions into fundamental rights, but that Court must show a certain degree of restraint and deference when considering to withhold a particular remedy, in particular injunctions, because doing so may create a *de facto* judicial exemption.

Section 7.2 gives a (brief) overview of the debate about the relation between copyright and fundamental rights, concluding that it is now generally acknowledged that, in principle, the enforcement of copyright may be precluded on fundamental rights grounds. Section 7.3 sets forth in what circumstances certain remedies may or should be withheld in order to maintain a fair balance between various fundamental rights.

7.2 From denial of conflict to qualified acceptance

179. **Primacy of human rights.** Copyright and fundamental rights have a strained relationship. For instance, granting (exclusive) control over the use of certain expression appears to put limits on the right to freedom of expression and freedom of information. Some see in this opposition between copyright and fundamental rights a fundamental conflict.¹ Those who subscribe to what can be termed the “primacy of human rights”² view in its most radical form, claim that exclusive control over

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¹ Cf. the well-known distinction drawn between conflict and coexistence in relation to human rights and intellectual property by Helfer 2003.
² Plomer 2013, p. 151
expression is incompatible with fundamental rights.\(^3\) Unsurprisingly, no serious academic defends this position. More moderately, this view admits that copyright protection is not by definition incompatible with the fundamental rights framework, in particular in light of the obligation under article 15 ICESCR to protect the “moral and material interests” of authors,\(^4\) but suggests that it should be acknowledged that “the public/private balance under article 15 [ICESCR] should be struck with the primary objective of promoting and protecting human rights”\(^5\).

180. **Copyright’s immunity.** If placing copyright in a fundamental rights framework has led some to suggest that it should be subordinated to the protection of fundamental rights, it has, conversely, also provoked others to claim that there is no real conflict between copyright and fundamental rights because, one, copyright itself is a fundamental right and, two, both pursue the same purpose.\(^6\) Moreover, to resolve any tension that might arise in practice, copyright includes many limitations and exceptions. It is, in fact, the existence of intrinsic limits of copyright that has led many commentators to conclude that, whatever may be of the theoretical conflict between copyright and fundamental rights, in practice there exists no conflict because fundamental right interests have been sufficiently accommodated within the structure of copyright. First, the fact that copyright in principle only protects expression, not ideas, allows anyone to convey the same information contained in the copyright protected work in their own words. Second, specific limitations and exceptions allow the reproduction of actual expression in certain specific cases where such use may be needed to safeguard the exercise fundamental rights. By introducing these limits, the legislature has struck an (appropriate) balance which does not need to be second-guessed, the argument goes.\(^7\)

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\(^3\) A view mostly defended by NGOs and advocacy groups. See, e.g., Engström & Falkvinge 2012, a pamphlet written by two members of the Swedish Pirate Party.

\(^4\) See, *supra*, section 5.2.2.


\(^6\) Cf. Torremans 2004b, p. 2-3 (“Both intellectual property law and human rights law try to get the private-public rights balance right and as such there is no conflict.”) and Derclaye 2008, p. 136 (“[T]here is no conflict between human rights and IPR. To that end, they both set rules so that human beings respect other human beings.”) and p. 137 (“[W]hatever the argument used to justify IPR, the specific IPR protection in question will by definition (intrinsically or internally) respect human rights.”).

\(^7\) Cf. Derclaye 2008, p. 142, Dessemontet 1999, p. 118-119, Ficsor 2010, para 27 *et seq.*, Lucas 2006, para 22 *et seq.* and Lucas & Ginsburg 2016, p. 72. See also Guibault 1998, p. 3, summarizing the view of most reporters to the 1998 ALAI Study Days that “the copyright system offers sufficient protection for the fundamental freedom of expression and right to information of the public, so that there is no need to look at this question from outside of copyright law”.
Some (highest) national courts have in the past adopted this position, which often entailed the exercise of the greatest possible level of restraint by accepting basically any trade-off between the advancement of the objectives pursued by copyright and limitation of fundamental rights as proportionate. For instance, in *Utrillo* the French Supreme Court (in)famously rejected as “ineffective” the claim that the Court of Appeals had violated article 10 ECHR and endorsed its ruling that “the author’s statutory monopoly in his work is incorporeal property, which is guaranteed as the right of any natural or legal person to the peaceful enjoyment of that person’s possessions and which the law subjects to proportionate limits both through the exceptions laid down in article L. 122-5 of the Intellectual Property Code and through the provision on manifest abuse in article L. 122-9 of the same Code”. Similarly, in *Index v Biblo* the Belgian Supreme Court laconically concluded that “[the Copyright Act 1994] as interpreted by the Court of Appeals does not constitute a restriction of freedom of expression as guaranteed by [the ECHR and the ICCPR]”. The German Federal Supreme Court has also shown hesitation. For instance, in *Lili Marleen* the Court suggested that the German Copyright Act had settled the conflict between the interest of the press to report on protected works and the interest of authors to control the dissemination of those works. Nevertheless, it appeared to concede that in exceptional cases “unusually pressing information needs” might warrant limitations beyond those enumerated in the law. The German Federal Constitutional Court, however, which prescribed liberal interpretations of limitations laid down in the German Copyright act in *Germania 3* and in *Metall auf Metall*, suggested in *Kunstaustellung im Online-Archiv* that there can be no separate consideration of fundamental rights outside the system of the Copyright Act where a particular limitation or exception has been introduced in the law that is intended to strike a balance between the rights of authors and a particular (other) fundamental right, although that provision itself must be interpreted and applied in conformity with the German Basic Law.

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9 Belgian Supreme Court (First Chamber), 25 September 2003, *Index v Biblo*, published in Auteurs & Media 2004, p. 29, at p. 35.
10 German Federal Supreme Court (First Civil Senate), 7 March 1985, I ZR 70/82 – *Lili Marleen*, paras 7-9.
11 See, supra, § 150.
12 German Federal Constitutional Court (First Senate), 17 November 2011, 1 BvR 1145/11 – *Kunstaustellung im Online-Archiv*, paras 13-15.
13 For a discussion of these (and other) decisions, see Graber 2005, Hugenholtz 2003 and Strowel & Tulkens 2005.
181. A paradigm shift. Many authors have questioned whether copyright should indeed be immunized from fundamental rights scrutiny. Sometimes a particular use may require copying a work beyond what is permitted by limitations and exceptions. In those cases, courts should not categorically refuse to entertain the question whether subjecting those uses to exclusive control is indeed “necessary in a democratic society” or otherwise in accordance with the principle of proportionality. On the contrary, it has been suggested that under certain circumstances courts ought to refuse copyright enforcement based on fundamental rights grounds.

Following the decisions by the ECtHR in Ashby Donald and Neij and Sunde Kolmisoppi, discussed in § 84, it can arguably no longer be denied that copyright (enforcement) in principle interferes with the right to freedom of expression and freedom of information. However, whether this also means that national courts must, to avoid being held in violation of the ECHR, always “check and evaluate whether this resulting restriction to freedom of expression is ‘necessary in a democratic society’ as to strike a fair balance between the different rights at issue” is uncertain. It appears from the description of the national proceedings in Ashby Donald and The Pirate Bay that the national courts hardly conducted an explicit balancing exercise. On other occasions such an omission has been by itself a sufficient reason for the ECtHR to find a violation of article 10, but not so in Ashby Donald and The Pirate Bay, likely due to the particularly wide margin of appreciation. Consequently, one may wonder whether any judgement that merely assesses the lawfulness of certain uses from within the existing copyright framework, without asking whether enforcement really is “necessary in a democratic society” if that enforcement restricts freedom of expression, stays within the boundaries of this broad margin of appreciation and can therefore count on the blessing from Strasbourg. This may be unlikely certainly in cases which, unlike the commercial expressions that were under consideration in Ashby Donald and in The Pirate Bay, concern political expression which contributes to a public debate on a matter of general interest and in which the margin of appreciation will accordingly be narrower.

Either way, since Ashby Donald and The Pirate Bay were decided the highest civil courts in both France and the Netherlands have quashed decisions which did not

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15 Geiger 2018, p. 11.


17 See also, supra, § 85.
sufficiently explain why their judgement struck a fair balance between the protection of copyright and the right to freedom of expression. In the case of *Klasen* the French courts were concerned with the lawfulness of the incorporation of three fashion photographs into a painting, as a means of criticism of the consumer society. The painter invoked the right to freedom of (artistic) expression but this argument was rebuffed by the Court of Appeal of Paris, which held that the right to freedom of expression may be limited for the protection of other rights and that the search for a fair balance cannot permit the exercise of the former right to the detriment of the rights of the author of the original work. The Court of Cassation, however, set aside the verdict, holding that the court of appeal ought to have explained “the specific manner in which the search for a fair balance between the rights in the present case required the judgment that it rendered”. In *GS Media*, the case which would ultimately lead to the well-known CJEU decision about hyperlinking to unauthorized content, the defendant used, without authorization, a cut-out from a photograph on one of its webpages. The Court of Appeal of Amsterdam held that the defendant could not invoke the quotation exception, due to the fact that the photograph had not been lawfully published and that no source was mentioned. It also rejected the plea that it must conduct a comprehensive balancing exercise between the right to freedom of expression and copyright, noting that copyright is a legitimate restriction of the right to freedom of expression and that freedom of expression can only in exceptional cases justify the violation of the copyright of another person. The Dutch Supreme Court reversed, holding that the court of appeal, by considering that only in “exceptional cases” the right to freedom of expression could preclude the enforcement of copyright, had applied the wrong standard. The Supreme Court noted that whether the right to freedom of expression should prevail depends on the circumstances of the case, including the nature (commercial or concerning a debate of general interest) of the expression.

**182. Acceptance of external constraints.** The prevailing opinion now certainly appears to be that the conflict between copyright and other fundamental rights should not be exclusively addressed within the confines of copyright itself. Besides a fundamental rights approach there are of course other avenues, notably competition law and civil law abuse/misuse of right doctrines, which may help redress

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18 Paris Court of Appeal (First Chamber), 18 September 2013, No. 12/02480.
any imbalances. In particular the latter has been suggested as a viable alternative to fundamental rights balancing.²² Herman Cohen Jehoram has argued that the conflict is in fact better addressed by applying such civil law doctrines, asserting that “the more precise abuse road” is to be preferred over a direct application of the right to freedom of expression, which “is lacking in precise criteria”.²³ Ultimately, the answer to the question of how to best resolve resolution of conflict between copyright and fundamental rights should not be a matter of “either...or”. Much like copyright can create disproportionate interferences despite its internal limits, there may still be such interferences after the application of the abuse of right doctrine. States that have such a doctrine can certainly apply it to resolve conflicts between copyright and fundamental rights, but this is unlikely to preclude an assessment within the fundamental rights framework altogether. More fundamentally, it is questionable whether abuse of right doctrines are really more precise and therefore better suited to address overbearing effects of copyright on fundamental rights. As has been argued in section 3.3, balancing is not necessarily irrational or lacking normative criteria which guide the balancing process. On the contrary, it can provide an appropriate framework for courts to take account of all rights and interests involved. Moreover, as Christophe Geiger has pointed out, “[t]he application of Art. 10 [ECHR], despite its being approximate, has the advantage that it is accompanied by established methods and criteria that involve an appreciation of the use at issue in the specific case”.²⁴ The wealth of experience with balancing rights such as the right to freedom of expression with other rights and interests can only be a benefit when adjudicating on conflicts between copyright and fundamental rights. Finally, fundamental rights balancing allows for the application of a uniform framework throughout the EU and is not dependent on national abuse of right doctrines.²⁵

7.3 Enforcement as a (dis)proportionate interference with fundamental rights

183. Outline. The question nevertheless remains to what extent EU Charter rights may prevent a right holder from relying on their copyright. This presumes, first of all, that the rights in the Charter apply. Their scope of application, and the relationship to national standards of fundamental rights protection, is discussed in Section 7.3.1. Charter rights may limit the exercise of copyright either directly or indirectly. Their possible direct effect is briefly addressed in Section 7.3.2, before Section 7.3.3

²⁴ Geiger 2007, p. 718.
²⁵ See, however, Sganga and Scalzini 2017, who suggest there is a nascent “European” copyright misuse doctrine, implicit in the case law of the CJEU.
discusses the indirect effect of Charter rights in relation to the interpretation and application of procedural norms concerning enforcement.

7.3.1 The scope of application of the EU law

184. Applicability of the Charter. To what extent is the relationship between user and right holder governed, whether directly or indirectly, by the fundamental rights in the EU Charter and/or national standards of fundamental rights protection? Insofar exclusive rights and the limitations and exceptions thereto laid down in national law derive from EU law, the applicable fundamental rights are found first and foremost in the EU Charter. After all, article 51(1) of the EU Charter designates the Member States as addressees of the provisions of the Charter “when they are implementing EU law”. However, even if the law of a Member State grants right holders a right that does not originate in EU law, the enforcement of such a right arguably falls within the scope of EU law as a result of the general applicability of the Enforcement Directive. Therefore, even if one considers that a right, such as the adaptation right, has not been the subject of general harmonization, the question whether the exercise of that right can be limited by fundamental rights may still fall within the scope of EU law.

The question as to the possible concurrent application of national standards of protection and the ECHR is more complicated. Although article 53 of the EU Charter appears to suggest that Member States may guarantee a higher level of protection of fundamental rights based on either the European Convention of Human Rights or their respective constitutions, the CJEU circumscribed that freedom in Melloni. The Court held that a national court may not apply “national standards of protection of fundamental rights” if it compromises “the primacy, unity and effectiveness of EU law”. This issue was also brought up in Afghanistan Papers, Spiegel Online and Metall auf Metall. The German Federal Supreme Court asked about the extent of the Member States' margin of discretion in the transposition of the InfoSoc Directive, in light of the case law of the German Federal Constitutional Court that national law based on measures of full harmonization can only be measured against the fundamental rights in the Charter. The CJEU limited its reply to the specific

26 See, in particular, art. 2(1) thereof, which provides that “…the measures, procedures and remedies provided for by this Directive shall apply ... to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned” (emphasis mine).

27 To that effect, e.g., Hugenholtz & Senftleben 2011, p. 26 (with further references). Arguing the most adaptations will constitute a reproduction (in part) within the meaning of the InfoSoc Directive are Rosati 2014, p. 21 and Jongmsma 2017, p. 666-670.

28 Case C-399/11 Melloni ECLI:EU:C:2013:107, para 60.
provisions under consideration, holding that the exclusive rights provided for in articles 2(a), 2(c) and 3(1) constitute measures of full harmonization, but that the exemptions provided for in articles 5(3)(c), second case, and 5(3)(d) do not.\(^{29}\) It added that national standards of fundamental rights can be applied in situations in which Member State action is not entirely determined by EU law as long as the level of protection of the Charter and the “primacy, unity and effectiveness” of EU law are not compromised. Arguably, national standards of protection only apply to the extent that Member States have discretion. Outside of that discretion, their application would undermine the “primacy, unity and effectiveness” of EU law. This also follows from Court’s consideration that when implementing any of permitted limitations and exceptions in the InfoSoc Directive, Member States must at least respect the conditions laid down therein and may not extend their scope.\(^{30}\) Accordingly, it seems doubtful that Member States may limit the exercise of exclusive rights provided for in the \textit{acquis Communautaire} on the basis of national standards of fundamental rights protection, other than within the limits of the discretion afforded to them in terms of implementation of limitations and exceptions.

\hspace{1cm} 7.3.2 \textit{Fundamental rights as an exception in themselves: horizontal direct effect?}

\hspace{1cm} 185. \textit{The fundamental rights exception.} There may be little doubt that (the exercise of) copyright has the potential to limit the enjoyment of fundamental rights, such as the right to freedom of expression and of information. Once this is recognized, it must also be accepted that there exists a risk that such limitations reach disproportionate levels. In vertical relationships, where the right holder/claimant is a state entity, such as in \textit{Afghanistan Papers}, users can directly rely on fundamental rights if the state action creates such a disproportionate interference. Accordingly, AG Szpunar held in his Opinion in \textit{Afghanistan Papers} that in the specific circumstances of the case the right to freedom of expression precluded the German State from invoking its copyright. The question is whether a user can similarly directly invoke a fundamental right if the right holder is not a state entity but a private party. In his Opinion in \textit{Spiegel Online}, AG Szpunar accepted only a marginal role for fundamental rights as direct constraints on copyright in such circumstances. He suggested that the balance as struck by the legislature should be respected, except “in the event of an infringement of the essential content of a fundamental right”.\(^{31}\) This implies that,

\(^{29}\) See also, \textit{supra}, Section 6.5.1.


\(^{31}\) Opinion of AG Szpunar in Case C-516/17 \textit{Spiegel Online} ECLI:EU:C:2019:16, para 62.
except in the most extreme of limitations of fundamental rights, he sees no role for fundamental rights.  

The CJEU did not explicitly take a stand on the possible horizontal direct effect of Charter rights in Afghanistan Papers and Spiegel Online. Strictly speaking, the Court merely held that, given the exhaustive nature of the catalogue of limitations and exceptions in the InfoSoc Directive, Member States are not free to introduce a limitation or exception to the exclusive rights in that directive that are not part of that catalogue, not even in order to safeguard a Charter right. In itself, this ruling does not preclude the possibility that a user might directly rely on a fundamental right to ward off an infringement claim. Nevertheless, one could argue that accepting such direct effect in essence leads to the (judicial) creation of an exemption beyond those provided for in the acquis. One could therefore argue that because the limitation placed on Member States extends to their judicial authorities, it also precludes the judicial creation of such exemptions by giving horizontal direct effect to fundamental rights.

Another question is whether a user may rely directly on one of the optional limitations and exceptions in the acquis communautaire even if that not has been implemented in the Member State in question. Some have argued this follows from Deckmyn. It is questionable whether this type of horizontal direct effect of directives is appropriate, precisely due to the intentionally optional nature of these provisions, which are moreover directed at Member States, not at individuals. However, this does not negate the possibility that prohibiting a particular use in specific circumstances creates a disproportionate interference with a Charter right.

The potential horizontal direct effect of fundamental rights may be largely a moot point. Typically, the degree of interference with the fundamental right in question will depend not just on the rights right holders possess, but also on how they are enforced. In many cases, the conflict between copyright and fundamental rights is therefore arguably best resolved when it is determined which remedies ought to be available to the right holder. In this regard, the acquis communautaire not only offers sufficient

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32 Both cases are discussed, supra, in § 107.
33 See ibid.
34 Cf., supra, § 116. See also Griffiths 2019, p. 47.
35 Tailoring of remedies may not resolve every potential conflict between copyright and fundamental rights. Notably, contractual limitations and the use of technological protection measures may also limit the enjoyment of fundamental rights. In such cases, it may not always be possible to resolve the tension through an interpretation of the existing legal framework in conformity with fundamental rights. In those cases, courts may need to resort other techniques to resolve disproportionate interferences, such as accepting horizontal direct effect or the existence of a positive obligation of the state (or EU) to take regulatory action. Since the
flexibility to limit disproportionate interferences with fundamental rights, but may even require the refusal of particular remedies to avoid those interferences. This is discussed in the next section.

7.3.3 *Indirect (horizontal) effect and available remedies*

186. **Remedies.** Insofar as users of copyright protected subject-matter are concerned, it is submitted that in most instances the conflict between copyright and their fundamental rights can be resolved indirectly. First, when interpreting and applying substantive copyright norms and, second, when deciding on the available remedies. The focus in this section is on the latter: when should courts refuse to grant a particular remedy in the interest of avoiding disproportionate interferences with fundamental rights? I will argue that the enforcement framework put in place by the InfoSoc Directive and, predominantly, the Enforcement Directive, can (and should) be interpreted in such a way as to avoid outcomes that create a disproportionate interference with fundamental rights.36 I will principally consider this issue in regard to one of the main remedies in the case of copyright infringement: (final) injunctions. The impact on the other main remedy, that of damages, will be addressed only in passing.

187. **EU directives on enforcement.** Article 3(1) of the Enforcement Directive specifies that “the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights ... shall be fair and equitable”. Article 3(2) adds that “[t]hose measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse”. A similar statement of principle is found in article 8(1) of the InfoSoc Directive: “The sanctions thus provided for shall be effective, proportionate and dissuasive.” The preamble to the Enforcement Directive further clarifies that “[t]he measures, procedures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case” (recital 17) and that “[d]epending on the particular case, and if justified by the circumstances, the measures, procedures and remedies to be provided for should include prohibitory measures aimed at preventing further infringements of intellectual property rights” (recital 24).

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36 See also, in general with regard to the proportionality of remedies, Fischman Afori 2014.
The foregoing suggests that the grant of remedies should be tailored to the specific circumstances of the case at hand. Nevertheless, the reality in several Member States is that final injunctions are automatically granted in case of infringement. It is questionable whether such a general rule also follows from the Enforcement (and InfoSoc) Directive(s). Article 11 of the Enforcement Directive only requires that “Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement” (emphasis added). Although at least one commentator has expressed the hope that the CJEU will read in this provision a general rule that the grant of an injunction is automatic if an infringement has been found, the argument for this is not strong. It is primarily based on an interpretation of article 11 in conjunction with article 12, which permits Member States to provide that, if certain conditions are met, courts may grant damages instead of an injunction. A contrario, one could argue that if those conditions are not met, Member States may not provide that damages in lieu of an injunction are granted. This argument is not convincing. It is contrary to text of article 11 and the general spirit of the directive as evinced by article 3 and the recitals cited above. Accordingly, the Enforcement Directive, nor the InfoSoc Directive for that matter, does not require the automatic grant of a final injunction, even if the conditions of article 12 are not met.

188. Degree of harmonization. The question is whether Member States, owing to the fact that the Enforcement Directive only lays down a minimum standard, are nevertheless free to provide that the grant of a final injunction is mandatory. Husovec and Van Dongen convincingly argue, in a not yet published contribution, that this is not the case. Article 3(2) requires not only that remedies be “effective” and “dissuasive”, but also that they be “proportionate”. Recitals 17 and 24 clarify that the proportionality of a particular remedy must be evaluated in light of the specific

37 Similarly ambiguous is article 8(2) InfoSoc Directive: “Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction”.
39 Art. 12 Enforcement Directive: “Member States may provide that, in appropriate cases and at the request of the person liable to be subject to the measures provided for in this section, the competent judicial authorities may order pecuniary compensation to be paid to the injured party instead of applying the measures provided for in this section if that person acted unintentionally and without negligence, if execution of the measures in question would cause him/her disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory”.
41 Cf. art. 2(1) Enforcement Directive.
circumstances of the case at hand. Accordingly, they conclude that the Enforcement Directive not only introduced a floor for available remedies, but also a ceiling. National courts thus ought to have the freedom to reject the request for a final injunction if the circumstances require it. How large is the courts’ freedom in this regard?

The freedom of courts to grant or withhold an injunction will be mainly circumscribed by the principles of effectiveness, dissuasiveness and proportionality. In turn, whether a remedy can be considered for instance effective or proportionate will be influenced by other (higher) legal norms such as the provisions on free movement, those on competition law and fundamental rights. In how far Member States, including national courts, are free to determine whether a measure is effective, dissuasive and proportionate is a matter of interpretation. As far as the protection of fundamental rights is concerned, the outer limits of that discretion will be determined by the Charter. Within those limits, Member States are free to give further content to those concepts, for instance by applying national standards of fundamental rights protection.

189. **Need for judicial restraint.** Despite the discretion inherent in article 11 of the Enforcement Directive, courts must show hesitation to refuse the grant of an injunction against direct infringers. In that regard, the proportionality of remedies against direct infringers should be approached differently than the proportionality of remedies against intermediaries, discussed in Section 4.3.2.3(iii). The enforcement against intermediaries is not similarly encumbered by provisions of substantive copyright law, which govern the *prima facie* relationship between right holder and user/infringer. This leaves courts more freedom to determine the most proportionate (optimal) remedies given the rights and interests involved. However, when a court refuses to grant an injunction against a direct infringer and instead grants damages it creates a *de facto* compulsory license. If it also withholds damages, it creates a *de facto* full exemption. Courts should therefore exercise restraint and deference vis-à-vis the choices made by the legislature in granting right holders exclusivity and not haphazardly undermine these choices by withholding remedies. Along these lines,
several authors have suggested precedence to fundamental rights should only be given “[i]n exceptional cases”, 44 in “special cases”, 45 or in “in very specific circumstances”. 46 One can compare in this regard the case law of the CJEU on the abuse of a dominant position by holders of intellectual property rights. Already in its Volvo ruling the Court held that “an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right”. 47 Nevertheless, the Court recognized that the specific exercise by an undertaking holding a dominant position may amount to an abuse of that position, but only in “exceptional circumstances”, as it clarified in Magill. 48 According to the CJEU, the refusal to enter into a licensing agreement, and by extension the request to enjoin a third party from using subject-matter protected by intellectual property, constitutes such exceptional circumstances if that refusal (i) prevents the emergence of a new product for which there is potential consumer demand, (ii) that refusal is not justified by objective considerations and (iii) such as to exclude any competition on a secondary market. 49 That the holder of an exclusive right is in principle entitled to obtain an injunction against a direct infringer was also emphasized in Huawei. In question was under which circumstances the holder of a standard essential patent (SEP), who has undertaken to licence that patent on fair, reasonable and non-discriminatory (FRAND) terms, abuses its dominant position by seeking an injunction against an infringing competitor. The CJEU emphasized that “in principle, the proprietor may not be deprived of the right to have recourse to legal proceedings to ensure effective enforcement of his exclusive rights”. 50 Nevertheless, the Court held that the holder of the SEP can be required to comply with specific requirements before it can obtain an injunction, specifically owing to the fact that the right holder has undertaken to licence the SEP on FRAND terms, which undertaking “creates legitimate expectations on the part of third parties that the proprietor of the

44 Geiger 2006b, p. 389 and Geiger 2007, p. 713, although Geiger does maintain, as noted supra at n 15 and accompanying text, that in every case the national court must check whether the restriction on freedom of expression is “necessary in a democratic society” and that they in that regard can rely on the case law by the ECtHR, it is not clear what level of deference and restraint national courts should display vis-à-vis the national (and European) legislature in his view (and if and how this differs from the level of deference and restraint displayed by the ECtHR).
45 Quaedvlieg 2006, p. 199.
46 De Cock Buning 2005, p. 163.
49 Ibid., para 54–56 and Case C-418/01 IMS Health ECLI:EU:C:2004:257, para 38.
50 Case C-170/13 Huawei Technologies ECLI:EU:C:2015:477, para 58.
SEP will in fact grant licences on such terms”.\footnote{Ibid., para 53.} In particular, the right holder must inform the alleged infringer of the infringing use and present it with an offer for a licensing agreement on FRAND terms if the alleged infringer has expressed a willingness to enter into a licensing agreement.\footnote{Ibid., para 59 et seq.} These decisions reveal the exercise of a considerable degree of restraint in regard to the determination whether a right holder can be denied an injunction and forced to licence its intellectual property on competition grounds. This is not least because the right holder must have dominant position, and, even then, only in exceptional circumstances may an injunction be withheld.

The question whether an injunction must be withheld because it would violate a fundamental right should be approached with similar caution. It should principally be approached in a way similar to a question of review: it must be assessed whether granting a certain remedy creates a disproportionate interference with a fundamental rights which cannot be tolerated, and not whether the rights and interests involved are optimally reconciled by exclusivity, a remuneration right, or by free use.\footnote{Cf. Graber 2005, p. 41: “Firstly, when a court order is self executing, it distorts the balance of power between the institutions of the State. Because such a derogation of statutory law itself poses constitutional problems, it should be chosen under exceptional circumstances only.”} A deferential attitude towards the legislative choice in this regard, made in light of both empirical and normative uncertainty as to the appropriate scope of protection, is therefore in order. I therefore am reluctant to agree with the approach taken by the Austrian Supreme Court starting with its well-known 2001 Medienprofessor ruling, in which it first accepted that the enforcement of copyright may be impeded by the right to freedom of expression directly.\footnote{Austrian Supreme Court, 12 June 2001, case 4 Ob 127/01, published in GRUR Int. 2002, p. 341.} In a later ruling from 2010, the Austrian Supreme Court specified the following criteria for determining whether the right to freedom of expression stands in the way of copyright enforcement: (i) the use under consideration falls within the scope of the right to freedom of expression and is neither false nor defamatory, (ii) the use does not undermine the economic interests of the author, (iii) it does not conflict with the normal exploitation of the work, (iv) it does not cause undue prejudice to the legitimate interests of the author and (v) the right to freedom of expression cannot be sufficiently exercised without the (\textit{prima facie}) infringing use.\footnote{Austrian Supreme Court, 13 July 2010, case 4 Ob 66/10z, para 5.7.} Depending in particular on how “undue prejudice” is understood, this may radically expand the category of permitted uses beyond those explicitly exempted by copyright law itself, by in effect creating an open-ended exception
similar to US fair use, directly based on the right to freedom of expression. Such a standard strikes me as inappropriate. The question is where the Charter draws the boundary.

190. Developing an appropriate standard. In assessing whether the grant of a remedy, such as an injunction, creates a disproportionate interference with a Charter right, courts can and should take note of the case law of the ECtHR. This follows in the first place from article 52(3) of the EU Charter, which specifies that the meaning and scope of Charter rights shall be the same as of corresponding rights in the ECHR, but that EU law may provide more extensive protection. In particular concerning the determination of the intensity of the interference with a particular right the case law of the ECtHR provides invaluable guidelines. In regard to freedom of expression, for instance, courts should take note of the factors which typically guide the assessment of the ECtHR, such as the character and purpose of the expression (e.g. political or otherwise in the general interest, artistic, (purely) commercial). The possible guidance which the case law of the ECtHR might offer was recognized by the CJEU in *Afghanistan Papers* and *Spiegel online*, when it considered that “for the purpose of striking a balance between copyright and the right to freedom of expression, [the ECtHR] has, in particular, referred to the need to take into account the fact that the nature of the ‘speech’ or information at issue is of particular importance, inter alia in political discourse and discourse concerning matters of the public interest”.

Nevertheless, national courts, and in guiding them the CJEU, should in principle develop an independent approach, to some degree separate from that used by the ECtHR to determine the lawfulness of fundamental rights limitations. This is because, as was noted in Chapter 4, the ECtHR grants states a margin of appreciation due to the subsidiary nature of the Convention, whereas national courts and the CJEU exercise restraint and deference towards their respective legislatures in order to

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56 Cf., also critical, Peukert 2014, p, 135.
57 See, more elaborately, Geiger & Izyumenko 2019a, p. 27 et seq., who identify a number of factors in the freedom of expression case law of the ECtHR (summarizing at p. 28: “1) the character of expression (commercial or not; artistic; etc.); 2) the purpose and nature of expression/ information at stake (political; cultural; entertaining; otherwise in the general interest); 3) the status of a counterbalanced interest and the degree of interference with it; 4) availability of alternative means of accessing the information; 5) the timing/ “oldness” of speech; 6) the status of the speaker/ user (active or “passive”; press; etc.); 7) the form of expression; 8) the medium of expression (notably, the Internet); 9) the nature and severity of the penalties; etc.”).
59 See, supra, Chapter 4, n 22 and accompanying text.
respect the separation of powers. In any event, the standard applied should not be more permissive of restrictions on fundamental rights than the one applied by the ECtHR, meaning that restrictions imposed on, for instance, the right to freedom of expression must in any case be “necessary in a democratic society”, although the discussion of Ashby Donald and Neij and Kolmisoppi in § 84 and 85 showed that the ECtHR does not place great restraints on states in this regard, including national courts.

Arguably the limits imposed by the EU Charter would be too permissive if it was interpreted as merely requiring that the essence of rights be respected. Nevertheless, this appeared to be what AG Szpunar suggested in his Opinion in Spiegel Online when he concluded that the legislative balance must be respected except “in the event of an infringement of the essential content of a fundamental right”. Such a standard is – in my opinion – far too strict (or lenient, depending on one’s point of view). In the first place, focusing solely on potential violations of the essence of a right is a one-sided exercise, which does not take account of the importance of a particular remedy to safeguarding the right holder’s rights and interests and the broader purposes pursued by copyright. More importantly, such a standard risks permitting serious interferences with rights that fall short of violations of the essence and does not recognize that the standard of review ought to fluctuate depending on the seriousness of the interference with the right in question and the intrinsic importance of that right.

Imagine a private corporate right holder who attempts to suppress the publication of theretofore unpublished documents in which it holds the copyright and which evidence gross corporate misconduct of great public interest. Unless the suppression of those documents is qualified as a violation of the essence of the right to freedom of expression and of information, the meaning of which is enigmatic, the AG’s approach may stand in the way of the free dissemination of such documents if their publication can for some reason not be safeguarded by a statutory exemption.

Courts must review not only whether the enforcement of copyright respects the essence of rights, but also whether it is not otherwise disproportionate. This assessment must be context specific and more intensive as the degree of interference and the intrinsic importance of the right concerned increase. An alternative standard could be found in the manifestly disproportionate test applied by the CJEU in relation to measures that involve political, economic and social choices, even if that is a

60 Cf. Mylly 2005, p. 196, who notes that the ECHR only lays down minimum standards of protection.
61 Opinion of AG Szpunar in Case C-516/17 Spiegel Online ECLI:EU:C:2019:16, para 62.
62 The term “essential content” appears to be a direct translation of “contenue essential” used in the original French version of the Opinion, which is the French term used for the concept of essence in article 52(1) EU Charter.
relatively strict test so far applied predominantly in cases involving restrictions on the right to property and the freedom to conduct a business.\textsuperscript{63} Such a standard primarily implies that the disproportional relationship between benefits and costs must be obvious. It is a deferential standard that permits courts to take account of the fact that the legislature’s task of striking a fair balance is complicated by empirical and normative uncertainty. Moreover, that standard is also not principally incapable of adapting to the circumstances: the more serious interference and the greater the importance of the right involved, the sooner disproportionality will be obvious. If this is accepted, a remedy such as an injunction may not be granted if it creates a manifestly disproportionate interference with a Charter right. The degree of interference with the right must be compared to the fulfilment of the purposes pursued by copyright protection, focusing on the choice made by the legislature to subject the use in question to exclusive right holder control, as well as to the impact non-enforcement would have on the fundamental rights of the right holder, notably the right to property and an effective remedy.

191. \textit{The problem of partial harmonization.} Applying a deferential standard recognizes at the same time that, on the one hand, copyright is not immune to fundamental rights scrutiny and, on the other hand, that the primacy of striking a balance between the legion of interests involved lies with the legislature. The foregoing is complicated by the fact that most limitations and exceptions in the \textit{acquis communautaire} are optional. Whether therefore the enforcement of copyright results in a disproportionate interference with a fundamental right will not merely be a result of choices made by the EU legislature, but potentially also on the choice of a Member State not to implement a particular limitation or exception. In principle, the same manifestly disproportionate standard can be applied. However, the fewer optional limitations and exceptions a Member State has chosen to implement, the more likely it is limitations placed on fundamental rights in concrete cases must be considered manifestly disproportionate. In practice, it might very well be that the omission to implement a particular optional exception or limitation must almost consistently lead to the conclusion that the use safeguarded by that provision must be permitted to prevent a manifestly disproportionate limitation of a fundamental right. One could imagine the lack of a quotation exception, or even a parody exception might produce such results.\textsuperscript{64} Nevertheless, this does not necessarily mean the exception or limitation itself is in effect mandatory. In the end, the range of permitted uses falling within an explicit limitation or exception will likely be wider than those under a

\textsuperscript{63} See, \textit{supra}, Section 4.3.1.

\textsuperscript{64} Cf. Griffiths 2019, p. 47.
differential manifestly disproportionate test, since the element of review of the latter is absent in the application of an explicit limitation or exception.

Finally, it must be recalled that in several Member States the law prescribes that an injunction must automatically be granted where copyright is infringed. It follows from the foregoing that such provisions are in my opinion contrary to the Enforcement and InfoSoc Directives. If it is not possible to interpret such provisions in conformity with those directives, national court may need to disapply them if their application would lead to a violation of a Charter right. Arguably, this follows from the case law discussed in § 169 concerning the disapplication of national law that conflicts with a general principle of EU law.

192. **Examples.** Some examples can illustrate the boundaries set by Charter rights when using a (flexible) manifestly disproportionate standard. For instance, should a court grant an injunction to the private corporate right holder invoking copyright to avoid dissemination of internal documents evidencing grave corporate misconduct? This may very well result in a manifestly disproportionate interference with the right to freedom of expression and information, if one considers that, on the one hand, such a right holder does not benefit from moral rights protection and has no strong exploitative interests in the works concerned, and, on the other hand, the works in question concern a matter of great public interest and are not otherwise publicly available.\(^{65}\) This conclusion is reinforced by the fact that the use in question would likely otherwise be allowed as a lawful quotation if not for the unpublished nature of the works, which requirement principally aims at protecting moral rights interests which the corporate right holder does not have. It is therefore easy to agree with the well-known *Scientology* decision of the Court of Appeal of The Hague, in which it refused to grant an injunction in a largely similar situation.\(^{66}\)

On the other hand, it is questionable whether the use that was the subject of the proceedings in *Klasen* should be permitted on grounds of freedom of expression, at least if one concludes that it cannot be brought within the scope of any exception.\(^{67}\) The Court of Appeal of Versailles, after remand, reached that conclusion, although on questionable grounds. It considered that it was up to the Klasen, the painter in question, to establish in which way the fair balance required that he use the works without authorization, that Klasen could have easily substituted those works for other photographs and that the works taken were not well-known enough to be the subject

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\(^{65}\) Cf. the judgement of the ECtHR in *Akdeniz*, discussed, *supra*, Chapter 4, n 46 and accompanying text, in which the ECtHR considers those same factors.


\(^{67}\) See, *supra*, n 18-19 and accompanying text.
of “appropriation”.68 These are largely irrelevant for the determination of the “fair balance”, which should not in the first place focus on choices made by the user, but on the degree of interference with their freedom caused by the enforcement of copyright.69 Klasen’s use of the photographs, taken from an advertising campaign, was not predominantly commercial, but was, according to the artist, intended to stimulate critical reflection in the minds of the public about the social order and the consumer society.70 Courts should not question an artist’s choice to want to convey their message by using a particular kind of source material, in this case a photograph used in a commercial advertising campaign.71 It is all but certain that any such photograph is subject to copyright and thus that its re-use is subject to authorization. This arguably creates at least a moderate interference with the right to freedom of expression, because it subjects the second artist to the risk that such authorization is refused.72 At the same time one can question whether the encroachment into the remuneration interest of the author is all that strong, considering it was a derivative use on what is likely a (very) minor licensing market in light of the overall commercialization of the photographs. There is thus an argument to be made that, if striking an optimal balance, the derivative use made by Klasen should be favoured over the exploitative interest of the author of the original photographic works. If, however, the use cannot be brought within the scope of an existing exemption, which can be questioned,73 the result may be different. If no exemption applies, the author is in principle entitled to authorize the use and be remunerated for it, meaning the legislature must be assumed to consider the grant of such rights conductive to the attainment of the objectives pursued by copyright. Given the uncertainty concerning the answer to the question how strong authorial protection ought to be for copyright to attain its objectives, one could conclude that it is not manifestly disproportionate to reserve to the author the control over the derivative uses in question to the detriment of other artists.

68 Versailles Court of Appeal (First Chamber), 16 March 2018, No. 15/06029.
69 Also critical is Geiger 2018, p. 22-24.
70 See also the judgement of the first court of appeals in this case, Paris Court of Appeal (First Chamber), 31 January 2012, No. 10/02898.
72 On similar grounds the German Federal Supreme Court in its Metall auf Metall ruling considered that there would be a “considerable infringement” of the freedom of art if the sampling in question were not permitted. German Federal Constitutional Court (First Senate), 31 May 2016, 1 BvR 1585/13 – Metall auf Metall, English translation published in IIC 2017, p. 343, paras 96-98 & 107.
73 Such a use can very well be characterized as an artistic quotation, or as a pastiche.
7.4 Synthesis

193. Synthesis. There exists an inherent conflict between the exclusivity of copyright and certain fundamental rights. An interpretation and application of substantive copyright norms may not completely resolve this conflict adequately. It is now widely recognized that (the enforcement of) copyright may create a disproportionate interference with fundamental rights. I have suggested in this Chapter that such tensions can largely be addressed at the time when determining which remedies ought to be available to the author. Importantly, the framework put in place by the Enforcement Directive and the InfoSoc Directive does not require that injunctions are automatically granted in case of infringement. Remedies must not only be “effective” and “dissuasive”, but also “proportionate”. I have suggested that a remedy can in any event not be considered proportionate if it leads to a manifestly disproportionate interference with a Charter right. An open question is to what extent Member States would have discretion beyond those situations, for instance by applying their own standards of fundamental rights protection. In other words, if granting an injunction would not lead to a manifestly disproportionate interference with a Charter right, nor is otherwise precluded by other norms of EU law, such as competition law, must it be granted? Or are there situations in which Member States may deny an injunction to avoid a disproportionate interference with a national standard of fundamental rights protection? This would largely depend on what the CJEU considers to constitute “effective” and “dissuasive” remedies and when the refusal to grant a particular remedy interferes with the fundamental rights of the right holder. In its case law on the availability of injunctions against intermediaries, discussed in Section 4.3.2.3(iii), the CJEU has mostly emphasized that the absence of a remedy may not lead to a violation of the essence of the rights to property and to an effective remedy, but besides being highly enigmatic such a standard is incomplete, since by itself it does not rule out serious interferences against only negligible gains. It is thus up to the CJEU to clarify the bandwidth of Member State discretion, detailing in which situations a particular remedy must always be denied and in which it must always be granted.

An important question on which I have only touched indirectly, but which certainly deserves further study, is under which circumstances only either the grant of an injunction or of damages must be refused, and in which both. This will likely largely depend on the exploitative interest of the right holder. If there is none, both can be refused to avoid a disproportionate interference with a fundamental right. If there is, and the use in question would create substitutionary harm, damages may be in order. Most complicated will be deciding those cases in which a licensing market exists, but
in which the reservation of exclusivity to the right holder is nevertheless found to be disproportionate. In that case one must essentially consider which of two alternatives, free use or remuneration, is most proportionate.
PART IV – CONCLUSIONS

This final part summarizes the findings of the previous parts and places them in a broader perspective. It suggests that balancing in the form of proportionality analysis has the potential to contribute to the coherence and transparency of judicial decision-making by the CJEU when determining the scope of protection. To achieve this, the CJEU should clearly identify which normative arguments clash and explain why the degree of fulfilment of one normative argument achieved by a particular decision outweighs the degree of interference with the other.
8 CONCLUDING AND SUMMARIZING COMMENTS

194. The research question. This dissertation has focused on the question what is and ought to be the role of fundamental rights in determining the scope of protection in EU copyright law. To answer this question I started, in Part I, with a more general enquiry into the construction by the CJEU of copyright norms through the interpretation of the acquis communautaire. In Part II, I presented a theoretical model of balancing and discussed the use of proportionality analysis, and specifically of the concept of fair balance, by the CJEU as well as the ECtHR, in whose case law that concept first emerged. This discussion focused both on the emergence of this model of analysis in general and its application in the context of copyright in particular, in order to illustrate the particularities and problems of the CJEU approach. In Part III I adopted a more normative perspective, suggesting how fundamental rights arguments can be used more coherently. This concluding chapter aims at summarizing the findings of the preceding chapters and to place them in a broader perspective.¹

The main difficulties of the CJEU approach that the analysis of Parts I and II revealed are briefly outlined in Section 8.1. The alternative approach developed in Part III is presented in Section 8.2 and illustrated with a number of examples. I conclude with some concluding observations in Section 8.3.

8.1 The CJEU and the creation of copyright

195. Judicial norm creation and rudimentary balancing. It is undeniable that the CJEU plays an important role in the development of copyright law in the EU. As a result of the EU’s harmonization efforts, the abstract delineation of the scope of protection now falls largely within the competence of the CJEU. There can be little doubt that in this regard the CJEU often has a certain measure of discretion, meaning it will create legal norms.² The way it exercises this discretion, however, is hardly a

¹ I have approached the question at the centre of this dissertation in a broad and general manner in order to address a (perceived) gap in legal doctrine in terms of a systematic analysis from a legal theoretical perspective of (the CJEU’s approach to) the use of fundamental rights arguments in copyright adjudication. I have focused on providing the building block for a more systematic approach of such arguments. I recognize that, as a result, many specific issues have only been addressed rather superficially, such the external justification of balancing decisions and the weighing of rights and interests that conflict with those of right holders. Issues such as these no doubt ask for further investigation.

² Accordingly, it is to be expected that its decisions generate certain “externalities”, i.e. consequences beyond those for the parties involved directly in the proceedings. Mylly 2019, p. 279-282 suggests that for this reason “the CJEU should limit its decision-making in favour of the legislator” (p. 281) as much as possible in cases in which once can expect far-reaching consequences that are difficult to predict, such as cases concerning Internet-infrastructure. Even if one agrees with this assessment, I do not necessarily agree with the argument that the
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paragon of consistency. This was illustrated, for instance, with the Court’s approach to hyperlinking. In a series of decisions, it has created the legal norm that hyperlinking, whether by means of a deep link or a framing link, to freely available legal sources is permitted, while linking to illegal sources is not permitted if the user knew or should have known of the illegality, which knowledge is presumed when the user acts with a profit motive. The Court arrived at this rule by applying a convoluted and mutative interpretation of what constitutes a communication to the public. Cases such as these often do not entail a consistent dogmatic development of the existing legal framework and precedent, even if it is presented as such, but rather a largely hidden balancing of rights and interests. In GS Media, one of the judgements in the hyperlinking-saga, the CJEU admitted as much, by emphasizing the purpose of the InfoSoc Directive to safeguard a fair balance of rights and interests, as well as the importance of hyperlinking to a sound operation of the Internet and its corresponding importance to freedom of expression and of information.

Arguably, much of the case law of the CJEU can be understood as a search for a proportionate relationship between the desire to guarantee authors and related right holders an appropriate reward and the need to safeguard other rights and interests. This would be an understandable approach to the interpretation of largely open textured norms which are precisely intended to strike such a balance. Often, however, this search for balance is hidden behind a rhetoric that includes terms such as “high level of protection”, “broad” and “strict interpretation” and “effectiveness”. Even the use of the concept of “fair balance”, which is more and more frequent, while indicative of a balancing exercise, often cannot escape the criticism that it is no more than an “empty slogan”.

196. Striking a balance and the failings of the CJEU method. The meaning and functioning of the concept of “fair balance” in decisions like GS Media is unclear. Balancing of competing normative arguments is a process by which the priority between two (or more) of such arguments, such as rights, is established. To determine which right or interest prevails in a given set of circumstances, one must determine to which degree a decision one way (e.g. exclusivity) will contribute to the fulfilment of one normative argument as compared with its fulfilment under a decision the other way (e.g. free use), and compare this degree of fulfilment with the degree to which that decision will interfere with the fulfilment of the other normative

use of proportionality analysis exacerbates the issue of externalities. These externalities may arise where courts exercise discretion, regardless whether they do so by means of a proportionality analysis involving fundamental rights or not. Where the law is unclear, externalities may often be unavoidable, and courts will simply have to decide as best they can.

3 See, supra, § 41-43.
4 See, supra, Chapter 4, n 282 and accompanying text.
argument, taking into account the intrinsic importance of the rights and interests involved and any uncertainty concerning the assumptions made.

Arguably, the most significant problem with the CJEU’s explicit reliance on the concept of fair balance in copyright cases is the lack of a clear identification of these normative arguments. As long as these are not clearly defined, there can be no rational talk of balancing of rights and interests. Typically the CJEU merely refers to the right to intellectual property in article 17(2) of the EU Charter, without specifying what this protection entails. This lack of specification is not odd when one realizes that the right to property, as conventionally interpreted, only protects (legitimate expectations to) existing entitlements, but does not itself define the content of those entitlements. Therefore, when determining the scope of protection in light of both the fundamental rights and interests of right holders and of users, the right to property has little role to play. Instead of relying on an undeveloped “right to intellectual property”, the main interest of right holders that arguably ought to be taken into account finds its origin in the intention of the legislature to permit them to obtain a reward by exploiting the protected subject-matter in order to attain certain objectives. Notably, the core objectives of EU copyright law are both rewarding creativity of authors and performers in itself, as well as the desire to incentivize creation generally.

As was illustrated in Chapter 2, this teleological argument already appears to guide much of the CJEU’s decisions. It is when (other) fundamental rights are involved, that the CJEU suddenly abandons teleology and adopts a property rhetoric. This appears to me improper, unnecessary as well as to obfuscate which rights and interests must really be considered. The teleological argument, taking account of the purpose to reward right holders, is itself not applied coherently or transparently either, being shrouded in a veil of useless concepts such as broad and strict interpretation. Such concepts ought to be abandoned, as they by themselves cannot justify the choice for including a particular use within the scope of protection, nor a choice to exclude it. Instead, the teleological argument, together with fundamental rights arguments, must themselves be considered in conjunction with other interpretative arguments when determining the scope of copyright protection in the course of interpretation of the *acquis communautaire*.

### 8.2 The impact of fundamental rights on the scope of protection

197. **Balancing scenarios.** Only once the relevant “rights and interests”, including those deriving from the legislative purpose, have been identified can they be taken into account in the process of interpretation and application of copyright norms. In Part III, I distinguished a number of different scenarios in which
fundamental rights arguments and balancing can (sometimes: should) play a role: (i) the interpretation of the scope of concepts that define the content of exclusive rights, (ii) the interpretation of the scope of concepts that define the content of limitations and exceptions, (iii) the determination of the content of open standards and the overall assessment whether the application of a limitation or exception strikes a fair balance and (iv) whether the grant or refusal to grant a particular remedy creates a disproportionate interference with a fundamental right.

198. **Exclusive rights.** The issue of hyperlinking can be used to illustrate how the CJEU might use a more explicit balancing approach in a more coherent and systemic manner. As noted in the previous section, the CJEU’s approach to hyperlinking has not been without flaws. The central question the CJEU has had to address is under which circumstances, if any, the provision of a hyperlink to a copyright protected work available elsewhere online is itself a *communication* to the public. In Svensson, the CJEU simply relied on its dogma of broad interpretation, stretching the concept of communication, which earlier had required an “indispensable intervention” of the user to enable access by the public, to bring all hyperlinks within the scope of that concept. Instead of concluding straight away that a broad interpretation was in order, it ought to have relied on textual, systemic and teleological arguments to determine whether a broad or a narrow interpretation was appropriate. Teleological arguments relating to rewarding right holders and systemic fundamental rights arguments might have been indicative of the proper scope, in particular if one deems the textual meaning of the concept of communication ambiguous. For instance, permitting simple clickable links to protected works has no negative impact on the primary market of the work. Although perhaps one could argue that permitting right holders to license hyperlinks would moderately contribute to the objectives of copyright law, it would have detrimental impact on the functioning of the internet and accordingly also on the right to freedom of expression and of information. This implies the placing of such hyperlinks ought not be subject to right holder control, not because they do not reach a (new) public as the CJEU concluded, which they arguably do, but because they can be considered to fall outside the scope of the concept of communication. A different conclusion might have been reached with regard to inline or framing links. Contrary to simple clickable (textual) links, these may interfere with the ability to exploit the work effectively on the primary market, by displaying the work on the linking website directly, since they no longer require users to go to the original website to enjoy the work. At the same time, subjecting such links to

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5 As AG Wathelet pointed out in his Opinion in Case C-160/15 GS Media ECLI:EU:C:2016:221, para 60, the application of that criterion ought to lead to the conclusion that the placing of a hyperlink cannot be qualified as an act of communication.
authorization arguably interferes to a lesser degree with the functioning of the internet and with fundamental freedoms.⁶

199. Limitations and exceptions. On other occasions, the potential conflict with a fundamental right is better taken into account during the interpretation or application of a particular limitation or exception, either when determining the prima facie scope of those provisions or in the course of the assessment whether their application in the concrete circumstances of the case preserves a fair balance. The Renckhoff case can serve as an example.

In Renckhoff the CJEU refused to construe the right of communication to the public narrowly in order to protect the right to education in a case concerning the online communication on a school website of a photographic work as part of a student assignment. Instead, the right to education may be safeguarded in particular by an exception for use for the sole purpose of illustration for teaching (permitted by art. 5(3)(a) InfoSoc Directive). Moreover, the student’s right to freedom of expression may be protected by a quotation exception (permitted by art. 5(3)(d) InfoSoc Directive).⁷ The German Federal Supreme Court (BGH), however, in its judgement of 10 January 2019, held that no limitation or exception applied. It agreed with the rejection by the court of appeal of the application of the (German implementation of the) exception for teaching purposes, considering that it is questionable that the use served the “purpose of illustration for teaching”.⁸ Similarly, the BGH considered the quotation exception not applicable because the illustrative use in the school assignment lacked a requisite purpose (Zitatzweck).⁹

In both instances, the narrow meaning given to the exceptions under consideration must be criticized. The interpretation of the exception for teaching purposes unnecessarily reduces the scope of the exception to the detriment of the right to education. It should not be limited to permitting active use by teachers, but should also cover use by students, as also AG Campos Sánchez-Bordona suggested in his Opinion in Renckhoff.¹⁰ Similarly, the exclusion of the use from the scope of the quotation exception leads to a narrower scope than necessary. At first sight, the ruling by the BGH appears to be in line with the recent rulings by the CJEU concerning the quotation exception in Metall auf Metall and Spiegel Online. In those cases, the CJEU considered that a quotation “must have the intention of entering into a ‘dialogue’ with

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⁶ Cf. Ohly 2018a, p. 117, who argues similarly.
⁷ Cf. Ohly 2018b, p. 1003.
⁸ German Federal Supreme Court (First Civil Senate), 10 January 2019, I ZR 267/15 – Cordoba II, para 61.
⁹ Ibid., para 53.
the work”¹¹ and that the user “must establish a direct link between the quoted work and his own reflections ... since ... a quotation must inter alia be intended to enable criticism or review”¹². However, such a restrictive understanding of the CJEU’s judgement unnecessarily reduces the scope of the quotation exception to the detriment of freedom of expression. Considering the CJEU’s ruling in Painer that a quotation need not be made in subject-matter that is itself protected by copyright, such a “dialogue” arguably does not need to be explicit, but may also be implicit or unspoken.¹³ Such an interpretation also does better justice to the text of article 5(3)(d) of the InfoSoc Directive, which does not per se require such a dialogue. Moreover, article 10(1) of the Berne Convention, to which the EU must adhere as a signatory to the TRIPS Agreement and the WCT, requires quotations be permitted provided “their extent does not exceed that justified by the purpose” without limiting the scope to certain specific purposes.¹⁴ There is thus little reason to consider that the inclusion of a photograph in a school assignment for illustrative purposes is not a quotation.

Arguably, therefore, the use in question must be considered both a use for the purpose of illustration for teaching and a quotation. If the other conditions of those provisions are also fulfilled the ultimate answer to the question whether either provision may be applied in the concrete circumstances of the case essentially depends on, in case of article 5(3)(a), whether the use does not go beyond what is “justified by the non-commercial purpose” and, in case of article 5(3)(d), whether the “use is in accordance with fair practice, and to the extent required by the specific purpose”, which are specific standards that themselves entail a proportionality analysis.¹⁵ This permits a full consideration of all rights and (legitimate) interests involved. AG Campos Sánchez-Bordona carried out such a balancing exercise, albeit within the context of application of the three-step test. In essence, he considered that the fact that the use in question was non-commercial and did not undermine “possible financial benefits to be gained from the presence of the photograph on the internet” meant the legitimate interests of the right holder were outweighed by the interests arising from the right to education.¹⁶ Whether one agrees with this particular outcome is not

¹¹ Case C-476/17 Pelham and Others (Metall auf Metall) ECLI:EU:C:2019:624, para 71.
¹² Case C-516/17 Spiegel Online ECLI:EU:C:2019:625, para 79.
¹³ For instance, a free-standing quotation on one of the first pages of a book.
¹⁵ See also, supra, § 166.
important here.\textsuperscript{17} What is important, is to recognize that an interpretation of limitations and exceptions that gives them a broad \textit{prima facie} meaning ensures that the exercise of the fundamental rights that are safeguarded by those provisions is enabled to the greatest possible extent. At the same time, such a broad interpretation is not to the detriment of the rights and interests of right holders, because they are safeguarded by the concluding balancing exercise.

\textbf{200. Enforcement.} Finally, it is possible that the use in question does not come within the scope of any limitation or exception to begin with, even when interpreted broadly. This may be either because no such limitation or exception is permitted by EU law, or because a Member State has opted not to implement an optional limitation or exception. In either case the enforcement of copyright may cause a disproportionate interference with a fundamental right. For a long time it has been debated whether in such circumstances fundamental rights ought to function as external limits to copyright. Insofar as the exclusive right so limited finds its origin in EU law, the CJEU appears to have closed the door for such external effect in \textit{Afghanistan Papers} and \textit{Spiegel Online}. In light of these decisions, I have suggested that the primary way to avoid such interferences is through the refusal to grant an injunction or of damages, or both, depending on the circumstances of the case.\textsuperscript{18} The determination whether a particular remedy is proportionate vis-à-vis affected fundamental rights must not be an independent assessment of whether the use is best subjected to exclusivity, to remuneration, or left free altogether. It ought to take

\textsuperscript{17} One could argue that, in particular if the quality of the photograph made available by the school is high, the use could undermine the initial exploitation by the author himself because those who want to access the work no longer need to visit the website on which it was originally communicated. Simultaneously, one could argue that if the school had password-protected the assignment, it could still have made it available to the target audience of the presentation, without making the work available to every person with Internet access. This would have meant a relatively large increase in protection for the author, in return for a minor limitation on the right to education and the right to freedom of expression. On the other hand, as the AG pointed out in footnote 81 of his Opinion, whether being password-protected or not, the “public that will access the site will, in all probability, be the same ..., namely the pupils and their families and friends, together with the teachers”.

\textsuperscript{18} As such I am not as pessimistic as some other commentators, such as Geiger & Izyumenko 2019b, p. 25 (“An external freedom of expression limitation on copyright is crucial for allowing to address all the legitimate uses that are emerging but that are not subject to an existing limitation.”) and Snijders & van Deursen 2019, p. 1189, who suggest that the approach by the CJEU may place national courts for the uncomfortable choice to either abide by the standards of the ECHR or comply with the judgements in \textit{Afghanistan Papers} and \textit{Spiegel Online}. I am sceptical whether such a dilemma really exists. As I see it, it is not the mere fact that no limitation or exception applies that will \textit{ipso facto} lead to an interference with the right to freedom of expression, but rather the grant by a court of particular measure (injunction, damages; or, like in \textit{Ashby Donald} and in \textit{Neij and Sunde Kolmisoppi}, the criminal conviction). If no limitation or exception applies, but a court refuses to enforce copyright by, for instance, rejecting the request for an injunction and damages, no interference with that right exists.
account of both the choice by the EU legislature to not provide for an exception or limitation at all or to not make it mandatory, and the choice of the Member State not to implement one if given the choice. It must take particular account of the empirical and normative uncertainty concerning the answer to the question what scope of protection is appropriate for copyright to attain its objectives.

The assessment of the appropriateness of certain remedies may depend both on Charter rights and national standards of fundamental rights protection. The latter is true unless the CJEU decides to lay down one single standard based on the Charter. It should probably avoid doing so as that would eliminate the discretion left to Member States in the Enforcement Directive, providing further fuel for the argument that the CJEU predominantly invokes the Charter to achieve greater harmonization of copyright law. It is not unlikely, following its approach adopted by the CJEU in cases concerning enforcement against intermediaries, that the CJEU will permit national courts to grant remedies as long as they do not result in the violation of the “essence” of rights, however that concept must be construed. At several places in this dissertation I have expressed my doubts as to the appropriateness of that standard because it does not reflect that the intensity of review must fluctuate depending on the intrinsic importance and intensity of the interference with the rights at stake. Instead, the CJEU could, for instance, lay down the standard requiring that a remedy must be refused if the resulting degree of interference with the affected fundamental right would be manifestly disproportionate in relation to the degree to which precluding such uses would further the objectives pursued by copyright and the potential interference caused with the legitimate expectations to the peaceful enjoyment of their possessions in case of non-enforcement. This assessment can, to a certain extent, be guided by the case law of the ECtHR, in particular the factors previously identified by that Court to determine the intensity of interference with a right. However, the standard applied should be particular to EU law, considering that the ECHR only offers a subsidiary level of fundamental rights protection.

201. **Final examples.** The three cases decided by the CJEU on 29 July 2019 provide an excellent further opportunity to illustrate how the foregoing may work out in practice. In both the *Afghanistan Papers* and *Spiegel Online* cases the issue is in essence whether the news organization in question was allowed to publish entire works in order to inform the public. The CJEU showed itself willing to give a broad interpretation to both article 5(3)(c), second case, and article 5(3)(d) of the InfoSoc Directive. As a result, the resolution appears to primarily depend on the outcome of

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19 On these cases, see also, principally, § 105.
20 See, supra, § 166.
a proportionality assessment: does permitting the use lead to a greater degree of fulfillment of the right to freedom of expression, including the freedom of the press, and of information than that it would interfere with the purposes that undergird copyright protection. As regards the latter, I have argued that EU copyright law is primarily intended to guarantee right holders a reward. Moreover, however, in the case of authors and performers, it can also be said to intend to safeguard their dignity. This implies a different outcome may be justified in both cases. The Court of Appeal of Cologne considered in *Afghanistan Papiere* that there was no great public interest in the public availability of the confidential military status reports in their entirety, due to fact that their content was largely made public in the form of summaries and that the publication of extracts could have satisfied public curiosity. Even if one agrees with that assessment, there is a strong argument to be made that enforcement of copyright is not necessary for copyright to attain its purposes. The German state has no exploitative interest to protect, nor does the enforcement of copyright intend to safeguard authorial dignity. Instead it merely aims at securing “military and other security-sensitive interests of the Bundeswehr”. The protection of authorial dignity is arguably what distinguishes *Afghanistan Papers* from *Spiegel Online*. In the latter case the author has no real exploitation interest either. However, he does have an interest in making his work available on his own terms that EU copyright law arguably intends to protect. In particular, the author wishes to limit publication to his own website in a manner that makes unequivocally clear that he has distanced himself from the opinions expressed in the works in question. It is arguable that permitting external publication from which such distanciation is not clear at least moderately interferes with that interest. At the same time, one could argue that the fact that the works in question were already publicly available on the author’s own website meant that the freedom of the press and the right to freedom of information was only interfered with to a minor degree.

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21 See, primarily, Section 5.3.2.
22 Court of Appeal of Cologne, 12 June 2015, 6 U 5/15, para 56.
23 Ibid. The protection of confidential information, as also AG Szpunar pointed out in his Opinion, is not a legitimate interest as such (see *supra*, § 107). Accordingly, I disagree with the conclusion by the Court of Appeal (para 56) that the mere decision by the German State not to publish the confidential military status reports is a legitimate interest in itself, i.e. without regard to the underlying purposes of copyright.
24 Moreover, as the AG noted in his Opinion (para 79), that interest is of a fundamental rights nature since art. 10 EU Charter protects not only the freedom of thought, but also the freedom to change belief.
25 It can very well be argued that exclusive economic rights are not intended for this purpose and that if Member States want to enable authors to object to these kinds of uses, they are free to grant them appropriate moral rights protection. Cf., *supra*, § 152.
26 This assumes the intrinsic importance of both the interest of the author and the rights of the press and the public are more or less the same.
Metall auf metall requires a different approach. This case does revolve around an exploitation interest of the right holder. In particular, the case essentially boils down to the question whether a phonogram producer is entitled to control a licensing market for artistic (but commercial) uses of short samples. I have suggested that this issue can be entirely approached within the context of the quotation exception.\(^{27}\) Instead, the CJEU opted for a bifurcated approach: unrecognizable samples used in new artistic works are not reproductions, while recognizable samples are reproductions although they can be quotations. The CJEU’s reasoning, while laudably taking account of the freedom of arts, is inadequate and ultimately illogical. Notably, the CJEU does not substantiate why excluding the use of unrecognizable samples from the reproduction right does not interfere with the opportunity of realising satisfactory returns on his or her investment. Obviously, foreclosing a licensing market will interfere with that opportunity. Even if that can be justified,\(^{28}\) the CJEU does not make a serious effort. Importantly, if one, like the CJEU does, considers that the creative use of short samples does not interfere with the opportunity of realizing satisfactory returns, it is unclear why that is different for recognizable and unrecognizable samples. If it is admitted that the same is true for recognizable samples, they ought to equally be considered a non-infringing use within the context of the application of the quotation exception. In this regard, the requirement, formulated by the CJEU, that the quoting subject-matter enter into a “dialogue” with the quoted should not be applied too strictly. Finally, if a recognizable sample is ultimately considered not to be a quotation, nor considered to come within the scope of any other limitation or exception, one must seriously doubt whether the right holder can be considered entitled to any remedy, if one strictly follows the CJEU’s reasoning. After all, if granting an injunction or damages cannot be said to be necessary for copyright to attain its purpose (providing a satisfactory return on investment), the resulting limitation of the freedom of art is in any case disproportionate.

8.3 Striking a fair balance: the healing power of balancing

202. Benefits of balancing. The problems of the European copyright system are well-documented. It has been built on the idea that a high level of protection is necessary to foster investment and drive forwards the digital economy. Other (fundamental) rights and interests often appear placed on the back burner. This has led to a system of broad rights combined with an inflexible system of non-mandatory limitations and exceptions, in which a student can be pursued for damages for

\(^{27}\) See, supra, § 161.

\(^{28}\) See ibid. and § 150.
publicly sharing a photograph with their classmates and their parents and teachers, without any consideration for the fundamental rights affected nor the impact on the position of the author.²⁹

Ultimately, the haphazard application of rules largely developed during analogue times to digital situations may lead to a reduced legitimacy of the copyright system in the eyes of the public, as also the European Copyright Society pointed out in its own comment on the Renckhoff case.³⁰ This does not necessarily mean the EU copyright system is in need of a complete overhaul. Legitimate user interests, positivized by fundamental rights, can largely be accommodated by an appropriate interpretation of both rights and of limitations and exceptions. Arguably the CJEU already does this on many occasions, as exemplified by its increased references to the concept of fair balance. What has been mostly lacking so far is a proper conceptualization of the function of this concept in the copyright context and a move away from the proprietarian paradigm, which takes broad protection as a starting point as a matter of principle in itself.

203. Fairness and the concept of fair balance. It must be stressed that a full consideration of fundamental rights does not necessarily mean a reduced scope of protection. Undoubtedly, the CJEU as well as national courts itself have a considerable discretion when striking a balance. Importantly, balancing, I have emphasized on more than one occasion, is not morally neutral. I argued that, as a consequence, conceptualizing copyright as the consolidation of competing fundamental rights claims, or even as a limitation of rights of others in the public interest, cannot isolate it from difficult questions about fairness and justice. Determining to which degree including a certain use within the scope of protection fulfils the objective of rewarding right holders may necessitate recourse to moral arguments relating to precisely such questions, especially if it accepted that granting protection to authors and performers is not solely intended to incentivize creation but also to reward them and protect their dignity. Arguably, it falls within the discretion of the CJEU, and in its place also national courts, to consider that it is, in principle, fair or just to grant such protection based on deontological doctrines. However, if it does so, it must also take account of their contentious nature, that is the existent

²⁹ Ironically, while the student’s alleged incursion into the rights of the author in the Renckhoff case was ultimately remedied by a strict application of copyright law, the legal proceedings needed to rectify it have led to the situation in which the same photograph can now be accessed free of charge indefinitely on the CJEU website, as part of the Opinion of the AG, as well as on the website of the German Federal Supreme Court, as part of its own judgement in the case.

normative uncertainty. Julian Rivers puts it well when he writes that “the greater the chance that one principle may be seriously infringed, the greater must be the chance that another principle is realised to a high degree”. This premise must also guide judicial norm-making. Accordingly, if there is little uncertainty that extending the scope of protection to a particular use will result in a serious interference with a fundamental right, the court must be convinced, and adduce good reasons, why doing so is nevertheless justified. As I noted in the introductory chapter, I have not intended to argue where the balance must be struck as a matter of fairness, even if on some occasions I have suggested a particular interpretation as – in my opinion – appropriate. Instead, this dissertation focused on balancing as a process.

204. **The CJEU: still searching for coherence.** The CJEU had a significant opportunity to lay down a coherent framework for the use of fundamental rights in copyright adjudication in its three copyright judgements of 29 July 2019. In all three cases it made abundantly clear that the interpretation, Member State implementation and application of copyright law must strike a fair balance of rights and interests. A clear and transparent approach, however, is still difficult to identify, which creates the risk that “balance” will remain little more than a buzzword. Several questions remain, while new ones have arisen. For instance, what does it mean that national courts must balance exclusive rights and limitations and exceptions and give them an interpretation which “fully adheres to the fundamental rights enshrined in the Charter”? Can rights and limitations and exceptions as such be balanced? Or – something which seems more appropriate – must the rights and interests which those provisions aim to protect instead be balanced? Similarly, the suggestion that the interpretation must fully adhere to fundamental rights seems trite and gives little indication as to how to proceed in practice. What is the margin of appreciation for Member States in this regard? And beyond the interpretation and application of limitations and exceptions in light of fundamental rights, is there any room for horizontal direct effect? And how do fundamental rights affect the arguably discretionary nature of remedies? On a more specific level: when is a reproduction of a phonogram “unrecognizable”? Does the same standard apply to reproductions of other subject-matter, notably works? How to square the requirement that a quotation “enter into a dialogue” with the finding that it need not be accompanied by any original expression? Arguably, these requirements are reflective of an idea of the balance that must be struck between divergent rights and interest, much like the concept of new public before it. But like that concept, their introduction may lead to more questions than they answer. Hopefully, on an inevitable following occasion, the

31 See, *supra*, n 37 in Chapter 3.
CJEU will lead by example in the creation of a more coherent and transparent balancing methodology.
BIBLIOGRAPHY

Monographs, journal articles and working papers


Griffiths, J. (2013a) Constitutionalising or harmonising? The Court of Justice, the right to property and European copyright law. 38 European Law Review 65-78.


Husovec, M., & van Dongen, L. (draft on file with the author), The European Harmonization of Injunctions in Intellectual Property Law: ‘Landing’ in a Standstill?


Le Chapelier. (1791) Report Made by M. Le Chapelier, On behalf of the Constitutional Committee, on the Petition of the Dramatic Authors, in the Session of Thursday 13 January 1791, with the Decree rendered in this Session. In L. Bently & M. Kretschmer (Eds.), *Primary Sources on Copyright (1450-1900)*. Retrieved from <www.copyrighthistory.org> accessed on 10 September 2019.


Rosati, E. (2017a) GS Media and its implications for the construction of the right of communication to the public within EU copyright architecture. 54 Common Market Law Review 1221-1241.


Reports, opinions and presentations


Comm. on Econ., Soc. & Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Art. 15(1)(c), of the Covenant) (E/C.12/GC/17, 12 January 2006).

Bently, Lionel, Harmonization By Stealth: Copyright and the ECJ (presentation given at the 2010 Fordham IP Conference). Retrieved from <http://fordhamipconference.com/wp-
Explanations relating to the Charter of Fundamental Rights (OJ 2007/C 303/02).


**European Union (in chronological order)**

Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action (Brussels, 7 June 1988, COM (88) 172 final)


Green Paper on Copyright and Related Rights in the Information Society (Brussels, 19 July 1995, COM(95) 382 final)

Communication from the Commission. Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society (Brussels 20 November 1996, COM(96) 586 final)

Explanatory Memorandum to the Proposal for a directive on the harmonization of certain aspects of copyright and related rights in the information society (Brussels, 10 December 1997, COM(97) 628 final)

Working group II, Incorporation of the Charter/ accession to the ECHR, Final report of Working Group II (Brussels, 22 October 2002, CONV 354/02)


Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Towards a modern, more European copyright framework (Brussels, 9 December 2015, COM(2015) 626 final)

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market (Brussels, 14 September 2016, COM(2016) 592 final)

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Case C-53/05 Commission v Portugal ECLI:EU:C:2006:448
Case C-306/05 SGAE v Rafael Hoteles ECLI:EU:C:2006:764
Joined Cases C-402/05 P and C-415/05 P Kadi and Al Barakaat International Foundation v Council and Commission ECLI:EU:C:2008:461
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Case C-304/07 Directmusicae Publishing ECLI:EU:C:2008:552
Case C- 545/07 Apis-Hristovicih ECLI:EU:C:2009:132
Case C-555/07 Kütükdeveci ECLI:EU:C:2010:21
Case C-557/07 LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten ECLI:EU:C:2009:107
Case C-5/08 Infopaq International ECLI:EU:C:2009:465
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Joined Cases C-403/08 and C-429/08 Football Association Premier League and Others ECLI:EU:C:2011:631
Case C-467/08 Padawan ECLI:EU:C:2010:620
Case C-528/08 Commission v United Kingdom ECLI:EU:C:2010:429
Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke and Eifert ECLI:EU:C:2010:662
Case C-136/09 Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon ECLI:EU:C:2010:151
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Case C-406/10 *SAS* ECLI:EU:C:2012:259
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Case C-544/10 *Deutsches Weintor* ECLI:EU:C:2012:526
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Case C-5/11 *Donner* ECLI:EU:C:2012:370
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Case C-283/11 *Sky Österreich* ECLI:EU:C:2013:28
Case C-399/11 *Melloni* ECLI:EU:C:2013:107
Joined Cases C-457/11 & C-460/11 *VG Wort and Others* ECLI:EU:C:2013:426
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Case C-607/11 *ITV Broadcasting and Others v TVCatchup* ECLI:EU:C:2013:147
Case C-101/12 *Schaible* ECLI:EU:C:2013:661
Case C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317
Case C-176/12 *Association de médiation sociale* ECLI:EU:C:2014:2
Case C-202/12 *Innoweb* ECLI:EU:C:2013:850
Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238
Case C-314/12 *UPC Telekabel Wien* ECLI:EU:C:2014:192
Case C-351/12 *OSA* ECLI:EU:C:2014:110
Case C-435/12 *ACI Adam and Others* ECLI:EU:C:2014:254
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Case C-98/13 *Blomqvist* ECLI:EU:C:2014:55
Case C-117/13 *TU Darmstadt v Eugen Ulmer* ECLI:EU:C:2014:2196
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Case C-279/13 *C More Entertainment* ECLI:EU:C:2015:199
Case C-348/13 *BestWater International* ECLI:EU:C:2014:2315
Case C-360/13 *Public Relations Consultants Association (PRCA)*
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Case C-516/13 *Dimensione Direct Sales and Labianca* ECLI:EU:C:2015:315
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Case C-580/13 *Coty Germany* ECLI:EU:C:2015:485
Case C-30/14 *Ryanair* ECLI:EU:C:2015:10
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Case C-362/14 Maximilian Schrems v Data Protection Commissioner ECLI:EU:C:2015:650
Case C-470/14 EGEDA and Others ECLI:EU:C:2016:418
Case C-484/14 McFadden ECLI:EU:C:2016:689
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Case C-110/15 Microsoft Mobile Sales (formerly Nokia Italia) and Others ECLI:EU:C:2016:717
Case C-117/15 Reha Training v GEMA ECLI:EU:C:2016:379
Case C-160/15 GS Media ECLI:EU:C:2016:644
Case C-166/15 Ranks and Vasilevičs ECLI:EU:C:2016:762
Case C-174/15 Vereniging Openbare Bibliotheken (VOB) ECLI:EU:C:2016:856
Case C-201/15 AGET Iraklis ECLI:EU:C:2016:972
Case C-203/15 Tele 2 Sverige ECLI:EU:C:2016:970
Case C-301/15 Soulier and Doke ECLI:EU:C:2016:878
Case C-527/15 Stichting Brein v Wullems (Filmspeler) ECLI:EU:C:2017:300
Case C-610/15 Stichting Brein v Ziggo and XS4ALL ECLI:EU:C:2017:456
Case C-641/15 Verwertungsgesellschaft Rundfunk ECLI:EU:C:2017:131
Case C-138/16 AKM v Züri.s.net ECLI:EU:C:2017:218
Case C-265/16 VCAST v RTI ECLI:EU:C:2017:913
Case C-414/16 Egenberger ECLI:EU:C:2018:257
Joined Cases C-569/16 and C-570/16 Bauer ECLI:EU:C:2018:871
Case C-147/17 Bastei Lübbe ECLI:EU:C:2018:841
Case C-161/17 Renckhoff ECLI:EU:C:2018:634
Case C-310/17 Levola Hengelo ECLI:EU:C:2018:899
Case C-469/17 Funke Medien NRW (Afghanistan Papers) ECLI:EU:C:2019:623
Case C-476/17 Pelham and Others (Metall auf Metall) ECLI:EU:C:2019:624
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Court of First Instance/General Court

Case T-76/89 ITP v Commission ECLI:EU:T:1991:41

Opinions of Advocates-General

Opinion of AG Mancini in Case 158/86 Warner Brothers v Christiansen ECLI:EU:C:1988:31
Opinion of AG Fennelly in Case C-267/95 *Merck v Primecrown*
ECLI:EU:C:1996:228

Opinion of AG Tesuaro in Case C-200/96 *Metronome Musik v Music Point Hokamp*
ECLI:EU:C:1998:18

Opinion of AG La Pergola in Case C-61/97 *FDV v Laserdisken*
ECLI:EU:C:1998:254

Opinion of AG La Pergola in Case C-293/98 *Egeda*
ECLI:EU:C:1999:403

Opinion of AG Sharpston in Case C-479/04 *Laserdisken*
ECLI:EU:C:2006:292

Opinion of AG Sharpston in Case C-306/05 *SGAE v Rafael Hoteles*
ECLI:EU:C:2006:487

Opinion of AG Sharpston in Case C-73/08 *Bressol and Others*
ECLI:EU:C:2009:396

Opinion of AG Trstenjak in Case C-467/08 *Padawan*
ECLI:EU:C:2010:264

Opinion of AG Bot in Case C-393/09 *BSA*
ECLI:EU:C:2010:611

Opinion of AG Trstenjak in Case C-277/10 *Luksan*
ECLI:EU:C:2011:545

Opinion of AG Bot in Case C-406/10 *SAS*
ECLI:EU:C:2011:787

Opinion of AG Bot in Case C-128/11 *Usedsoft*
ECLI:EU:C:2012:234

Opinion of AG Jääskinen in Case C-131/12 *Google Spain and Google*
ECLI:EU:C:2013:424

Opinion of AG Cruz Villalón in Case C-314/12 *UPC Telekabel Wien*
ECLI:EU:C:2013:781

Opinion of AG Jääskinen in Case C-117/13 *TU Darmstadt v Eugen Ulmer*
ECLI:EU:C:2014:1795

Opinion of AG Szpunar in Case C-484/14 *McFadden*
ECLI:EU:C:2016:170

Opinion of AG Kokott in Case C-547/14 *Philip Morris Brands and Others*
ECLI:EU:C:2015:853

Opinion of AG Wathelet in Case C-160/15 *GS Media*
ECLI:EU:C:2016:221

Opinion of AG Saugmandsgaard Øe in Case C-166/15 *Ranks and Vasilevičs*
ECLI:EU:C:2016:384

Opinion of AG Wathelet in Case C-214/16 *King*
ECLI:EU:C:2017:439

Opinion of AG Wathelet in Case C-266/16 *Western Sahara Campaign UK*
ECLI:EU:C:2018:1

Opinion of AG Bot in Joined Cases C-569/16 and C-570/16 *Bauer*
ECLI:EU:C:2018:337

Opinion of AG Campos Sánchez-Bordona in Case C-161/17 *Renckhoff*
ECLI:EU:C:2018:279

Opinion of AG Szpunar in Case C-469/17 *Funke Medien NRW (Afghanistan Papers)*
ECLI:EU:C:2018:870

Opinion of AG Szpunar in Case C-476/17 *Pelham and Others (Metall auf Metall)*
ECLI:EU:C:2018:1002

Opinion of AG Szpunar in Case C-516/17 *Spiegel Online*
ECLI:EU:C:2019:16

European Court of Human Rights

Decision of the European Court of Human Rights (Plenary), in the case of Handyside v. United Kingdom, Appl. No. 5493/72, of 7 December 1976

Decision of the European Court of Human Rights (Plenary), in the case of Dudgeon v. United Kingdom, Appl. No. 7525/76, of 22 October 1981

Decision of the European Court of Human Rights (Plenary), in the case of Sporrong and Lönnroth v. Sweden, Appl. No. 7151/75 and 7152/75, of 23 September 1982

Decision of the European Court of Human Rights (Plenary), in the case of James and Others v. The United Kingdom, Appl. No. 8793/79, of 21 February 1986

Decision of the European Court of Human Rights (Plenary), in the case of Rees v. The United Kingdom, Appl. No. 9532/81, of 17 October 1986

Decision of the European Court of Human Rights (Chamber), in the case of Tre Traktörer Aktiebolag v. Sweden, Appl. No. 10873/84, of 7 July 1989

Decision of the European Court of Human Rights (Chamber), in the case of Stran Greek Refineries and Stratis Andreadis v. Greece, Appl. No. 13427/87, of 9 December 1994


Decision of the European Court of Human Rights (Grand Chamber), in the case of Iatridis v. Greece, Appl. No. 31107/96, of 25 March 1999

Decision of the European Court of Human Rights (Grand Chamber), in the case of Chassagnou and Others v. France, Appl. No. 25088/94, 28331/95 and 28443/95, of 29 April 1999


Decision of the European Court of Human Rights (Third Section), in the case of Hatton and Others v. The United Kingdom, Appl. no. 36022/97, of 2 October 2001

Decision of the European Court of Human Rights (First Section), in the case of L.B. v. Italy, Appl. No. 32542/96, of 15 November 2002

Decision of the European Court of Human Rights (Grand Chamber), in the case of Hatton and Others v. The United Kingdom, Appl. no. 36022/97, of 8 July 2003

Decision of the European Court of Human Rights (Second Section), in the case of Melnychuk v. Ukraine, Appl. No. 28743/03, of 5 July 2005

Decision of the European Court of Human Rights (Grand Chamber), in the case of Anheuser-Busch Inc. v. Portugal, Appl. No. 73049/01, of 11 January 2007

Decision of the European Court of Human Rights (Grand Chamber), in the case of Evans v. The United Kingdom, Appl. No. 6339/05, of 10 April 2007

Decision of the European Court of Human Rights (Fourth Section), in the case of Bălan v. Moldova, Appl. No. 19247/03, of 29 January 2008

Decision of the European Court of Human Rights (Third Section), in the case of SC EDITURA ORIZONTURI SRL v. Romania, Appl. No. 15872/03, of 13 May 2008

Decision of the European Court of Human Rights (Third Section), in the case of Giuran v. Romania, Appl. No. 24360/04, of 21 June 2011
Decision of the European Court of Human Rights (Grand Chamber), in the case of *S.H. and Others v. Austria*, Appl. No. 57813/00, of 3 November 2011

Decision of the European Court of Human Rights (Grand Chamber), in the case of *Mouvement Raëlien Suisse v. Switzerland*, Appl. No. 16354/06, of 13 July 2012

Decision of the European Court of Human Rights (Grand Chamber), in the case of *Nada v. Switzerland*, Appl. No. 10593/09, of 12 September 2012

Decision of the European Court of Human Rights (Fifth Section), in the case of *Ashby Donald and Others v. France*, Appl. No. 36769/08, of 10 January 2013

Decision of the European Court of Human Rights (First Section), in the case of *OOO Ivpress and Others v. Russia*, Appl. No. 33501/04, 38608/04, 35258/05 and 35618/05, of 22 January 2013

Decision of the European Court of Human Rights (Fifth Section), in the case of *Neij and Sunde Kolmisoppi v. Sweden*, Appl. No. 40397/12, of 19 February 2013

Decision of the European Court of Human Rights (Second Section), in the case of *Akdeniz v. Turkey*, Appl. No. 20877/10, of 11 March 2014

Decision of the European Court of Human Rights (First Section), in the case of *Reznik v. Russia*, Appl. No. 4977/05, of 4 April 2013

Decision of the European Court of Human Rights (Fifth Section), in the case of *SIA AKKA/LAA v. Latvia*, Appl. No. 562/05, of 12 July 2016

Decision of the European Court of Human Rights (Grand Chamber), in the case of *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Appl. No. 931/13, of 27 June 2017

**European Commission of Human Rights**

European Commission of Human Rights, in the case of *Televisier v. the Netherlands*, Appl. No. 2690/65 of 3 October 1968


**WTO Dispute Settlement Body**

Dispute DS160, United States – Section 110(5) of the US Copyright Act, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm, last accessed 30 June 2019

**Austria**

Austrian Supreme Court, 12 June 2001, case 4 Ob 127/01, published in GRUR Int. 2002, p. 341

Austrian Supreme Court, 13 July 2010, case 4 Ob 66/102
Belgium


Belgian Supreme Court (First Chamber), 25 September 2003, *Index v Biblo*, published in Auteurs & Media 2004, p. 29

Canada


France


French Supreme Court (First Civil Chamber), 28 February 2006, *Studio canal, Universal Pictures vidéo France v. UFC Que Choisir, Stéphane X*

French Supreme Court (First Civil Chamber), 15 May 2015, *Klasen*, English translation in IIC 2016, p. 856

Paris Court of Appeal (First Chamber), 31 January 2012, No. 10/02898

Paris Court of Appeal (First Chamber), 18 September 2013, No. 12/02480

Versailles Court of Appeal (First Chamber), 16 March 2018, No. 15/06029

Germany

German Federal Constitutional Court (First Senate), 7 July 1971, 1 BvR 765/66 – *Schulbuchprivileg*, published in IIC 1972, p. 394

German Federal Constitutional Court (First Senate), 8 July 1971, 1 BvR 766/66 – *Schallplatten*, published in GRUR 1972, p. 491

German Federal Constitutional Court (First Senate), 25 October 1978, 1 BvR 352/71 – *Kirchenmusik*, published in GRUR 1980, p. 44

German Federal Constitutional Court (First Senate), 11 October 1988, 1 BvR 743/86 & 1 BvL 80/86 – *Vollzugsanstalten*, published in GRUR 1989, p. 193

German Federal Constitutional Court (First Senate), 29 July 2000, 1 BvR 825/98 – *Germania 3*, English Translation published in EIPR 2013, p. 646

German Federal Constitutional Court (First Senate), 30 August 2010, 1 BvR 1631/08 – Drucker und Plotter

German Federal Constitutional Court (First Senate), 19 July 2011, 1 BvR 1916/09 – *Le Corbusier-Möbel*

German Federal Constitutional Court (First Senate), 17 November 2011, 1 BvR 1145/11 – *Kunstaustellung im Online-Archiv*

German Federal Constitutional Court (First Senate), 31 May 2016, 1 BvR 1585/13 – *Metall auf Metall*, English translation published in IIC 2017, p. 343

German Federal Supreme Court (First Civil Senate), 6 November 1953, I ZR 97/52 – *Öffentliche Schallplattenübertragung*, published in GRUR 1954, p. 216
German Federal Supreme Court (First Civil Senate), 7 March 1985, I ZR 70/82 – Lili Marleen
German Federal Supreme Court (First Civil Senate), 11 March 1993, I ZR 263/91 – Alcolix
German Federal Supreme Court (First Civil Senate), 25 February 1999, I ZR 116/96 – Kopienversanddienst
German Federal Supreme Court (First Civil Senate), 20 September 2012, I ZR 69/11 – Elektronische Leseplätze
German Federal Supreme Court (First Civil Senate), 28 July 2016, I ZR 9/15 – auffett getrimmt
German Federal Supreme Court (First Civil Senate), 10 January 2019, I ZR 267/15 – Cordoba II

Court of Appeal of Cologne, 12 June 2015, 6 U 5/15

The Netherlands

Dutch Supreme Court, 3 April 2015, ECLI:NL:HR:2015:841, GS Media v Sanoma


The Hague Court of Appeal, 4 September 2003, Scientology, published in Mediaforum 2003-10, nr. 45
Amsterdam Court of Appeal, 19 November 2013, ECLI:NL:GHAMS:2013:4019, GS Media v Sanoma

Switzerland


United States Supreme Court

Marbury v. Madison, 5 U.S. 137 (1803)
Creating EU Copyright Law
Striking a Fair Balance

As a result of extensive, if incomplete, harmonization efforts in the area of copyright law most of the rights granted to authors and related rights holders now originate in EU law. This makes the Court of Justice of the European Union (CJEU) an important authority with regard to the construction of copyright law in the EU. It appears the CJEU has accepted this role with great enthusiasm, achieving ever greater harmonization through an expansionist interpretation of the acquis communautaire.

Increasingly, the CJEU pays attention to the impact of copyright on fundamental rights, such as the right to freedom of expression, considering that copyright must maintain a “fair balance” of rights and interests. Accordingly, fundamental rights are used as interpretative arguments when defining the scope of protection offered by copyright. This begs the question about the functionality of fundamental rights arguments in the process of judicial norm-making by the CJEU. This question is at the centre of this dissertation.

To answer this question, this dissertation provides a systematic and critical analysis of both the CJEU’s interpretation of copyright norms generally and its use of fundamental rights arguments specifically. It does so against a legal theoretical background of proportionality analysis and balancing. It is argued that the CJEU frequently implicitly strives to find a “balance” between the interest of right holders in an “appropriate reward” and other rights and interests, but that this approach is often clouded by confusing rhetoric that obscures the true reasons for the CJEU’s decision-making. Even where it more explicitly emphasizes the need for copyright law to preserve a “fair balance of rights and interest”, the meaning and content of this concept is left unclear. Most importantly, the CJEU does not explain the precise content of the rights and interests to be balanced. The result is that its decision-making is opaque, not always coherent and often unpredictable.

This dissertation makes several recommendations for a more coherent approach to the use of fundamental rights arguments in EU copyright adjudication. Importantly, the CJEU should more explicitly and more consistently focus on copyright’s purpose to provide right holders with an appropriate reward, taking account of both the empirical and normative uncertainty about the degree to which that reward can really be justified. To give full effect to fundamental rights, it is argued that limitations and exceptions to the rights of right holders can typically be construed broadly, since the right holder’s interest in an appropriate reward can be safeguarded by assessing whether the application of those provisions “preserves a fair balance”. Finally, remedies should be applied flexibly in a way that recognizes their potential limiting effect on fundamental rights but that respects the legislative prerogative to determine the boundaries between exclusivity, remuneration, and free use.