

Copyright, Freedom of Expression and the World Cup

Opening keynote speech delivered at [ALAI Congress 2026, Copyright and Free Expression in the Age of Algorithms](#), The Hague, 18 June 2026

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This is what it's all about these days: the World Cup.

This picture of the cup featured prominently on the cover of a special issue of the [French *Onze Mondial* football magazine](#), published in the run up to the 1998 World Cup in France. The cover also showed a collage of formerly famous football stars (Zidane, Ronaldo, Bergkamp), all “dreaming of gold”. FIFA sued publisher Hachette for infringing copyright in the cup design, a work by Italian sculptor Silvio Gazzaniga that FIFA owns. Hachette invoked freedom of expression, but FIFA ultimately prevailed before the Cour de Cassation. [According to the Court](#), reproduction of the trophy “exceeded a simple account of a news event”, did not contribute to informing the public, and therefore was an infringing act.

As a football fan still dreaming of gold, I disagree.

Copyright and freedom of expression co-exist in a complex, or should I say ambivalent, relationship. Both are rooted in the philosophy of the Enlightenment and mirror similar values: individual autonomy and dignity, promotion of knowledge, learning and culture, and of public discourse.

In France, the cradle of [the ALAI](#), copyright and free speech were recognized as rights almost simultaneously. Freedom of expression in the [Declaration of the Rights of Man of 1789](#), author's rights in the laws of 1791 and 1793.

Both freedom of expression and copyright liberated authors from the state censorship of the old regime. The early copyright laws of the 18th and early 19th century put an end to the state privileges and printing monopolies that, for centuries, had regulated the book trade – controlling the press while preventing piracy. Finally, authors had rights of their own, allowing them to speak freely, be published and – hopefully – get paid.

Thus, copyright became the “engine of free expression” – as the US Supreme Court coined the famous phrase a century later in the case of [Harper v. the Nation \(1985\)](#).

But the opposite is also true: copyright cannot function without freedom of expression. For authors, free speech is as essential as the air they breath. In societies where speech is severely controlled, creativity cannot flourish, and culture dies – or goes underground.

Authorship is almost synonymous with free expression. The vocabulary of copyright is rife with references to free speech. Copyright protects “original expression”, but facts and ideas are free. Originality assumes “creative freedoms” that allow the author to express his or her personality in the work. Where external constraints unduly limit the author's freedom, no personality can be expressed, no work is created and no copyright ensues.

Freedom of expression also implies a right not to speak. Here copyright and free speech are perfectly aligned. The moral right of first publication prevents works from being published without the author's consent.

Whole libraries have been written on the reasons why we protect freedom of expression: enabling democracy, the quest for truth, respect for human autonomy and dignity, access to knowledge and culture, controlling government, transparency – to name just a few. But perhaps freedom of expression needs no justification at all. Being able to freely communicate, create, criticize, and participate in our society and culture is simply what it takes to live as a person in a free society. A human right.

Despite their common heritage, copyright and freedom of expression are not always best friends. Indeed, as rules governing human communication, they are opposing forces. Freedom of expression guarantees everyone the freedom to communicate. Copyright

restricts – even prohibits – the communication of works. Note that freedom of speech does not require that the speech be original to the speaker. Free speech is a human right that applies to all – including those poor souls incapable of creating the great works that inform our culture, teach and entertain us. Poor souls like you and me.

Freedom of expression also benefits commercial entities, such as the press, the media and all the intermediaries that are the main conduits of human communications.

The potential conflict between copyright and free speech is obvious. So blatantly evident, that it was largely overlooked in legal doctrine until the end of the last century. The great U.S. copyright scholar Melville B. Nimmer was one of the first to address it in 1970 – when he called it “a largely ignored paradox”.¹ Nimmer was also an authority on the 1st Amendment. In Europe, most of the literature dates from this century.

But the origins of the conflict are as old as the law of copyright itself. Nineteenth century philosophers and lawmakers struggled with the emerging notion of “literary property” that some perceived as a threat to intellectual freedom.

Victor Hugo, the legendary founder of this venerable society, was one of those:

“the book, as a book, belongs to the author, but as a thought, it belongs [...] to humanity. All minds are entitled to it. If one of these two rights, the right of the writer and the right of the human mind, were to be sacrificed, it would certainly be the right of the writer, because the public interest is our only concern, and, I declare, all must come before us.”²

Indeed, the topic of this conference is not new. Twenty years ago, the [ALAI study days in Barcelona focused on “Copyright and Freedom of Expression”](#). Our unforgettable colleague and friend Ramon Casas Vallès delivered a brilliant keynote. And the 1998 ALAI conference in Cambridge explored the “Boundaries of copyright”, including those set by freedom of expression.

¹ Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 UCLA L. REV. 1180 (1970).

² *Le livre, comme livre, appartient à l'auteur, mais comme pensée [...] il appartient au genre humain. Toutes les intelligences y ont droit. Si l'un des deux droits, le droit de l'écrivain et le droit de l'esprit humain, devait être sacrifié, ce serait, certes, le droit de l'écrivain, car l'intérêt public est notre préoccupation unique, et tous, je le déclare, doivent passer avant nous.* Translation by the author. V. Hugo, speech delivered at the congress on literary, industrial and artistic property, Paris (1978), *Annales de la propriété industrielle, artistique et littéraire*, Volume 25 (1880), p. 15; quoted from James Boyle, ‘Victor Hugo: Guardian of the Public Domain’, <https://www.thepublicdomain.org/2014/07/18/victor-hugo-guardian-of-the-public-domain/>.

As we can read in the reports of those conferences, the prevailing view was then that, yes, there is a potential conflict, but that much of this is mediated by the copyright system itself. Copyright has a range of built-in levers that allow us to protect creative works while leaving the core of freedom of expression intact. These include:

- subject matter exclusions
- the notion of originality
- the idea/expression dichotomy
- the principle that facts are not protected
- the term of protection
- limits to copyright liability and enforcement
- and – last, not least – limitations and exceptions.

Several of these levers are traceable to the [Berne Convention](#), while the idea/expression rule can be found in the WCT and TRIPs agreements. The [WCT's preamble](#) underscores the importance of freedom of expression and information, by “Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”.

Perhaps the strongest recognition of freedom of expression in the BC is [article 10\(1\) BC](#) that mandates a quotation right, as follows from its prescriptive wording (“It shall be permissible ...”). This elevates this – broadly phrased – exception above most of the other exceptions (of the “may”-kind) listed elsewhere in the Convention.³

The strength of the quotation right illustrates an important point. Leaving space in the copyright system for freedom of expression is not just a matter of accommodating the interests and needs of others (the “users” of this world) – it is essential for authors themselves. There is much truth in the cliché that every author stands on the shoulders of giants. Each work of authorship builds on and interacts with the aggregate of works created in the past – our common cultural heritage. The very authors that copyright seeks to protect are the main beneficiaries of some of its most important limits and limitations: idea/expression, quotation, parody, pastiche, even private copying. These levers are often enough to solve the conflict, but not always.

What is freedom of expression? It is a fundamental (human) right, enshrined in countless treaties, declarations, and national constitutions. Over 170 countries have acceded to the [International Covenant on Civil and Political Rights \(1966\)](#) – the most important global convention on human rights. Article 19(2) of the Covenant reads:

³ See: Tanya Aplin & Lionel Bently, *Global Mandatory Fair Use: the nature and scope of the right to quote copyright works*, Cambridge, UK (2020).

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

This is a very broad freedom. It encompasses not only active acts of speech, but also downstream acts of communication, reception and access. And it applies to “information and ideas of all kinds” – which surely includes copyright protected works.

Freedom of expression is even more rigorously protected in some regional treaties, such as the [European Convention on Human Rights \(Rome, 1950\)](#) and the [OAS American Convention on Human Rights \(1969\)](#). Article 13 of the American Convention uses the strongest language –including a ban on promoting violence by advocating war and hatred.

Some of these instruments also accord fundamental rights status to copyright, like the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the EU Charter.

That does not mean, of course, that copyright trumps freedom of expression, or that free speech always prevails. Fundamental rights and freedoms are never absolute, as some libertarians might have it. Freedom of expression is not a right to poison the minds of millions or to free ride on the works of authors without proper remuneration. Para. 19(3) of the Covenant allows states certain restrictions to free speech, including those that are necessary for respecting the rights “of others”. Art. 10(2) ECHR uses similar language.

So where does this leave copyright?

In recent years, the European Court of Human Rights has provided some answers. While the Court recognizes that copyright rules restrict freedom of expression, it leaves a broad “margin of appreciation” to the states in determining the “necessity” (proportionality) of the restriction. So far, no copyright rule has failed this Strasbourg test. But copyright is not immune to free speech scrutiny.⁴

As a fundamental freedom, freedom of expression may impact copyright law in several ways, and at different levels. Its primary negative (or “vertical”) function is to act as a shield against government speech interference. This might, for example, justify excluding (or limiting the scope of) copyright protection for government works. Its secondary function is a positive obligation upon governments to make freedom of expression work – to make it

⁴ *Ashby Donald and Others v. France*, ECtHR 10 January 2013, CE:ECHR:2013:0110JUD003676908; *Neij and Sunde Kolmisoppi v. Sweden*, ECtHR19 February 2013, CE:ECHR:2013:0219DEC004039712.

“practical and effective”, as the ECtHR has said multiple times.⁵ Therefore, states must design their laws in such a way that freedom of expression is secured. This implies an obligation for national legislatures to implement a range of free speech levers, including robust exceptions, such as quotation, news reporting and parody. For the same reason, the courts are obliged to take fundamental freedoms into account when adjudicating copyright cases. This leads to the so-called ‘horizontal’ effect: freedom of expression indirectly acquires normative effect between private parties.

National courts in many jurisdictions have on occasion applied freedom of expression horizontally in cases where copyright law was deemed to be too restrictive. One of the most famous examples is from the Netherlands. Internet pioneer, activist and journalist Karin Spaink was sued by Scientology for posting some of the church’s best-kept secrets on the web – as part of her critical reporting on Scientology. The [Court of Appeal in The Hague \(2003\)](#) agreed that no exception in Dutch copyright law justified copying these unpublished documents. Nevertheless, the Court rejected the copyright claim because of freedom of expression. Informing the public about the practices of the so-called church outweighed any copyright interests Scientology might have. Karin Spaink died last month. But her memory – and [her website with the Scientology documents](#) – lives on.

Instead of directly overriding copyright, many courts will prefer to interpret copyright laws “in the light of” freedom of expression. This is the approach prescribed by the European Court of Justice in its jurisprudence on copyright exceptions.⁶ On the one hand, the Court prohibits national courts from directly applying constitutional freedoms – because this would undermine copyright harmonisation and legal certainty. On the other, the Court encourages the courts to interpret copyright law, and especially its limitations and exceptions, in line with the freedoms enshrined in the EU Charter. Copyright exceptions grounded in fundamental freedoms confer rights on the users, and are to be broadly constructed, says the CJEU – as opposed to the rule of strict interpretation otherwise applied to exceptions.⁷

Since both copyright and freedom of expression are grounded in fundamental rights and freedoms, copyright should be interpreted in such a way that a “fair balance” between these competing freedoms be achieved. “Fair balance” – these are the magic words of the CJEU’s case law on copyright law.

⁵ See, for example, *Centro Europa 7 S.r.l. and Di Stefano v. Italy*, ECtHR 7 June 2012, CE:ECHR:2012:0607JUD003843309.

⁶ *Spiegel Online v Volker Beck*, CJEU 29 July 2019, Case C-516/17; *Funke Medien v Germany*, CJEU 29 July 2019, Case C-469/17.

⁷ *Pelham 2*, CJEU 14 April 2026, Case C-590/23.

The Court's fundamental rights scrutiny is especially severe when it comes to enforcement measures. Referring to freedom of expression and other fundamental freedoms, the CJEU has enjoined national courts from ordering general Internet monitoring and content filtering, and strictly circumscribed URL blocking orders.⁸

In the US, the Supreme Court similarly assumes that First Amendment concerns are internalized into the copyright system and does not allow freedom of speech to serve as an external limit to copyright.⁹ On the other hand, due to the flexibility of fair use, there is less pressure on the courts to do so anyway.

A related constitutional freedom especially relevant to copyright is freedom of the arts. This is generally seen as a species of freedom of expression, but in the EU, following Germany's example, artistic freedom has its own place in the [EU Charter \(Article 13\)](#). Freedom of the arts gives additional weight to exceptions such as quotation, parody and pastiche that allow creative re-use. Framing reuse in the context of freedom of the arts rather than free speech has consequences. Freedom of expression is purpose-oriented and favours news, political speech or speech that is otherwise of general interest. But art – almost by definition – has no purpose, except itself. Artistic re-use ought, therefore, be privileged as an artistic statement per se.

This brings me to the recent (second) Pelham decision of the CJEU¹⁰ – in one of the longest running IP cases in recent history. The case concerns a one-second sound sample, used repeatedly by German record producer Moses Pelham in a hip-hop hit of the late 1990's. Plaintiffs, the members of [Kraftwerk](#) (legendary pioneers of electronic music), invoke neighbouring rights. Pelham raises all kinds of defences, which have already led to a vast jurisprudence including five decisions by the German Federal Supreme Court, one by the German Constitutional Court, countless lower court decisions and two references to the CJEU. The second reference was decided by the CJEU only recently and concerns the notion of “pastiche” – one of the more obscure exceptions allowed under the EU copyright framework.

The European court posits freedom of the arts (in tandem with freedom of expression) as a fundamental freedom that pastiche seeks to accommodate. From there the Court arrives at a broad reading of ‘pastiche’. According to the Court the exception

⁸ *Scarlet Extended v SABAM*, CJEU 24 November 2011, Case C-70/10; *UPC Telekabel Wien GmbH v Constantin Film a.o.*, CJEU 27 March 2014, Case C-314/12.

⁹ *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985); *Eldred v. Ashcroft*, 537 U.S. 186 (2003)

¹⁰ *Pelham 2*, CJEU 14 April 2026, Case C-590/23.

“covers creations which evoke one or more existing works [...] in order to engage with those works in an artistic or creative dialogue that is recognisable as such and that can take different forms, in particular the form of an overt stylistic imitation of those works, of a tribute to them or of humorous or critical engagement with them.”

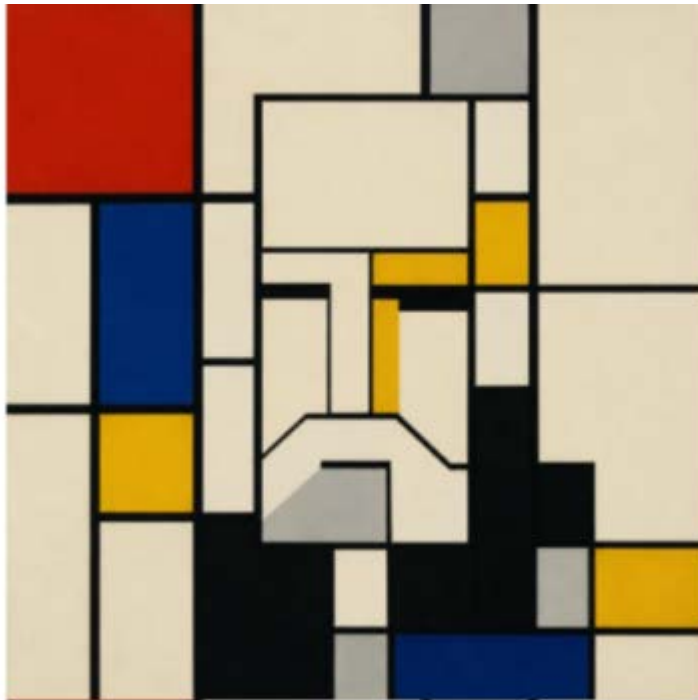
The Pelham decision raises intriguing questions. Has the CJEU, by allowing creative re-uses that engage in an “artistic or creative dialogue” with the works used, turned the pastiche exception into a “right to remix”, as some commentators have suggested? Has appropriation art finally found its place in copyright law?

Nowhere is the conflict between copyright v freedom of expression as thorny as with content sharing platforms. The rise of the social media has transformed the ways in which we interact with other people and the content they create. With that our social norms and culture have evolved, and our expectations of copyright law changed. At the same time, the social media have grown into hugely profitable undertakings extracting value from copyright protected works by way of advertising.

How to find a “fair balance” between the opposing interests of right holders, platforms and users? Article 17 of the [2019 EU Copyright in the Digital Single Market Directive](#) tries to achieve the impossible, by imposing upon the platforms a rule of direct copyright liability implying a requirement to seek licenses, but at the same time safeguarding the users’ rights to freely post parodies and pastiches. The new rules have been challenged on grounds of freedom of expression – but survived scrutiny by the CJEU.¹¹ Just barely.

And then there is generative AI, which has magically equipped us poor un-creative souls with all the powers of the creative universe.

¹¹ *Poland v European Parliament and Council*, CJEU 26 April 2022, Case C-401/19.



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The impact of GenAI on creators, the creative economy, and on copyright is obviously enormous. Several of the legal issues raised by AI are directly related to the theme of this conference – particularly, idea versus expression. Is the use of copyright works as input to AI training an “expressive use” that justifies infringement? Or is this merely a matter of “data mining”? On the output side, the big question remains: is ‘prompting’ a GenAI model to generate output an act of human creation deserving copyright protection – or are the prompts merely unexpressed ideas? And should the users of Gen AI qualify for exemptions meant to permit creative re-use, or are these the prerogatives of ‘real’ human creators?

One of the most daunting questions raised by the rise of GenAI is whether copyright law’s incentive function as the *engine of free expression* is still relevant in a world where creativity has become “cheap”. In recent years the online world is being flooded with low-grade AI generated content. What will be left for copyright and freedom of expression when human creation is lost in a sea of AI slop and disinformation?

Here, copyright and of free speech face similar challenges. In a world where expression is increasingly disconnected from human authorship, and algorithms reward clickbait rather than works of art or science, both copyright and freedom of expression are in peril.

Perhaps, wrote Dan Burke, not long before he died, copyright law should shift its focus to promoting authenticity rather than ‘incentivizing’ production and distribution of creative content.¹² Something to consider during this conference as we explore “[Copyright and Free Expression in the Age of Algorithms](#)”.

¹² Dan L. Burk, Cheap Creativity and What It Will Do, 57 Georgia Law Review, 1669 (2023), available at <https://ssrn.com/abstract=4397423>.