

2 Transforming copyright exceptions into user rights

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1 Introduction

Copyright protection falls under the umbrella of Article 17 of the Charter of Fundamental Rights of the EU (“CFR”).² The first paragraph of this provision sets forth the right to “own, use, dispose of and bequeath . . . lawfully acquired possessions.” The second paragraph clarifies in this context that “[i]ntellectual property shall be protected.”³ The exclusive rights granted in copyright law, thus, fall within the scope of the right to property.

However, this legal position is not absolute.⁴ It follows from Article 52(1) CFR that the right to property may be limited as long as the limitation is provided for by law and leaves the essence of the right intact. Subject to the principle of proportionality, limitations are possible 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.”⁵

Good reasons for limiting copyright can be derived from the catalogue of fundamental rights itself. The right to property is not the only legal position with fundamental rights status that becomes relevant in copyright cases. Article 11(1) CFR contains the right to freedom of expression, including “freedom to hold opinions and to receive and impart information and ideas.”⁶ Article 13 adds that “arts and scientific research shall be free of constraint.”⁷ Article 16 sets forth the freedom to conduct a business.⁸ Articles 20 and 21 require equal treatment and prohibit discrimination.⁹ In rights clearance and enforcement scenarios, the right to privacy and the protection of personal data under Articles 7 and 8 CFR enter the picture as well.¹⁰ The strong societal interest in environmental protection and sustainable development has made its way into Article 37 CFR, which points out that “a high level of environmental protection and the improvement of the quality of the environment” must be integrated into EU policies.¹¹ In copyright cases, all these rights, freedoms, and overarching societal objectives must be factored into the equation to ensure compliance with the multiple value system of the Charter.¹²

In this vein, the CJEU has included fundamental rights considerations in its copyright decisions. In cases concerning freedom of expression and information, the Court enunciated that a “fair balance” had to be found between “the rights and interests of authors on the one hand, and the rights of users of protected

subject-matter on the other.”¹³ After earlier references to freedom of expression in quotation and parody cases,¹⁴ the Court confirmed its willingness to follow a “user rights” approach in the triad of copyright decisions of 29 July 2019.¹⁵ In *Funke Medien* and *Spiegel Online*, the Court stated – more clearly than in previous decisions – that copyright exceptions serving freedom of expression and information “do themselves confer rights on the users of works or of other subject matter.”¹⁶ Referring to user “rights,” the Court clarified that the legal position of users invoking competing fundamental rights was not a priori weaker than the protection status which a copyright holder enjoyed by virtue of EU law.

2 Meaningful user rights

Referring to copyright exceptions as “user rights,” the Court has recognized the dualism that enters the picture with a fundamental rights analysis: from the perspective of the right to property, copyright protection may be a rule that requires neither explanation nor justification. But this is only one side of the coin. From the viewpoint of competing fundamental rights and values, the copyright monopoly is an exception to the rule of freedom that requires further explanation and a sound justification. More specifically, the curtailment of competing fundamental rights resulting from the grant of copyright protection must comply with the requirements set forth in Article 52(1) CFR. This dualistic perspective – recognizing not only the right to property but also the inroads made into competing fundamental rights and freedoms – is of particular importance.

With regard to the implementation of meaningful user rights in practice, it is even more important to recognize that there is no hierarchy between fundamental rights: as an exponent of the right to property, copyright has the status of a fundamental right. However, this does not imply that it is stronger or, a priori, more important than other fundamental rights, such as freedom of expression and information, the right to a healthy environment, and freedom to conduct a business. This insight allows the identification of minimum requirements for the implementation of meaningful user rights in copyright law: *the user rights recognized by the Court should allow users relying on competing fundamental rights to meet copyright holders as equals*. To achieve this result, it can be necessary to depart from the standard rule/exception configuration of copyright law. The development of true user rights reverses the logic of the copyright system: protection is no longer the rule, and freedom of use without prior authorization is no longer the exception. In cases involving competing fundamental rights, the alleged infringer must have an equal opportunity to prevail in the dispute.

3 Critique of CJEU jurisprudence

Applying this assessment standard to CJEU decisions, it becomes apparent that, while referring to copyright exceptions as “user rights,” the Court is hesitant to change the equation and give users invoking competing fundamental rights the chance of meeting right holders as equals. In *Painer*, the Court clarified that “on the

one hand, the rights and interests of authors, and, on the other, the rights of users of protected subject-matter”¹⁷ had to be safeguarded in copyright law. More specifically, the Court stated that the quotation right enshrined in Article 5(3)(d) of the 2001 Information Society Directive (“ISD”)¹⁸ was intended to strike a fair balance “between the right to freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.”¹⁹ To achieve this goal, it was necessary to interpret the conditions laid down in Article 5(3)(d) ISD in a way that “enable[s] the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed.”²⁰ In later decisions, the Court has applied the same amalgam of “fair balance” and “effectiveness” considerations to the parody exemption,²¹ library and press privileges,²² and sound sampling that remains unrecognizable to the ear.²³

At first glance, these developments leading to established “fair balance” and “effectiveness” case law²⁴ may appear as elements of a broader strategy to implement meaningful user rights in EU copyright law. However, disillusionment sets in quickly when looking back at these decisions in the light of the described assessment criterion: if the CJEU really wants to elevate copyright exceptions to user rights, the Court will have to recalibrate the standard rule/exception configuration of copyright law. Otherwise, users will not have the chance to meet rightholders as equals – in accordance with the equal rank of the fundamental rights supporting their freedom of use. Evaluating CJEU case law from this perspective, the landmark decision in *Infopaq* darkens the horizon. This decision preceded the described “fair balance” case law. In *Infopaq*, the Court had affirmed the unsubstantiated and outdated civil law mantra that limitations of exclusive rights – subversive, unwanted “fierce creatures”²⁵ of the copyright system – had to be interpreted strictly:

it should be borne in mind that, according to settled case-law, the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly This holds true for the exemption [of temporary acts of reproduction] provided for in Article 5(1) of Directive 2001/29, which is a derogation from the general principle established by that directive, namely the requirement of authorisation from the rightholder for any reproduction of a protected work.²⁶

After establishing this doubtful “strict interpretation” dogma, any step – no matter how small – which the Court took in the opposite direction of a more flexible application of copyright limitations appeared as a welcome surprise. When *Painer* was handed down in 2011, commentators were simply relieved that, despite the necessity of a strict interpretation established in *Infopaq*, the Court was generous enough not to erode copyright limitations altogether.²⁷

However, there is hardly anything revolutionary about the series of decisions that softened the dogma of strict interpretation. The CJEU only stated the obvious when it had recourse to “fair balance” and “effectiveness” considerations. While it is certainly true that the right to freedom of expression and information undergirds the restriction of copyright in favour of quotations, parodies, library use, and press

privileges, it is misleading to qualify the willingness to adopt an interpretation that safeguards the effectiveness of copyright exceptions in these areas as a precious achievement. With its “fair balance” and “effectiveness” rhetoric, the CJEU only excuses the departure from its own – wrong and misguided – dogma of strict interpretation. It was simply wrong to state in *Infopaq* that copyright limitations had to be interpreted strictly.

In the absence of the doubtful *Infopaq* mantra of strict interpretation, an effective interpretation of copyright limitations would follow naturally and effortlessly from the simple letter of EU copyright legislation itself. Introducing copyright limitations in Article 5 ISD, the legislator has clearly indicated that it favours freedom of use – without prior permission – in several cases. It goes without saying that the CJEU must implement this legislative decision effectively. How could the Court assume that the legislator wanted certain elements of the copyright *acquis* to be applied ineffectively? Hence, the necessity of effective application follows directly from EU copyright legislation itself.

In reality, the Court’s “fair balance” and “effectiveness” approach does not change the equation. It fails to give copyright exceptions the status of meaningful user rights. This became clear in the sound sampling case *Pelham*. As in earlier decisions, the CJEU recognized the need to reconcile copyright protection with competing fundamental rights.²⁸ However, this starting point did not prevent the Court from confining the arsenal of regulatory tools to the rule/exception elements of secondary EU copyright law. It did not trouble the Court that, in contrast to the fundamental rights in the Charter, the EU copyright framework does not have the status of primary EU legislation. Passing over this central point, the Court stated that:

[t]he mechanisms allowing those different rights and interests to be balanced are contained in Directive 2001/29 itself, in that it provides *inter alia*, first, in Articles 2 to 4 thereof, rightholders with exclusive rights and, second, in Article 5 thereof, for exceptions and limitations to those rights which may, or even must, be transposed by the Member States.²⁹

Assuming that the harmonized EU system of rights and limitations constituted a complete and closed universe, the CJEU rejected the national free adaptation rule which had evolved in Germany.³⁰ In the national decisions that gave rise to the preliminary questions in *Pelham*, German courts had applied the traditional domestic copyright rule that a derivative work could be deemed permissible if it had new features of its own that made the individual features of the incorporated source material fade away.³¹ The CJEU, however, saw no basis for this national doctrine within the harmonized EU copyright system. Instead of opening up the norm canon of EU copyright law in the light of freedom of expression and freedom of the arts, it declared the German free adaptation rule incompatible with EU law.³² Sound sampling could be deemed permissible only if remix artists included a music fragment in their derivative creations in a modified form unrecognizable to the ear.³³ Quite clearly, the CJEU sought to avoid any destabilization of the traditional rule/exception edifice in EU copyright law.³⁴

This outcome of the *Pelham* case reveals the Court's true intentions. Despite all confirmations of the need to strike a "fair balance," the CJEU is not prepared to reconfigure copyright's rule/exception architecture in order to establish meaningful user rights. On the contrary, the Court does not hesitate to sacrifice fundamental rights positions, such as the right to freedom of expression and information, on the altar of the EU harmonization agenda.³⁵ The *Pelham* decision leaves little doubt in that regard. Eroding the German free adaptation rule, the Court explained that to allow each Member State:

to derogate from an author's exclusive rights, referred to in Articles 2 to 4 of Directive 2001/29, beyond the exceptions and limitations exhaustively set out in Article 5 of that directive, would endanger the effectiveness of the harmonisation of copyright and related rights effected by that directive, as well as the objective of legal certainty pursued by it.³⁶

4 No meaningful application of user rights

Hence, the harmonization objective reigns supreme. In practice, the balancing of copyright against user rights must take place within the existing copyright system of rights and limitations. The closer inspection of "fair balance" and "effectiveness" approaches shows that there is more user rights rhetoric than meaningful user rights reality in the case law of the CJEU.³⁷ Stating that the balancing exercise must take place within the confines of EU copyright law, the CJEU deprives users relying on competing fundamental rights of the chance to meet right holders as equals. In the copyright arena, they will always have to fight an uphill battle. To avoid any interference with the copyright harmonization agenda, the CJEU seems to tolerate this evident imbalance. In *Pelham*, the Court did not find it contradictory to state that:

Article 5(5) of Directive 2001/29 also contributes to the fair balance mentioned in paragraph 32 above, in that it requires that the exceptions and limitations provided for in Article 5(1) to (4) of the directive be applied only 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.³⁸

This uncritical attitude with respect to the three-step test in Article 5(5) ISD is surprising. As the Court explains, Article 5(1) to (4) ISD contains an enumeration of permissible, specific copyright limitations. These listed limitation prototypes, however, are subject to the three-step test laid down in Article 5(5) ISD. As a result of this legislative design, the three-step test serves only one purpose in EU copyright law: it is a tool to restrict copyright limitations further. Stipulating that limitations "shall only be applied" in accordance with the three-step test, Article 5(5) ISD leaves little doubt about this role. Not surprisingly, national judges have developed a practice of scrutinizing the scope of copyright limitations on the basis of the EU three-step test. The CJEU itself has rendered several decisions in which the three-step test features prominently as an additional control instrument.³⁹

Copyright exceptions that play a crucial role in safeguarding fundamental rights of users – artists, researchers, journalists, and other creative users – are thus strait-jacketed in the EU copyright framework. Their validity hangs by the thread of compliance with the abstract criteria of the three-step test. Users who are confronted with allegations of copyright infringement seek legal certainty in vain when they invoke copyright exceptions as a defence argument. Even the most narrowly circumscribed national exception may still be challenged on the ground that it is incompatible with the EU three-step test set forth in Article 5(5) ISD.

Quite clearly, Article 5(5) ISD is thus a regulatory instrument that is exclusively in favour of copyright holders.⁴⁰ By definition, it will never broaden the scope of a copyright limitation and strengthen the position of users:

Article 5(5) of Directive 2001/29 is not intended either to affect the substantive content of provisions falling within the scope of Article 5(2) of that directive or, inter alia, to extend the scope of the different exceptions and limitations provided for therein.⁴¹

Moreover, the CJEU has confirmed that the EU three-step test cannot be employed to create new, additional forms of permitted unauthorized use:

Furthermore, it is apparent from recital 44 in the preamble to Directive 2001/29 that the EU legislature meant to envisage, when Member States provide for the exceptions or limitations referred to by that directive, that the scope of those exceptions or limitations could be limited even more when it comes to certain new uses of copyright works and other subject-matter. By contrast, neither that recital nor any other provision of that directive envisages the possibility of the scope of such exceptions or limitations being extended by the Member States.⁴²

Hence, it is impossible for judges in the EU to use the abstract assessment criteria of the three-step test as signposts for devising new use privileges.⁴³ Unlike fair use provisions with comparable abstract criteria,⁴⁴ the EU manifestation of the three-step test cannot be employed to create new, additional forms of permitted unauthorized use on a case-by-case basis.⁴⁵ This insight sheds an even less favourable light on the Court's *Pelham* assumption that internal balancing – within the existing system of exclusive rights and limitations in EU copyright law – will safeguard not only the fundamental rights of copyright holders but also those of users.⁴⁶ Including the three-step test, the CJEU has woven a strong bias in favour of copyright holders in its internal balancing fabric. The corrosive effect of this approach on the legal position of users is obvious. Instead of enjoying true user rights, they have to fight an uphill battle if they want to exercise competing fundamental rights:

- EU copyright law grants broad, general exclusive rights. The right of reproduction in Article 2 ISD and the right of communication to the public in Article 3 ISD can serve as examples. The comprehensive scope of these exclusive rights offers right holders the opportunity to build *prima facie* infringement arguments

that can hardly be rebutted as evidently unfounded from the outset (protection is the rule);

- While right holders can rely on broad exclusive rights to build *prima facie* infringement arguments, users seeking to rely on user rights only have specific exceptions to exclusive rights at their disposal. From the outset, they are placed in a defence position (freedom is the exception). In EU copyright law, the exceptions are enumerated in the closed list of Article 5 ISD. Articles 3 to 6 of the Directive on Copyright in the Digital Single Market (“CDSMD”)⁴⁷ add further cases. An open-ended fair use provision with a broad, elastic scope – comparable to the general, comprehensive nature of exclusive rights – is sought in vain.⁴⁸ The imbalance in the regulatory design is obvious: like David in his fight against Goliath, users must invoke narrow exceptions against broad exclusive rights.
- The three-step test⁴⁹ aggravates the problem. As explained, it further restricts exceptions that could support competing fundamental rights. Instead of allowing users with a valid fundamental rights argument to be on equal footing with copyright owners, the three-step test only confirms the bias of the system in favour of protection interests. It enhances legal certainty for copyright holders and reduces legal certainty for users who invoke competing fundamental rights. Even if a given form of use complies with the specific requirements set forth in an exception to copyright protection, it can still be challenged on the ground that it does not fulfil the additional criteria of the three-step test.

In practice, this configuration of EU copyright law places users relying on copyright exceptions in a weak position. The exposure to infringement arguments that cannot directly be rejected as invalid is a serious threat.⁵⁰ It is likely to have a deterrent effect on use that is important and socially valuable from a fundamental rights perspective. Arguably, a cease-and-desist letter will be sufficient in many cases to discourage the user and stop the use. Empirical studies show that this is not a mere theoretical scenario. In various areas of creative activity, concerns have been articulated about a growing fear of artists being sued for copyright infringement.⁵¹ As Amy Adler has concluded, “a climate of ‘self-censorship’ has taken hold in the art world.”⁵² In such a case, the courts do not even have the chance of clarifying that the use is permissible. Artists and other risk-averse users seeking to avoid potential lawsuits will refrain from the creation of works based on pre-existing material or limit takings from pre-existing material to an absolute minimum.⁵³ Therefore, the legal uncertainty arising from the described imbalance – broad exclusive rights bolstering the position of right holders and narrow exceptions destabilizing the position of users – leads to a climate that is likely to impede and impoverish the work of artists, researchers, journalists, and other users. It appears ironic – if not sarcastic – that the Court nonetheless refers to copyright exceptions as “user rights.”

5 Proposals for reform

Despite all confirmations of a need to strike a “fair balance” and ensure the “effectiveness” of exceptions, the CJEU has not managed to establish meaningful user rights. Instead of openly addressing the described imbalances in the rule/

exception edifice of EU copyright law and employing the competing fundamental rights that support user freedoms to bring the system into balance, the CJEU prefers to gloss over the current, flawed configuration of the copyright regime. With its user rights rhetoric, the CJEU only cements the existing architecture of EU copyright law, which is strongly in favour of right holders and places a heavy burden on users seeking to exercise competing fundamental rights.⁵⁴

To establish meaningful user rights in EU copyright law, an approach would be necessary that renders user rights – exponents of competing fundamental rights recognized in the Charter – capable of constituting real counterbalances to the protection paradigm: counterbalances that have the potential to recalibrate the standard rule/exception configuration of EU copyright law. Considering the equal status of fundamental rights in the Charter, it is simply wrong to assume that protection must be the rule and freedom of use an exception that requires a strong justification and thorough scrutiny in each individual case. The right to intellectual property of copyright holders is in no way superior to freedom of expression and information, freedom of the arts and sciences, the right to a healthy environment, the protection of privacy and personal data, or freedom to conduct a business.

Considering the results of the preceding analysis, it is inevitable to conclude, against this background, that the Court's user rights approach – relying on exceptions to reconcile copyright protection with these competing fundamental rights – has failed.⁵⁵ Restricted by the three-step test, the exceptions in EU copyright law are incapable of creating sufficiently reliable breathing space for user freedoms. The system of exclusive rights and limitations in EU copyright law disregards the equal status of the competing fundamental rights which users can invoke to support their legal position in the copyright arena.

Hence, EU copyright law and practice must explore new avenues. It is indispensable to recognize that the competing fundamental rights that support the position of users in copyright law constitute real counterbalances to the protection paradigm. When these competing fundamental rights are at stake, it is necessary to depart from the traditional rule/exception configuration that favours right holders and establish legal certainty and a robust legal position for both right holders and users alike. Abandoning the traditional and highly problematic reliance on mere exceptions to the rule of protection, EU law must introduce legal mechanisms which, from the outset, prevent right holders from bringing a valid infringement claim.

Legal tools that could achieve this goal have been known in intellectual property law for a long time. In trademark law, for instance, there is a vivid debate on the requirement of use of a trademark “as a mark.”⁵⁶ This general prerequisite for infringement claims functions as an upfront gatekeeper requirement that confines the scope of trademark rights to instances where another's trademark is employed as an identifier of commercial source with regard to one's own goods or services.⁵⁷ Following this approach, access to trademark protection can be contained from the outset. Trademark infringement claims are doomed to fail as long as users refrain from using protected third-party brand insignia as indications of the commercial origin of their own products.⁵⁸

In copyright law, a comparable approach is conceivable.⁵⁹ Copyright holders could be obliged to demonstrate use of a work “as a work” as a general prerequisite for an infringement claim. Introducing this gatekeeper requirement, EU copyright law could make it clear that right holders must explain why their infringement claim is legitimate, even though the grant of protection would curtail fundamental rights of the alleged infringer. Instead of readily assuming *prima facie* infringement when a use falls within the province of an exclusive right, right holders would be required to first justify the infringement claim. Making it more difficult for right-holders to build a valid case of *prima facie* infringement, EU law could substantially enhance legal certainty for users.

6 Practical examples

In the past, EU copyright law has refrained from seizing opportunities to immunize valuable forms of use against infringement claims by introducing a gatekeeper requirement of use of a work “as a work.” The regulation of temporary copying (6.1)⁶⁰ and text and data mining (6.2)⁶¹ can serve as examples.

6.1 Temporary copying

The issue of how to regulate temporary acts of reproduction that serve freedom of expression and information, such as browsing, caching and streaming,⁶² played a central role in the international deliberations leading to the WIPO Copyright Treaty (“WCT”). Article 7(1) of the Basic Proposal for the international treaty that finally became the WCT contained a provision that sought to confirm the comprehensive nature of the reproduction right granted in Article 9(1) of the Berne Convention for the Protection of Literary and Artistic Works (“BC”) and fortify the position of copyright holders in respect of forms of copying that were deemed new at the time of the 1996 Diplomatic Conference.⁶³ These new forms included, in particular, temporary acts of copying that are inherent in technical processes, such as streaming, caching, and browsing:

The exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorizing the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form.⁶⁴

The notes accompanying Article 7(1) of the WCT Basic Proposal reflected the intention to clarify the “widely held”⁶⁵ understanding that both permanent and temporary reproduction constituted reproduction within the meaning of Article 9(1) BC.⁶⁶ The negotiations at the 1996 WIPO Diplomatic Conference, however, showed that this position was less widely shared than expected.⁶⁷ Singapore stated that the inclusion of temporary reproduction in the reproduction right “had far reaching consequences, in that fair use rights in the areas of researchers, libraries, and private use were in danger of being curtailed.”⁶⁸ Denmark held the view that

temporary reproduction made for the sole purpose of making a work perceptible, or reproduction of a purely transient or incidental character, as part of a technical process, “did not constitute reproduction within the meaning of Article 9(1) of the Berne Convention.”⁶⁹ Sweden confirmed that these temporary acts of reproduction “were not really reproductions.”⁷⁰ In the same vein, Norway stated that, instead of merely allowing for the adoption of copyright limitations to keep acts of temporary copying free, it should be made clear in the text of the future treaty that temporary reproduction made for the sole purpose of making a work perceptible, or of a purely transient or incidental character as a part of a technical process, “did not as such constitute a reproduction within the meaning of Article 9(1) of the Berne Convention.”⁷¹ To better illustrate its position, Norway tabled a concrete proposal for amending Article 7(1) of the WCT Basic Proposal, which consisted of adding the following sentence:

Temporary reproduction made for the sole purpose of making a work perceptible, or which are of a purely transient or incidental character as part of a technical process, does not as such constitute a reproduction within the meaning of Article 9(1) of the Berne Convention.⁷²

The negotiations, thus, did not confirm the broad, unlimited scope of the right of reproduction laid down in Article 9(1) BC. Instead, the Basic Proposal for the later WCT gave rise to the question whether the right of reproduction – and the underlying concept of “reproduction” – could be understood to cover temporary copying at all.⁷³ Instead of confirming the broad scope of the right, several delegations cast doubt upon the comprehensive nature of Article 9(1) BC.

The position taken by the Scandinavian countries did not remain an outlier. Switzerland declared that it shared the concerns expressed by the delegations of Denmark, Sweden and Norway.⁷⁴ Australia proposed an amendment to Article 7 of the WCT Basic Proposal that pointed in the same direction as the proposal made by Norway: instead of providing limited room for the introduction of copyright exceptions, it was advisable to make a statement clarifying that temporary copying fell outside the scope of the right of reproduction altogether.⁷⁵ The African Group synthesized this approach by proposing a new Article 7(2) for the later WCT that would replace the mere possibility for contracting parties to adopt copyright exceptions in the original Article 7(2) of the WCT Basis Proposal:

Temporary reproduction does not as such constitute a reproduction within the meaning of Article 9(1) of the Berne Convention and this Treaty where –

- (i) such temporary reproduction is made for the sole purpose of making a work perceptible, or
- (ii) such temporary reproduction is part of a technical process incidental to the transmission or utilization of the work concerned; or
- (iii) such reproduction is incidental to the use of the work as authorized by the right holder concerned or permitted by law.⁷⁶

In an explanatory note, the Group of Latin American and Caribbean Countries described the need for this remarkable change of course as follows:

Article 9(1) of the Berne Convention establishes the right of reproduction “in any manner or form.” In view of the fact that new technology has broadened traditional “forms” and “manners,” it has become necessary to redefine the scope of the right of reproduction and exclude from it those reproductions that are technically necessary for making the work perceptible or form part of a technical process and do not in themselves constitute the production of originals or copies of the work.

If the foregoing is not expressly stated, it could give rise to one-sided, excessively broad interpretations of the scope of Article 9(1) of the Berne Convention.⁷⁷

Therefore, the deliberations at the 1996 Diplomatic Conference culminated in statements and proposals that, instead of confirming the comprehensive scope of the right of reproduction at the international level, did not hesitate to articulate the need for a redefinition of the conceptual contours and reach of the exclusive right granted in Article 9(1) BC in the light of technological developments.⁷⁸

With initiatives seeking to carve out temporary copying from the scope of the right of reproduction altogether, a consensus on Article 7 of the WCT Basic Proposal was beyond reach. Against this background, Main Committee I decided to delete the proposed Article 7 of the WCT Basic Proposal altogether.⁷⁹ With regard to the right of reproduction, the final treaty text only contains the following Agreed Statement accompanying Article 1(4) WCT:

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

The impact and interpretative authority⁸⁰ of this Agreed Statement is limited because it has not been adopted by consensus.⁸¹ The statement was established with 51 votes in favour, five against, and 30 abstentions.⁸² Explaining the reasons for its vote against the Agreed Statement, Brazil pointed out that the Diplomatic Conference had not managed to reach consensus on the definition of the term “storage.”⁸³ It was the understanding of Brazil that neither the access to make a work perceptible by browsing nor the transmission of a work through a computer network in the occurrence of a temporary or non-temporary storage resulting from a technical procedure infringed the exclusive right of reproduction within the meaning of the Berne Convention.⁸⁴ Korea explained that it had opposed the Agreed Statement because reproductions that were not relevant in economic terms should not be considered as reproductions all the time. The acts of browsing or providing telecommunication

facilities had an economic value in a number of cases. It was, however, difficult to distinguish acts which had an economic significance from those which had not. Against this background, Korea believed that “acts of browsing should not be covered by the exclusive right of reproduction without exceptions.”⁸⁵

Quite clearly, the discussion about temporary copying that emerged at the 1996 Diplomatic Conference offered a basis for copyright legislation placing acts of temporary copying, such as browsing, caching, and streaming, outside the scope of the right of reproduction altogether. An upfront gatekeeper requirement – stating that temporary copying does not constitute relevant use of the work “as a work” – could have achieved this goal. Dutch copyright law comes close to this result. Article 13a of the Dutch Copyright Act (*Auteurswet*) stipulates that temporary copying does not constitute an act of reproduction.⁸⁶ In practice, however, this Dutch solution remains ineffective because the EU did not avail itself of the option to place temporary copying outside the scope of the right of reproduction. Instead, Article 5(1) ISD sets forth a specific exception that exempts temporary acts of reproduction:

which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary, or
- (b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance.

The interpretation and application of Article 13a of the Dutch Copyright Act must be brought in line with this harmonized copyright exception at the EU level. As a result, an effective “carve out” – a true user right – is missing.⁸⁷ Instead, the complex and highly specific nature of the requirements in Article 5(1) ISD only confirms the traditional rule/exception configuration of EU copyright law. The detailed regulation of temporary copyright in Article 5(1) ISD contrasts sharply with the comprehensive right of reproduction granted in Article 2 ISD: a general right that explicitly entitles right holders to “prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.”

The EU, thus, preferred to confirm the rule of protection and impose the burden on users to establish compliance with the highly complex and specific prerequisites laid down in Article 5(1) ISD. Making the assessment framework even more complex, Article 5(5) ISD clarifies that the open-ended three-step test can impact the decision on infringement and enhance legal uncertainty for users, even though Article 5(1) ISD already sets forth very detailed and specific requirements.⁸⁸ This regulatory design follows the standard rule/exception approach in the EU copyright acquis. It offers a high degree of legal certainty for right holders and a low degree of legal certainty for users invoking Article 5(1) ISD to exercise their right to freedom of expression and information.⁸⁹

6.2 Text and data mining

The more recent discussion on TDM provides a further example of a missed opportunity to reconfigure copyright's rule/exception architecture by introducing a gatekeeper requirement of use of a work "as a work." With the introduction of specific TDM rules in Articles 3 and 4 CDSMD, the EU legislator sought to remove barriers to the use of copyrighted material in scientific research and reconcile copyright protection with the fundamental right to research following from Articles 11 and 13 CFR.⁹⁰ From the outset, the legislative initiative culminating in the adoption of Articles 3 and 4 CDSMD aimed at the elimination of legal uncertainty to encourage the use of TDM tools:

The need to better reflect technological advances and avoid uneven situations in the single market is also clear with text-and-data mining (TDM), through which vast amounts of digital content are read and analysed by machines in the context of science and research. The lack of a clear EU provision on TDM for scientific research purposes creates uncertainties in the research community. This harms the EU's competitiveness and scientific leadership at a time when research and innovation (R&I) activities within the EU must increasingly take place through cross-border and cross-discipline collaboration and on a larger scale, in response to the major societal challenges that R&I addresses.⁹¹

From the perspective of the fundamental right to research,⁹² this statement was particularly important and welcome. It reflects the laudable objective to strengthen the position of researchers by removing legal uncertainty that could arise from an imbalanced rule/exception approach. Translating the mission statement into copyright legislation, however, the EU legislator was not courageous enough to choose a new avenue and make freedom of TDM research the rule. Instead, the use for TDM purposes remained an exception to the rule of protection that forces researchers into a defensive position. Confronted with allegations of copyright infringement, they can hardly argue that no relevant act of reproduction has occurred.⁹³ They can only invoke the TDM rules in Articles 3 and 4 CDSMD as defence arguments. The CDSMD Directive does not place the use of copyrighted source material for TDM purposes entirely outside the scope of the exclusive right of reproduction – and beyond the reach of copyright holders.

In light of the stated objective to eliminate legal uncertainty, it is surprising that the EU legislator did not embrace an alternative regulatory approach that could have been based on the central insight that use for TDM purposes differs substantially from regular copying. In the TDM debate, the point has been made around the globe that, considering the different nature of TDM, a relevant act of reproduction in the traditional sense of making copies for the purpose of consulting and enjoying a work is missing. From a US perspective, Michael Carroll has pointed out that in the context of TDM:

copies are made only for computational research and the durable outputs of any text and data mining analysis would be factual data and would not

contain enough of the original expression in the analysed articles to be copies that count.⁹⁴

Explaining the outright exemption of TDM activities in Article 30–4(ii) of the Japanese Copyright Act, Tatsuhiro Ueno has pointed out that:

if an exploitation of a work is aimed at neither enjoying it nor causing another person to enjoy it (e.g. text-and-data mining, reverse engineering), there is no need to guarantee the opportunity of an author or copyright holder to receive compensation and thus copyright does not need to cover such exploitation. In other words, exploitation of this kind does not prejudice the copyright holder's interests protected by a copyright law.⁹⁵

Criticizing the restrictive regulation of TDM in the EU, Rosanna Ducato and Alain Strowel described the following alternative approach:

when acts of reproduction are carried out for the purpose of search and TDM, the work, although it might be reproduced in part, is not used as a work: the work only serves as a tool or data for deriving other relevant information. The expressive features of the work are not used, and there is no public to enjoy the work, as the work is only an input in a process for searching a corpus and identifying occurrences and possible trends or patterns.⁹⁶

In fact, the distinction between “works as works” and “works as data” is not entirely new in the European copyright debate. In 2011, Maurizio Borghi and Stavroula Karapapa already developed the concept of “de-intellectualized use”⁹⁷ against the background of mass digitization projects, such as the Google Book Search. As Borghi and Karapapa point out, mass digitization turns protected content into mere data – with the result that “the expression of the idea embodied in the work is not primarily used to communicate the ‘speech’ of the author to the public but rather to form the basis of machine-workable algorithms.”⁹⁸

Considering these comments and observations, it becomes apparent that TDM raises issues that concern the conceptual core of the right of reproduction: the question of whether a relevant category of reproduction can be assumed in TDM cases at all.⁹⁹ Answering this question in the negative in the CDSM Directive, it would have been possible to place use for TDM purposes outside the right of reproduction – and the control of copyright holders – altogether.

The EU approach, however, is much less ambitious. Instead of exploring new avenues to immunize TDM research against allegations of copyright infringement, the EU legislature did not find it necessary to depart from the traditional rule/exception recipe. While seeking to satisfy the need for enhanced legal certainty in the area of TDM, the lawmaker refrained from introducing a robust non-infringement *rule*. Instead, two *exceptions* to protection – Articles 3 and 4 CDSMD – were deemed sufficient. In consequence, researchers – and also investigative journalists¹⁰⁰ – cannot exercise their fundamental right to research in a

legal environment that offers robust legal certainty and allows them to meet copyright holders as equals. Instead, the legal framework resulting from Articles 3 and 4 CDSMD raises the previously-described issues which an exception-based approach typically brings in its wake: are all specific requirements of these exceptions fulfilled? Do researchers stay within the confines of the use privilege which EU copyright law makes available? Are they working at a research organization?¹⁰¹ Is the use confined to reproductions and extractions? No acts of data sharing and making available to the public?¹⁰² Does the use concern a scientific research project? Can they demonstrate lawful access?¹⁰³ Have they observed all opt-outs in the case of commercial research?¹⁰⁴

Following this traditional path, the EU legislator has put the burden on researchers to establish compliance with Articles 3 and 4 CDSMD and tolerate inroads into their freedom of expression and freedom of science that follow from the legal uncertainty surrounding these complex provisions. In addition, Article 7(2) CDSMD confirms the applicability of the three-step test laid down in Article 5(5) ISD: next to the hurdles posed by Articles 3 and 4 CDSMD, researchers must also ensure compliance with the abstract criteria set forth in the three-step test. Like the policy decision in the field of temporary copying, the EU approach to TDM research, thus, confirms the traditional protection imperative and fails to offer researchers a solid position in the copyright arena that allows them to be on equal footing with copyright owners.

To change this equation, EU copyright law would have to make broader use of immunization tools, such as the gatekeeper requirement of use of a work “as a work” that is capable of placing TDM research outside the scope of the right of reproduction from the outset.¹⁰⁵ As the discussion on TDM has shown in the meantime, this policy decision need not deprive the creative industry and individual creators of adequate remuneration for the use of literary and artistic works in the AI industry. To set in motion a money stream back to the creative industry and individual authors and performers, it is not necessary to bring TDM under the umbrella of the right of reproduction¹⁰⁶ and impose a heavy burden of rights clearance¹⁰⁷ and transparency obligations¹⁰⁸ on AI trainers.

Instead of imposing payment obligations and administrative burdens during the AI development phase, EU copyright law could exempt TDM for AI training purposes from the control of copyright holders by introducing the gatekeeper requirement of use of a work “as a work” (thus placing use “as data” outside the scope of the right of reproduction). As a result, copyright law would support the use of the full spectrum of available literary and artistic resources for AI training and allow AI trainers to develop the best, least biased,¹⁰⁹ and most powerful AI models.¹¹⁰ The obligation to pay equitable remuneration could then be implemented at a later stage. Once fully developed AI models are exploited in the marketplace, copyright law can require the payment of remuneration. As compensation for the freedom to use human creations for AI training purposes, an output-based remuneration system can be introduced – a system that requires the payment of fair remuneration when the supply and use of AI systems in the market leads to machine-made literary and artistic output that may replace human creations, and generates income for

AI companies.¹¹¹ At that point, the providers and users of AI systems can be obliged to share the revenue accruing from generative AI systems with individual creators and the creative industry.

7 Conclusion

The CJEU has recognized that copyright exceptions play a central role in the EU copyright system: they offer breathing space for competing fundamental rights, in particular freedom of expression and information, freedom of the arts and sciences, the right to a healthy environment, the protection of privacy and personal data, and freedom to conduct a business. Highlighting this specific function, the Court stated that copyright exceptions “do themselves confer rights on the users of works or of other subject matter.”¹¹² However, the preceding analysis has shown that the Court has not managed to develop a meaningful user rights approach. Instead of departing from the traditional rule/exception configuration that strongly favours right holders, the Court cemented the existing system of exclusive rights and exceptions: a user seeking to exercise a fundamental freedom in EU copyright law must ensure compliance with all detailed requirements of copyright exceptions. In addition, the user must satisfy all conditions of the three-step test. As a result, a high degree of legal certainty and a robust legal position for users is sought in vain. The current approach taken by the Court is mere cosmetics. Instead of changing the parameters of a successful user rights claim, the CJEU only confirmed the status quo: freedom of use is the exception; protection is the rule.

This result is incompatible with the equal status of user rights, such as freedom of expression and information, in the Charter. To give users the opportunity to meet right holders as equals – and enjoy meaningful “user rights” – EU copyright law must develop legal mechanisms that, from the outset, prevent right holders from bringing a valid infringement claim. Gatekeeper requirements, such as an obligation to demonstrate actionable use of a work “as a work” can serve as examples. Introducing effective gatekeeper requirements upfront, EU law can oblige right holders to explain why their infringement claim is justified and legitimate, even though the grant of protection would curtail fundamental user rights. Instead of readily assuming *prima facie* infringement when a use falls within the scope of an exclusive right, right holders should be required to first justify the infringement claim.

Making it more difficult for right holders to build a valid case of *prima facie* infringement, EU law can substantially enhance legal certainty for users and establish meaningful user rights. In the past, EU legislation has refrained from seizing opportunities to immunize valuable forms of use against infringement claims from the outset. The regulation of temporary copying and text and data mining can serve as examples. Despite these missed opportunities, there is hope. It is not too late to diversify the tools for reconciling copyright protection with competing rights and values. The necessity to find a better response to the challenges and opportunities of generative AI systems can be a catalyst, paving the way for new regulatory approaches.¹¹³ Similarly, the need for measures to support the sustainable re-use of copyrighted products can lead to a fresh approach that allows re-users in the

circular economy to meet right holders as equals.¹¹⁴ If the Court abandons its reluctance to change the problematic rule/exception architecture in EU copyright law, CJEU decisions can play an important role in the development of a more balanced system. To achieve this goal, however, the CJEU will have to make productive use of competing fundamental rights and refrain from meaningless user rights rhetoric.

Notes

- 1* Ph.D.; Professor of Intellectual Property Law and Director, Institute for Information Law (IViR), Amsterdam Law School, University of Amsterdam; Of Counsel, Bird & Bird, The Hague, The Netherlands
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- 3 For a more detailed discussion of this global statement, see DJW Jongsma, *Creating EU Copyright Law – Striking a Fair Balance* (Hanken School of Economics 2019) 163–68; J Griffiths and L McDonagh, ‘Fundamental Rights and European IP Law – the Case of Art 17(2) of the EU Charter’ in C Geiger (ed), *Constructing European Intellectual Property Achievements and New Perspectives* (Edward Elgar 2013) 75 (75); C Geiger, ‘Intellectual Property Shall be Protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope’ (2009) 31 EIPR 113 (113)
- 4 Cf. CJEU, 26 April 2022, case C-401/19, *Poland*, para 92; CJEU, 29 July 2019, case C-469/17, *Funke Medien NRW*, para 72
- 5 Article 52(1) CFR. Cf. CJEU, 26 April 2022, case C-401/19, *Poland*, para 63–66
- 6 CJEU, 4 October 2011, cases C-403/08 and C-429/08, *Football Association Premier League/QC Leisure*, para 162–64; CJEU, 1 December 2011, case C-145/10, *Painer*, para 132; CJEU, 3 September 2014, case C-201/13, *Deckmyn*, para 26; CJEU, 29 July 2019, case C-469/17, *Funke Medien NRW*, para 67–76; CJEU, 26 April 2022, case C-401/19, *Poland*, para 66
- 7 Cf. CJEU, 29 July 2019, case C-476/17, *Pelham*, para 32–34. For a more detailed discussion of the right to research in the Charter, see C Geiger and BJ Jütte, ‘Conceptualizing a “Right to Research” and Its Implications for Copyright Law, An International and European Perspective’ (2024) 38 American University International Law Review 1 (1–86); MRF Senftleben, ‘Study on EU Copyright and Related Rights and Access to and Reuse of Data, European Commission, Directorate-General for Research and Innovation (DG RTD)’ (Publications Office of the European Union, 2022) <<https://data.europa.eu/doi/10.2777/78973>>, 12
- 8 CJEU, 16 February 2012, case C-360/10, *Sabam/Netlog*, para 51; CJEU, 27 March 2014, case C-314/12, *UPC Telekabel Wien*, para 52
- 9 CJEU, 3 September 2014, case C-201/13, *Deckmyn*, para 29–31; CJEU, 23 November 2023, case C-260/22, *Seven. One Entertainment Group*, C-260/22, para 40–53. Cf. MRF Senftleben, JP Quintais and A Meiring, ‘How the European Union Outsources the Task of Human Rights Protection to Platforms and Users: The Case of User-Generated Content Monetization’ (2023) 38 Berkeley Technology Law Journal 933 (1006–9)
- 10 CJEU, 16 February 2012, case C-360/10, *Sabam/Netlog*, para 51
- 11 As E Izyumenko, ‘Intellectual Property in the Age of the Environmental Crisis: How Trademarks and Copyright Challenge the Human Right to a Healthy Environment’ (2024) 55 IIC 864 (882–87), explains, measures to reconcile copyright protection with repair and reuse initiatives in the circular economy are also necessary in the light of individual fundamental rights that are affected by the climate crisis, in particular the right to life, respect for private and family life, and the right to property (Articles 2, 7, 17 CFR)

- 12 MRF Senftleben, 'The Unproductive Overconstitutionalization of EU Copyright and Trademark Law – Fundamental Rights Rhetoric and Reality in CJEU Jurisprudence' (2024) IIC 1471 (1477)
- 13 CJEU, 4 October 2011, cases C-403/08 and C-429/08, *Football Association Premier League/QC Leisure*, para 162–64; CJEU, 1 December 2011, case C-145/10, *Painer*, para 132; CJEU, 3 September 2014, case C-201/13, *Deckmyn*, para 26; CJEU, 29 July 2019, case C-469/17, *Funke Medien NRW*, para 67–76; CJEU, 26 April 2022, case C-401/19, *Poland*, para 66. For a critique of the concept of “fair balance,” see DJW Jongsma, 'Modalities of Fundamental Rights Balancing in EU Copyright Law: Understanding the Use and Abuse of the EU Charter and the Concept of “Fair Balance”' (2024) 49 *European Law Review* 256 (272–74); C Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It' (2019) 41 *European Intellectual Property Review* 683 (683–85 and 695)
- 14 CJEU, 1 December 2011, case C-145/10, *Painer*, para 132–34; CJEU, 3 September 2014, case C-201/13, *Deckmyn*, para 25–27
- 15 For a discussion of the fundamental rights dimension of these decisions, see C Geiger and E Izyumenko, 'The Constitutionalization of Intellectual Property Law in the EU and the *Funke Medien*, *Pelham* and *Spiegel Online* Decisions of the CJEU: Progress, but Still Some Way to Go!' (2020) 51 IIC 282 (292–98)
- 16 CJEU, 29 July 2019, case C-516/17, *Spiegel Online*, para 50–54; CJEU, 29 July 2019, case C-469/17, *Funke Medien NRW*, para 65–70
- 17 CJEU, 1 December 2011, case C-145/10, *Painer*, para 132; CJEU, 4 October 2011, cases C-403/08 and C-429/08, *Football Association Premier League/QC Leisure*, para 162–64
- 18 Council Directive 2001/29/EC of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167, 10
- 19 CJEU, 1 December 2011, case C-145/10, *Painer*, para 134
- 20 *Ibid* para 133
- 21 CJEU, 3 September 2014, case C-201/13, *Deckmyn*, para 23–26
- 22 CJEU, 11 September 2014, case C-117/13, *Technische Universität Darmstadt*, para 31–32; CJEU, 29 July 2019, case C-469/17, *Funke Medien NRW*, para 70–71
- 23 CJEU, 29 July 2019, case C-476/17, *Pelham*, para 32–34. Cf. S Kulk and P Teunissen, 'Naar een nieuw fundament – hoe het Handvest het auteursrecht hervormt (deel 2)' (2019) *Tijdschrift voor auteurs-, media- en informatierecht* 149 (155)
- 24 See also the precursor in CJEU, 4 October 2011, cases C-403/08 and C-429/08, *Football Association Premier League*, para 162–64
- 25 Cf. PB Hugenholtz, 'Fierce Creatures: Copyright Exemptions towards Extinction?' (1997) Keynote speech, *IFLA/IMPRIMATUR Conference “Rights, Limitations and Exceptions: Striking a Proper Balance”* (Institute for Information Law, 30–31 October 1997) 2–4 <<http://www.ivir.nl/publicaties/download/PBH-FierceCreatures.pdf>>
- 26 CJEU, 16 July 2009, case C-5/08, *Infopaq*, para 56–57
- 27 For instance, see MRF Senftleben, 'Quotations, Parody and Fair Use' in PB Hugenholtz, AA Quaedvlieg and DJG Visser (eds), *A Century of Dutch Copyright Law – Auteurswet 1912–2012* (deLex 2012) 359 (382)
- 28 CJEU, 29 July 2019, case C-476/17, *Pelham*, para 59
- 29 CJEU, *ibid* para 60. Cf. CJEU, 29 July 2019, case C-469/17, *Funke Medien NRW*, para 58
- 30 CJEU, 29 July 2019, case C-476/17, *Pelham*, para 56–57 and 65
- 31 *Ibid* para 22. Cf. German Federal Court of Justice, 16 April 2015, case I ZR 225/12, '*Goldrapper*', *GRUR* 2015, 1189 (1198); German Federal Court of Justice, 1 December 2010, case I ZR 12/08, '*Perlentaucher*', *GRUR* 2011, 134 (137–38); German Federal Court of Justice, 20 March 2003, case I ZR 117/00, '*Gies-Adler*', *GRUR* 2003, 956 (958). For a more detailed discussion of this German free adaptation rule, see L Bently and others, 'Sound Sampling, a Permitted Use Under EU Copyright Law?'

- Opinion of the European Copyright Society in Relation to the Pending Reference Before the CJEU in Case C-476/17, *Pelham GmbH v Hütter* (2019) 50 IIC 467 (486–87); RM Hilty and MRF Senftleben, ‘Rückschnitt durch Differenzierung? – Wege zur Reduktion dysfunktionaler Effekte des Urheberrechts auf Kreativ- und Angebotsmärkte’ in T Dreier and RM Hilty (eds), *Vom Magnettonband zu Social Media – Festschrift 50 Jahre Urheberrechtsgesetz (UrhG)* (C.H. Beck 2015) 317 (321–24); PB Hugenholtz and MRF Senftleben, *Fair Use in Europe. In Search of Flexibilities* (Institute for Information Law/VU Centre for Law and Governance 2011) 26–27; PE Geller, ‘A German Approach to Fair Use: Test Cases for TRIPs Criteria for Copyright Limitations?’ (2010) 57 Journal of the Copyright Society of the U.S.A. 901 (901)
- 32 CJEU, 29 July 2019, case C-476/17, *Pelham*, para 56–57 and 65
- 33 Ibid para 32–37
- 34 As to the discussion on internal and external balancing tools, see S Kulk and P Teunissen, ‘Naar een nieuw fundament – hoe het Handvest het auteursrecht hervormt (deel 1)’ (2019) *Tijdschrift voor auteurs-, media- en informatierecht* 121 (126–29); C Geiger, ‘“Constitutionalising” Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union’ (2006) 37 IIC 371 (371); D Voorhoof, ‘Freedom of Expression, Parody, Copyright and Trademarks’ in JC Ginsburg and JM Besek (eds), *Adjuncts and Alternatives to Copyright – Proceedings of the ALAI Congress June 13–17, 2001* (Kernochan Center for Law, Media and the Arts, Columbia University School of Law 2002) 636 (639–40); T Dreier, ‘Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?’ in RC Dreyfuss, D Leenheer-Zimmerman and H First (eds), *Expanding the Boundaries of Intellectual Property. Innovation Policy for the Knowledge Economy* (OUP 2001) 295
- 35 Senftleben, ‘The Unproductive Overconstitutionalization of EU Copyright and Trademark Law’ (n 12) 1482–83
- 36 CJEU, 29 July 2019, case C-476/17, *Pelham*, para 63
- 37 Senftleben, ‘The Unproductive Overconstitutionalization of EU Copyright and Trademark Law’ (n 12) 1504–6
- 38 CJEU, 29 July 2019, case C-476/17, *Pelham*, para 62
- 39 Cf. M Senftleben, ‘From Flexible Balancing Tool to Quasi-Constitutional Straitjacket – How the EU Cultivates the Constraining Function of the Three-Step Test’ in J Griffiths and T Mylly (eds), *Global Intellectual Property Protection and New Constitutionalism – Hedging Exclusive Rights* (OUP 2021) 83 (90–101); Jonathan Griffiths, ‘The “Three-Step Test” in European Copyright Law: Problems and Solutions’ (2009) 4 Intellectual Property Quarterly 489 (495); KJ Koelman, ‘De nationale driestappentoets’ (2003) *Tijdschrift voor auteurs-, media en informatierecht* 6 (8–9)
- 40 Cf. M Senftleben, ‘EU Copyright 20 Years after the InfoSoc Directive – Flexibility Needed More Than Ever’ in G Ghidini and Valeria Falce (eds), *Reforming Intellectual Property* (Edward Elgar 2022) 185 (194–95 and 199–200); Griffiths (n 39) 495; C Geiger, ‘The Three-Step Test, a Threat to a Balanced Copyright Law?’ (2006) 37 IIC 683 (683)
- 41 CJEU, 10 April 2014, case C-435/12, *ACI Adam*, para 26
- 42 Ibid para 27
- 43 Ibid para 26–27; CJEU, 29 July 2019, case C-476/17, *Pelham*, para 59–60 and 64. Cf. Senftleben, ‘From Flexible Balancing Tool to Quasi-Constitutional Straitjacket’ (n 39) 194–95 and 199–200
- 44 For a comparative analysis, see MRF Senftleben, ‘Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law’ in GB Dinwoodie (ed), *Methods and Perspectives in Intellectual Property* (Edward Elgar 2013) 30 (30–67). For a description of the results achieved in the United States on the basis of an open-ended fair use provision, see M Sag, ‘Predicting Fair Use’ (2012) 73 Ohio State Law Journal 47 (47); B Beebe, ‘An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005’

- (2008) 156 *University of Pennsylvania Law Review* 549 (549); P Samuelson, 'Unbundling Fair Uses' (2009) 77 *Fordham Law Review* 2537 (2537); P Samuelson, 'Possible Futures of Fair Use' (2015) 90 *Washington Law Review* 815 (815); P Jaszi, 'Quoting Copyrighted Sports Content under Fair Use After *Google v Oracle*' in MRF Senftleben and others (eds), *Intellectual Property and Sports – Essays in Honour of Bernt Hugenholtz* (Kluwer Law International 2021) 361 (361–71)
- 45 CJEU, 10 April 2014, case C-435/12, *ACI Adam*, para 26–27; CJEU, 29 July 2019, case C-476/17, *Pelham*, para 59–60 and 64
- 46 Senftleben, 'The Unproductive Overconstitutionalization of EU Copyright and Trademark Law' (n 12) 1489
- 47 Council Directive 2019/790 of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130, 92
- 48 Cf. C Geiger and E Izyumenko, 'Towards a European "Fair Use" Grounded in Freedom of Expression' (2019) 35 *American University International Law Review* 1 (13–23); MRF Senftleben, 'Bridging the Differences between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine' (2010) 57 *Journal of the Copyright Society of the U.S.A.* 521 (528–40)
- 49 Article 5(5) ISD; Article 7(2) CDSMD
- 50 Cf. MA Lemley and MP McKenna, 'Irrelevant Confusion' (2010) 62 *Stanford Law Review* 413 (418–22 and 443); I Calboli, 'Overlapping Trademark and Copyright Protection: A Call for Concern and Action' (2014) (1) *Illinois Law Review Slip Opinion* 25 (31)
- 51 MRF Senftleben, *The Copyright/Trademark Interface – How the Expansion of Trademark Protection Is Stifling Cultural Creativity* (Wolters Kluwer 2020) 135–38; E Izyumenko, *The Freedom of Expression Perspectives on Intellectual Property in Europe* (CEIPI 2020) 440–46; A Adler, 'Fair Use and the Future of Art' (2016) 91 *New York University Law Review* 559 (566); K Köklü and S Nérissou, 'How Public Is the Public Domain? The Perpetual Protection of Inventions, Designs and Works by Trademarks' in H Ullrich and others (eds), *TRIPS plus 20 – From Trade Rules to Market Principles* (Springer 2016) 561 (572); P Aufderheide and others, 'Copyright, Permissions, and Fair Use in the Visual Arts Communities: An Issues Report' (American University, 2014) <https://cmsimpact.org/wp-content/uploads/2016/01/fair_use_for_visual_arts_communities.pdf>, 5; GF Frosio, 'Rediscovering Cumulative Creativity from the Oral Formulaic Tradition to Digital Remix: Can I Get a Witness?' (2014) 13 *John Marshall Review of Intellectual Property Law* 341 (378–80); Calboli (n 50) 31–32; Lemley and McKenna (n 50) 418–22 and 443; DM Morrison, 'Bridgeport Redux: Digital Sampling and Audience Recoding' (2008) 19 *Fordham Intellectual Property, Media and Entertainment Law Journal* 75 (131–36); J Gibson, 'Risk Aversion and Rights Accretion in Intellectual Property Law' (2007) 116 *Yale Law Journal* 882 (913); JE Cohen, 'Copyright, Commodification, and Culture: Locating the Public Domain' in LMCR Guibault and PB Hugenholtz (eds), *The Future of the Public Domain – Identifying the Commons in Information Law* (Kluwer Law International 2006) 121 (154–56); P Aufderheide and P Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers* (American University 2004) 29–30; L Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin Press 2004) 185–88; RJ Coombe, 'Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property' (2003) 52 *DePaul Law Review* 1171 (1174); TM Amabile, *Creativity in Context* (Westview Press 1996) 115–20 and 231–32
- 52 Adler (n 51) 566
- 53 *Ibid*; Aufderheide and others (n 51) 5, pointing out that artists 'pay a high price for copyright confusion and misunderstanding. Their work is constrained and censored, most powerfully by themselves, because of that confusion and the resulting fear and anxiety.'

- 54 Senftleben, 'The Unproductive Overconstitutionalization of EU Copyright and Trademark Law' (n 12) 1492–93
- 55 Ibid 1506–7. Cf. Geiger and Izyumenko (n 48) 13–23; M Leistner, 'The German Federal Supreme Court's Judgment on Google's Image Search – A Topical Example of the "Limitations" of the European Approach to Exceptions and Limitations' (2012) 42 IIC 417 (417); LMCR Guibault, 'Why Cherry-Picking Never Leads to Harmonisation' (2010) 1 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 55 (55); Senftleben, 'Bridging the Differences between Copyright's Legal Traditions' (n 48) 528–29
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- 60 As to flexibility for upfront exclusions of exclusive rights at the international level (which has not been used in the EU), see MRF Senftleben, 'Compliance of National TDM Rules with International Copyright Law – An Overrated Nonissue?' (2022) 53 IIC 1477 (1483–98). Cf. S Ricketson and JC Ginsburg, *International Copyright and Neighbouring Rights – The Berne Convention and beyond* (2nd edn, OUP 2006) para 11.72; J Litman, 'The Exclusive Right to Read' (1994) 13 Cardozo Arts and Entertainment Law Journal 29 (39–42); JS Sheinblatt, 'The WIPO Copyright Treaty' (1998) 13 Berkeley Technology Law Journal 535 (541); P Samuelson, 'The U.S. Digital Agenda at WIPO' (1997) 37 Virginia Journal of International Law 369 (382–84 and 388–91)
- 61 For proposals to introduce an upfront gatekeeper requirement of use of a work "as a work" in this context, see C Craig, 'The AI-Copyright Challenge: Tech-Neutrality, Authorship, and the Public Interest' (All Papers: Osgoode Hall Law School of York University 360, 2022) <https://digitalcommons.osgoode.yorku.ca/all_papers/360>, 1 (26–27); Ducato and Strowel (n 59) 334; T Ueno, 'The Flexible Copyright Exception for "Non-Enjoyment" Purposes Recent Amendment in Japan and Its Implication' (2021) 70 Gewerblicher Rechtsschutz und Urheberrecht International 145 (150–51); Strowel (n 59) 226–28; M Borghi and S Karapapa, 'Non-display Uses of Copyright Works: Google Books and Beyond' (2011) 1 Queen Mary Journal of Intellectual Property 21 (44–45); C Geiger, G Frosio and O Bulayenko, 'Text and Data Mining: Articles 3 and 4 of the Directive 2019/790/EU' in *Centre for International Intellectual Property Studies Research Paper 2019/08* (CEIPI 2019) 31; T Margoni and M Kretschmer, 'A Deeper Look into the EU Text and Data Mining Exceptions: Harmonisation, Data Ownership, and the Future of Technology' in *CREATe Working Paper 2021/7* (CREATe Centre 2021) 10. As to flexibility at the international level for this approach, see Senftleben, 'Compliance of National TDM Rules with International Copyright Law' (n 60) 1483–501
- 62 Cf. CJEU, 4 October 2011, cases C-403/08 and C-429/08, *Football Association Premier League/QC Leisure*, para 162–79

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- 64 WIPO, *Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions – Geneva 1996*, WIPO Publication No. 348(E), vol 1 (WIPO 1999) 8
- 65 Ibid vol 1, 188, para 7.05. As to the preparatory work in expert committees, see Reinbothe and von Lewinski (n 63) para 7.1.31–7.1.36
- 66 Cf. Ricketson and Ginsburg (n 60) para 11.72, who point out that “implicit in the call for effective harmonization may be a recognition that the scope of the application of the reproduction right to digital media was not completely ‘obvious.’” As to the critique, see Litman (n 59) 39–42; Sheinblatt (n 60) 541
- 67 Reinbothe and von Lewinski (n 63) para 7.1.29; Samuelson (n 60) 388
- 68 WIPO (n 64) vol 2, 612, para 404
- 69 Ibid vol 2, 669, para 256
- 70 Ibid vol 2, 670, para 263
- 71 Ibid vol 2, 672, para 274
- 72 Ibid vol 1, 407, Document CRNR/DC/22. Cf. Samuelson (n 60) 389
- 73 Reinbothe and von Lewinski (n 63) para 7.1.29 and 7.1.46. For a more detailed discussion and critique of proposals to include temporary copying in the concept of reproduction, see Litman (n 59) 39–42; JH Spoor, ‘The Copyright Approach to Copying on the Internet: (Over)stretching the Reproduction Right’ in PB Hugenholtz (ed), *The Future of Copyright in a Digital Environment* (Kluwer Law International 1996) 67 (67)
- 74 WIPO (n 64) vol 2, 673, para 281
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- 80 Cf. Reinbothe and von Lewinski (n 63) para 7.1.29, who refer to “interpretative value” in the absence of the “status of an Article of the WCT.”
- 81 For a more detailed description of the circumstances leading to the adoption of the Agreed Statement at the Conference, see Samuelson (n 60) 390–91
- 82 WIPO (n 64) vol 1, 628, para 497. Cf. Reinbothe and von Lewinski (n 63) para 7.1.50; Samuelson (n 60) 390–91
- 83 For a more detailed discussion of use of the word “storage” in the Agreed Statement, see Ricketson and Ginsburg (n 60) para 11.75
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- 86 Cf. JH Spoor, DWF Verkade and DJG Visser, *Auteursrecht* (4th edn, Wolters Kluwer 2019) 208–10; JH Spoor, ‘*Verveelvoudigen*: Reproduction and Adaptation under the 1912 Copyright Act’ in PB Hugenholtz, AA Quaadvlieg and DJG Visser (eds), *A Century of Dutch Copyright Law – Auteurswet 1912–2012* (deLex 2012) 197 (204); PB Hugenholtz, ‘Caching and Copyright. The Right of Temporary Copying’ (2000) 11 *European Intellectual Property Review* 482 (490–93)
- 87 Spoor, Verkade and Visser (n 86) 210; Spoor (n 86) 204
- 88 Cf. CJEU, 4 October 2011, cases C-403/08 and C-429/08, *Football Association Premier League/QC Leisure*, para 181
- 89 Cf. Senfleben, ‘The Unproductive Overconstitutionalization of EU Copyright and Trademark Law’ (n 12) 1488–89
- 90 As to the anchorage of the right to research in the Charter, see Geiger and Jütte, ‘Conceptualizing a “Right to Research”’ (n 7) 1–86; Senfleben, ‘Study on EU Copyright and Related Rights’ (n 7) 12

- 91 European Commission Communication, 9 December 2015, *Towards a Modern, More European Copyright Framework*, COM(2015) 626 final, 7. For an analysis of the impact of the copyright framework on TDM research, see C Handke, L Guibault and J-J Vallbé, 'Is Europe Falling behind in Data Mining? Copyright's Impact on Data Mining in Academic Research' in B Schmidt and M Dobрева (eds), *New Avenues for Electronic Publishing in the Age of Infinite Collections and Citizen Science: Scale, Openness and Trust – Proceedings of the 19th International Conference on Electronic Publishing* (IOS 2015) 120
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- 105 Cf. Ducato and Strowel (n 59) 334; Strowel (n 59) 217–28
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- 113 Cf. literature references in the preceding footnote
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