A new era for EU copyright exceptions and limitations?

Judicial flexibility and legislative discretion in the aftermath of the Directive on Copyright in the Digital Single Market and the trio of the Grand Chamber of the European Court of Justice

Caterina Sganga*

Abstract For long neglected, copyright exceptions and limitations have recently been the subject of multiple interventions by the EU legislator and the European Court of Justice, some of these bringing about landmark changes to the approach, nature and interpretation of such provisions. Taking stock of the long road travelled in recent decades, this article systematises the results which have been achieved in the field and highlights the outstanding flaws and inconsistencies which mark the route forward in EU copyright harmonisation. To this end, it offers an overview of the evolution of exceptions and limitations in EU copyright law prior to the entry into force of the Directive on Copyright in the Digital Single Market (§2), analyses the interpretative problems solved, created and left behind by the European Court of Justice (§3), and looks at the policy debates and preparatory works that led to the Directive, highlighting which reform proposals were successfully adopted and which ones were abandoned over the years (§4). It then provides a brief analysis of the innovations introduced by the Directive and their impact on the state of the art of EU copyright exceptions and limitations (§5), linking it to the recent decisions of the Grand Chamber (§6.1) which draw new boundaries in the discretion and flexibility left to national legislators and courts in balancing conflicting rights and interests in copyright law (§6.2), and commenting on the strengths and weaknesses of the new framework.

Keywords EU copyright · Exceptions · Limitations · Fundamental rights · Copyright in the Digital Single Market Directive · CDSMD · CJEU · Harmonisation · *Funke Medien* · *Pelham* · *Spiegel Online* · Text and data mining · Digital preservation · Cross-border teaching

* Associate Professor of Comparative Private Law, Scuola Superiore Sant'Anna, Pisa, Italy. Email: c.sganga@santannapisa.it

1 Introduction

For long, the flaws and shortcomings in the balance between exclusivity, access, users' rights and the public interest in EU copyright law have prominently featured doctrinal and policy studies. Scholars have devoted much attention to the frictions caused by the limited adaptability of the closed and exhaustive list of exceptions as regards fast technological developments. They have repeatedly emphasised how the current system is unable to guarantee an adequate balance between copyright, conflicting fundamental rights and the public interest, due to its rigidity and the overridability of exceptions by contract.[1] Not less importantly, they have highlighted the negative impact of the optional nature and territoriality of exceptions and limitations on legal certainty, and the chilling effects of the internal market fragmentation that has ensued on cross-border uses and activities.[2] A related critique has focused on the confusion triggered by the vague definitions offered by the EU legislator, and by the unclear relationships between the definitions and qualifications offered by *leges generales* such as the InfoSoc Directive,[3] and those offered by *leges speciales* that have introduced new general exceptions, or exceptions limited to specific subject matters.[4]

Nothwistanding the profilic scholarly responses, the EU legislator has not given immediate priority to the matter. However, after years of focus on exclusive rights and their management and enforcement, copyright exceptions and limitations have slowly reached the centre stage. From 2008, a number of landmark cases of the Court of Justice of the European Union (CJEU) have focused on provisions concerning such issues. *Travaux préparatoires* testify to the important place they have attained in the public policy debate.[5] Most recently, several directives and

[1] The literature on the topic is extremely broad. *Ex multis*, see Geiger [9] p. 178; Guibault [14] p. 53; Hugenholtz-Senftleben [16] p. 9 *et seq*.; van Eechoud [32] pp. 298 *et seq*.

[2] See Guibault [14] 55-56.

[3] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmon-isation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10 [InfoSoc].

[4] M.van Eechoud [32] pp. 94 et seq.; Janssen, [19] pp. 331 et seq.

[5] For or a broader and contextual analysis, see Matthias Leistner [22] pp. 584 *et seq*.; Sganga [31] pp. 137 *et seq.*

~~regulations have been~~ enacted with the sole aim of harmonising specific exceptions and making their adoption mandatory across the EU. Then, in 2019 two major steps were made in the span of four months. First, the Directive on Copyright in the Digital Single Market (CDSM Directive)[6] introduced three new horizontal limitations, declaring them mandatory and not overridable by contract. Along the same lines, the Directive has transformed optional exceptions introduced by the InfoSoc Directive into mandatory provisions, albeit limiting them to the narrow field of automated content-filtering applied on user-generated content by online content-sharing platforms. The Grand Chamber of the European Court of Justice has also issued three milestone rulings (*Funke Medien*, *Pelham* and *Spiegel Online*) on the interplay between copyright and fundamental rights and the flexibility which fundamental rights allow national legislators and courts in the field of exceptions and limitations.[7] In light of these landmark changes, it may be useful to take stock of the long road travelled in recent decades, systematise the results achieved, and highlight outstanding flaws and inconsistencies that will characterise the way forward in EU copyright harmonisation. With this goal in mind, this article offers an overview of the evolution of exceptions and limitations in EU copyright law before the CDSM Directive (§2), analyses the interpretative problems solved, created and left behind by the Court of Justice (§3), and looks at the policy debates and preparatory works that led to the CDSM Directive, highlighting which reform proposals were successfully concluded and which ones were abandoned through the years (§4). Then, the paper provides a brief analysis of the innovations introduced by the Directive and their impact on the state of the art of EU copyright exceptions and limitations (§5), links this analysis to the recent Grand Chamber decisions (§6.1) to draw new boundaries in the discretion and flexibility left to national legislators and courts in setting the copyright balance (§6.2), and comments on the strengths and weaknesses of the new framework.

[6] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/125 [CDSMD].

[7] Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] EU:C:2019:623; case C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] EU:C:2019:624; case C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] EU:C:2019:625.

2 The art of quilting: exceptions and limitations in EU copyright law before the CDSM Directive

The story of exceptions in EU copyright law has long been that of a patchwork of *ad hoc* responses to contingent policy needs, and optional lists of limitations remitted to the discretion of national legislators.

Early communications by the Commission focused on the opportunity to harmonise exclusive rights and enforcement measures to fight piracy and ensure the correct functioning of the internal market.[8] Their texts offer little by way of evidence to enable us to retrace the legislative intent and rationale inspiring the approach adopted by the first two vertical Directives – the Software Directive (91/50/EEC)[9] and the Database Directive (96/9/EEC)[10] - which provided special harmonised exceptions to the newly introduced rights. Except for one instance – uses necessary for running the software by a lawful acquirer (Article 3.1) - the Software Directive opted for mandatory limitations, not overridable by contracts, authorising decompilation for interoperability purposes (Article 6), study and testing to determine ideas and principles underlying elements of the programme (Article 5.3) and the making of a backup copy (Article 5.2). With a quite different approach, the Database Directive introduced only three optional exceptions to copyright, limited by the three-step test - private copy; illustration for teaching and research; and use for the purposes of public security, administrative or judicial procedure (Article 6) - leaving national legislators free to expand the list with other limitations taken from their general copyright laws. The new *sui generis* right, created by the Directive and unprecedented in national laws, was also subject to three optional exceptions, in favour of private extraction in the case of non-electronic databases; extraction

[8] To mention but one example, the most prominent preparatory document in early EU copyright law, the Commission Communication *Green Paper on Copyright and the Challenges of New Technologies* (COM (1988) 172, 1.6.1988) devotes its almost 250 pages to piracy, audiovisual home copying exhaustion and rental rights, software and databases.

[9] *E.g.*, Council Directive 91/250/EEC on the legal protection of computer programs [1991] OJ L122/42 [Software I].

[10] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protec-tion of databases [1996] OJ L 77/20 [Database].

for teaching and research; and extraction for the purposes of public securities, administrative or judicial procedures (Article 9).

The Commission maintained the same approach with the InfoSoc Directive. Unable to find any convergence between Member States, the EU legislator opted to adopt a unified list of mandatory exceptions (temporary reproduction; transient or incidental; internal and essential part of a technological process (Article 5.1)) – and twenty optional exceptions, listed in Article 5.2 and divided between limitations to the right of reproduction and limitations to the right of reproduction and the right of communication to the public. The decision was justified by the willingness to pre-serve national cultural diversities and legal traditions, leaving enough discretion to Member States to introduce the derogatory provisions they deemed the most fitting to their social, cultural and economic needs and features.[11] Recital 32 of the InfoSoc Directive, however, made it explicit that the list of Article 5 of the Directive had to be considered exhaustive, while Article 5(5) of the Directive clarified that the national implementation of exceptions had to comply with the three-step test. National legislators, in fact, had a much narrower margin of appreciation to determine their copyright policies than the optional nature of Article 5 of the InfoSoc Directive suggested. At the same time, the optional nature of exceptions was coupled with their free overridability by contract, and the favourable approach towards private ordering emerged also in the delegation to rightholders' voluntary measures (or, in the absence of these, to Member States) of the task to adopt measures to ensure that technological measures of protection do not hinder the exercise of specific exceptions. While exclusive rights were subject to maximum harmonisation, exceptions were harmonised only to the extent necessary to the smooth functioning of the internal market (Recital 31 of the InfoSoc Directive), with the result of a quilt of national solutions and definitions, later restricted by recurrent limiting interventions by the European Court of Justice.[12]

[11] As indicated by Recital 32 InfoSoc ("the list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market").

[12] The principle of strict reading of exceptions, drawn from general EU law, was first reinstated explicitly by Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] EU:C:2009:465, para 59.

The Rental and Lending Directive did not depart from the optional-style approach followed until this point by the Commission, either in its original version (92/100/EEC) or in its recast version (2006/115/EC).[13] The introduction of the public lending exception was left to Member States' discretion, as was the decision on the exemption from remuneration for certain categories of works.[14] Analogously, national legislators could decide whether or not to introduce specific limitations to related rights – private use, ephemeral fixation by broadcasting organisations, use of short excerpts for news reporting, teaching and research - always subject to the three-step test.[15]

More recent Directives show, instead, the signs of ongoing reflection on the part of the EU legislator regarding the negative effects that are engendered by the territoriality, fragmentation and rigidity of exceptions both on the market for protected works, and on copyright balance. In the Orphan Works Directive (2012/28/EU),[16] the exception to the right of reproduction and the right of making available to the public under Articles 2 and 3 of the InfoSoc Directive is purposefully made mandatory in order to prevent obstacles to the functioning of the internal market and the unrestricted use and cross-border access to orphan works (Recital 8). In addition, a common approach to the determination of the orphan work status and on permitted uses is deemed fundamental to ensure the legal certainty needed by cultural heritage institutions in order to safely engage in the digitisation and making available of such works, and thus perform their public interest function (Recital 9). The same approach features in the Marrakesh Directive (2017/1564/EU), in compliance with the interna-tional obligation undertaken by the EU as a signatory of the Marrakesh Treaty, which requires contracting parties to implement in their legal system an exception to permit authorised entities to reproduce, distribute and make available protected works in

[13] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right [1992] OJ L 346/61 [Rental I]; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376/28 [Rental II].

[14] Rental II Directive, Article 6(1) and (2).

[15] Rental II Directive, Article 10.

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

formats accessible for visually impaired individuals.[17] Marking a step forward compared to the Treaty, however, the Directive declares the overridability by contract of the provision, reducing the risk of fragmentation and legal uncertainty which would be entailed in leaving discretionary power to private arrangement.[18]

The result of this normative output is a quilt of provisions that are partly mandatory, partly optional, partly "horizontal" and applicable to every protected work, partly "vertical" and applicable only in specific fields, partly overridable by contract and partly not. The consequences of such a fragmentation are manifold. First of all, the territoriality of exceptions has created both a high degree of legal uncertainty and a chilling effect on cross-border activities. Secondly, the degree of harmonisation has long remained unclear, and so has the margin of discretion left to Member States. Thirdly, the weak coordination of sources of law having a different scope has resulted in a lack of general principles and, frequently, in the use of different language, definitions and concepts. Lastly, the strict reading of exceptions, the additional filter imposed by the three-step test and the exhaustive nature of the general list in Article 5 of the InfoSoc Directive have straitjacketed the system into rigidities that have resulted in it not being adaptive to the new challenges to copyright balance triggered by the advent of new technologies.

Scholars have proposed different solutions to such shortcomings, ranging from the enactment of a EU copyright code[19] to the use of fundamental rights and other flexibilities inherent to the EU copyright system[20] to overcome its rigidities. Some commentators have identified the three-step test as a gateway to introduce a fair use clause that could increase the plasticity of the copyright balance.[21] Others have

[17] Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled [2017] OJ L 242/6 [Marrakesh Directive].

[18] Marrakesh Directive, Article 3(5).

[19] Wittem Group, European Copyright Code (2010), available at http://www.copyrightcode.eu (accessed 13 May 2020). See Hugenholtz [17] pp. 339-354.

[20] As in Griffiths [12] p. 65. See also Geiger [8] p. 371; Husovec [18] p. 262; Mylly [25] p. 119; Hugenholtz-Senftleben [16] p. 13

[21] See Hugenholtz-Senftleben [16] p. 18; Griffiths [11] p. 277; Geiger-Hilty-Griffiths-Suthersanen [5] p. 119; Geiger-Gervais-Senfleben [4] p. 581; Lucas [23] p. 281.

argued that standardising exceptions across the EU by making them mandatory and non-overridable by contract would help tackling the most pressing problems raised by the InfoSoc Directive and its progeny.[22] Despite the vivid debate, however, the EU legislator has long remained silent on the issue, leaving ample room for the European Court of Justice to intervene and fill the gaps.

3 Exceptions and the Court of Justice: problems solved, problems created, problems left behind

As a consequence of the legislative quilt, the vague and broad definitions offered by EU Directives, the lack of coordination among sources, and the uncertain degree of harmonisation and flexibility left to Member States, since 2001 the number of questions raised by national courts on the interpretation of exceptions have been substantial. This has given ample room for the European Court of Justice to engage in prolific activism and rampant judge-made harmonisation of the field.[23]

With its interventions, the Court have tackled and solved several problems triggered by the flaws in the EU legislative harmonisation. Yet some of its decisions have generated further inconsistencies and paved the way to additional questions, while other problems have been left largely unsolved. Getting a glimpse of the state of the art of the case law of the European Court of Justice may assist in understanding the background on which the *travaux préparatoires* and consultations preceding the reform of the CDSM Directive reform took place, in defining the boundaries and degree of EU copyright harmonisation, and in highlighting the problematic areas still requiring clarification.

In the period that ran from the InfoSoc Directive to the CDSM Directive, the European Court of Justice mostly ruled on matters related to Article 5 of the InfoSoc Directive, with few references to the exceptions provided for in other Directives. The great majority of decisions can be grouped in five homogeneous categories: interventions on (i) general interpretative principles; (ii) the notion of

[22] As in Geiger-Schoherr [7] p. 136; Janssen [19] p. 327; Guibault [13] p. 115.

[23] For a systematic analysis, see Leistner [22] pp. 584 et seq. The harmonisation goals of the European Court of Justice are particularly emphasised by Griffiths [12] p. 65.

temporary reproduction under Article 5(1) of the InfoSoc Directive; (iii) the notion of fair compensation for private copying under Article 5(2)(d) of the InfoSoc Directive; (iv) the scope and implications of the three-step-test (under Article 5(5) of the InfoSoc Directive); and the possibility of providing an extensive reading of exceptions when necessary to ensure a fair balance between copyright and conflicting fundamental rights.

3.1 Problems solved

The European Court of Justice has undoubtedly contributed to an increase in the level of legal certainty and systematic consistency of EU copyright law on several fronts.

A first group of cases concerns instances where the Court has engaged in clarification of the scope and borders of specific exceptions. In the context of the exception for temporary reproductions (under Article 5(1) of the InfoSoc Directive), for example, the European Court of Justice has specified that the storage and deletion of the copy should be automated and not dependent on discretionary human intervention.[24] Then, in order to avoid distortive side-effects, it has excluded the relevance of the latter in the activation or termination of an automated process, thus also covering, under Article 5(1) of the InfoSoc Directive, on-screen and cached copies, particularly in the light of the key importance of caches for the correct functioning of the architecture of the internet.[25]

Along the same lines, the Court has intervened to provide guidelines for the interpretation of the notion of "fair" compensation in case of private copy exception, qualified as an autonomous concept of EU law[26] that needs a consistent and harmonised determination in order to comply with the InfoSoc Directive's objective of ensuring a functioning internal market.[27] The Court of Justice used a contextual and teleological interpretation of the InfoSoc preamble to define as fair

[24] *Infopaq*, paras 55, 61.

[25] Case C-360/13 *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others* [2014] EU:C:2014:1195.

[26] Case C-467/08 *Padawan v SGAE* [2010] ECR I-10055, para 33.

[27] Id., paras 35-36.

compensation an amount that makes good the harm suffered by the author as a consequence of the private copy.[28] At the same time, the Court considered fair and thus allowed under Article 5(2)(a) a private levy system that imposes on producers of reproduction equipment the payment of fair compensation for private copies potentially executable through their devices, in the light of the fact that the activity of producers represents a factual precondition of the private copy, that they may still pass the cost on to users by proportionally increasing the purchasing price, and that a single harm may be minimal and the cost of enforcement too high to make an individual collection effective.[29] With several decisions in the following years, the European Court of Justice highlighted that Member States have full discretion on the definition of the features and mechanisms of their private levy systems,[30] but specified the notion of fairness by applying it to different national schemes, formulating *ad hoc* principles characterised by a high degree of factual specificity and no general applicability. In this context, the Court ruled out the admissibility of a scheme that financed compensation from the general state budget, for it indirectly imposed the levy on all taxpayers without guaranteeing that the costs of fair compensation were borne only by natural persons who could potentially make private copies of protected works.[31] Similarly, it required national laws to distinguish between lawful and unlawful sources of private copies, imposing levies only on the former;[32] it admitted the possibility of splitting proportionally the levy on different products that were used in a chain of devices;[33] it excluded the possibility that the rightholder's authorisation of reproduction has a bearing on the fair compensation owed;[34] and it accepted a scheme where half of funds collected from levies were directed to social and cultural institutions set up for the benefit of those entitled to compensation, attributing to Member States the discretion to

[28] Id., paras 40-41.

[29] Id., paras 46-49.

[30] Case C-463/12 *Copydan Båndkopi v Nokia Danmark* [2012] OJ C399/13-14, para 26.

[31] Case C-470/14 *EGEDA and Others v AMETIC* [2016] EU:C:2016:418, para 41.

[32] Case C-435/12 *ACI Adam and Others v Stichting de Thuiskopie* [2014] EU:C:2014:254, paras 29 *et seq*.

[33] Joined cases C-457-458-459-460/11 *VG Wort v Kyocera and Others* [2013] EU:C:2013:426, para 78 (but should not be different from the amount obtained if a single device was involved).

[34] Id., para 40.

provide indirect compensation.[35] According to the Court, a private levy system is fair – *i.e.*, it ensures a fair balance between conflicting interests[36] - if it excludes compensation in case of minimal prejudice,[37] is non-discriminatory *vis-à-vis* economic operators,[38] and pro-vides an effective, publicised, and simple reimbursement system in favour of legal persons or natural persons using the device in a professional capacity.[39]

In sketching the frontiers of exceptions and interpreting their main concepts, the European Court of Justice made extensive use of the teleological method of interpretation, looking at the objectives of EU harmonisation and at the functions of EU copyright law identified in the Directives. The same principles guided the definition of the margin of discretion left to Member States when implementing exceptions harmonised at EU level. While stating that such provisions must be interpreted and applied strictly,[40] particularly in the light of the high level of protection to be granted to exclusive rights according to Recital 9 of the InfoSoc Directive, the Court adopted a teleological approach and argued that the strict reading of exceptions should not prejudice their effectiveness, but should permit the fulfillment of their purpose.[41] This general principle inspired subsequent readjustments of existing norms, allowing for greater flexibility in their implementation and a broadening by analogy of their scope to forms of conduct that were not formally covered but pose the same balancing needs or constitute a prerequisite for the functioning of the exception. The latter was the case in *Ulmer* (C-117/13),[42] where the Court of Justice stretched the provision that allows libraries to make available works on their terminals (under Article 5(3)(n) of the InfoSoc Directive) in order to grant them also the possibility of digitally reproducing their

[35] Case C-462/09 *Amazon.com v Austro-Mechana* [2013] EU:C:2013:515, para 49.

[36] Id., para 34.

[37] *Copydan Båndkopi*, paras 27-28.

[38] Id., para 33.

[39] *Amazon.com*, paras 35-37; along the same lines see *Copydan Båndkopi*, para 55.

[40] *Infopaq*, paras 56-57.

[41] Joined Cases C-403/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and C-429/08 Karen Murphy v Media Protection Services Ltd (FAPL)* [2011] ECR I-09083, para 163.

[42] Case C-117/13 *Technische Universität Darmstadt v Eugen Ulmer KG* [2014] EU:C:2014:2196.

collections when digitisation was necessary to exercise the exception.[43] The European Court of Justice excluded that this possibility could be ruled out by rightholders' offer to conclude licensing agreements on digitised copies, since this would mean subordinating the fulfillment of the purpose of the exception (""*to promote the public interest in promoting research and private study, through the dissemination of knowledge"*) to unilateral discretionary action on the part of copyright owners.[44] Along the same lines, in *Vereniging Openbare Bibliotheken* (*VOB*),[45] the Court extended the public lending exception under Article 6(1) of the Rental Directive to cover e-books as well, arguing that in light of new technological and economic developments,[46] the effectiveness of the provision and its purpose of contributing to cultural promotion would have been frustrated if its application were to be limited only to material copies.[47]

The most innovative interventions, however, came in the field of fundamental rights. Soon after the debut of the principle of fair balance as an interpretative tool in the arsenal of the Court of Justice of the European Union, marked by the judgment in *Promusicae* in the field of ISP injunctions,[48] the Court was faced with the difficult question of whether and to what extent fundamental rights could influence the interpretation of exceptions, impacting on their nature and scope. The European Court of Justice resolved some of the uncertainties in *Painer*, where it ruled that the need to respect fundamental rights – in this case the freedom of press – could not by itself justify the application of an exception meant to protect public security. In other words, only the protection of the specific fundamental right

[43] Id., para §57, provided that digitisation did not make it possible to print or store on USB devices works so digitised, in order to strike a correct balance between the fulfillment of the scope of the exception and the need to provide a high level of protection of rightholders' exclusive rights.

[44] Id., paras 27-28.

[45] Case C-174/15, *Vereniging Openbare Bibliotheken v Stichting Leenrecht* [2016] EU:C:2016:856.

[46] The Court cited Recital 4 of the Rental Directive in support, which requires that copyright law is interpreted so to adapt to new economic developments (Id ., para 45)

[47] Id., paras 50-53. The European Court of Justice supported this teleological conclusion with a careful consideration of literal arguments. In fact, the limitation to tangible copies operated by Article 7 of the WIPO Copyright Treaty and its Agreed Statement with regard to rental and distribution rights is deemed not applicable to lending, and is not explicitly mentioned in the WIPO (id., paras 33-34)

[48] Case C-275/06 *Promusicae v Telefonica de Espana* [2008] ECR I-271, para 68.

representing the purpose of the exception could be used to stretch the borders of the provision if necessary in order to fulfill its functions.[49] This represented one of the sporadic instances where the Court shed some light on its fair balance doctrine and the impact of fundamental rights on the reading of exceptions, until the Grand Chamber's trio of decisions in July 2019 (see *infra*, Sect. 6). In this area, Court of Justice case law, in fact, contributed to the creation of many more interpretative problems than those it contributed to the solution of.

3.2 Problems created

Deckmyn[50] is, in this sense, a paradigmatic case in point. The case concerned the possibility of classifying as a parody a drawing, published by a calendar edited by the plaintiff, which used the main character of a comic book – the mockery of a benefactor – to criticise the Mayor of Ghent. The European Court of Justice stated that the notion of parody should be understood as an autonomous concept of EU law, to be interpreted uniformly across the Union.[51] In addition, it required Article 5(3)(k) of the InfoSoc Directive to be implemented in a manner that ensures that a fair balance between copyright and freedom of expression is preserved, particularly by avoiding the imposition of criteria that are more restrictive than those deriving from the commonly accepted characteristics of parody.[52] The link between freedom of expression and parody resulted in a more pervasive harmonisation of the content of the excep-tion and in the implicit transformation of an optional provision into a mandatory rule. Member States, in fact, could avoid implementing Article 5(3)(k) of the InfoSoc Directive only if they could prove that they otherwise guaranteed the fair balance between copyright and freedom of expression struck by the parody exception.[53] The European Court of Justice, however, also added that the exercise of parody should not violate the principle of non-discrimination, thus implicitly

[49] Case C-145/10 *Eva-Maria Painer v Standard Verlags GmbH and Others* [2011] ECR I-12533, para 116.

[50] Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* [2014] EU:C:2014:2132,

[51] Id., para 15.

[52] Id., para 25.

[53] As underlined by the European Copyright Society [2] p. 130.

suggesting that the protection of fundamental rights may also require the judicial disapplication of national exceptions.[54]

By using the concept of fair balance between copyright and fundamental rights as one of the main criteria to define the scope of exceptions, their optional or mandatory nature and even their ultimate judicial applicability without providing clear guidelines for the balancing exercise, the Court contributed to increase the degree of uncertainty and fragmentation already intrinsic in the structure of Article 5 of the InfoSoc Directive. The same effect was triggered by the interpretation if offered of Article 5(5) of the InfoSoc Directive and its three-step-test. In *ACI Adam* and its progeny, the European Court of Justice rejected the idea that the test could be used as a fair use clause or as a tool to affect or extend the substantive content of exceptions under Article 5 of the InfoSoc Directive.[55] To the contrary, Article 5(5) of the InfoSoc Directive should be understood as requiring courts to consider the impact of the exception on the normal exploitation of a work and the rightholder's legitimate interests, and to decide in favour of its disapplication or limitation when the circumstances of the case caused the exception to alter the balance required by the three-step test.[56] Such an approach, criticised for its dubious compatibility with the fair balance doctrine and the need to ensure an adequate protection to fundamental rights,[57] introduced yet another element of legal uncertainty into the operation of EU copyright exceptions, remitting the ultimate decision on their application to the discretion of national courts, again with no guidelines reducing the risk of conflicting and fragmented outcomes.

Legal uncertainty is also likely to be the outcome of *Deckmyn*'s introduction of the notion of autonomous concept of EU law within the context of Article 5 of the InfoSoc Directive, which claims for the European Court of Justice the power of advancing the level of harmonisation provided for by the InfoSoc Directive *via* the standardisation of general definitions. This is the case regardless of whether or not national exceptions covered by EU law either preexisted or were implemented after

[54] Similarly see Griffiths [10] pp. 154-155.

[55] *ACI Adam*, para 26.

[56] Id., para 27.

[57] See, e.g., among the most recent contributions, Senftleben [29], 1 *et seq*.

the intervention of the EU legislator. As long as it cannot be foreseen how far the European Court of Justice may go in identifying autonomous concepts - thus reducing the degree of flexibility and discretion left to Member States in defining the content and scope of exceptions - national courts remain without guidance as to the broadness of their margin of appreciation, with obvious consequences for certainty and consistency in the judicial development of EU copyright law.

3.3 Problems left behind

Despite the large number of cases ruling on exceptions and limitations, several ques-tions triggered by the evolution of European Court of Justice's case law have been left unsolved.

The first open question concerns the nature of exceptions under Article 5 of the InfoSoc Directive. On the basis of the arguments developed in *Deckmyn*, in fact, it was reasonable to conclude that any exception protecting a fundamental right that conflicted with copyright should have been deemed mandatory, despite Recital 31 of the InfoSoc Directive specifying that Article 5(2)-(4) of the InfoSoc Directive are provisions the implementation of which is optional. Whether the process of balancing fairly copyright and fundamental rights could transform an optional exception into a norm of mandatory application remained a question left behind by the European Court of Justice and which was latent in doctrinal contributions and national court decisions.

Deckmyn came in line with a number of decisions that seemed to suggest that fundamental rights could have had the power to justify the introduction of judge-made solutions to the balancing problems triggered by copyright law or the technological evolution, beyond the borders set by law.[58] Carrying the consequence of the Court's argument forward, scholars underlined how the constitutionalisation of EU copyright law through the fair balance doctrine could have led to overcome the exhaustive nature of the list of exceptions provided by Article 5 of the InfoSoc Directive, dictated by Recital 32 of the InfoSoc Directive.[59] This conclusion contrasted with other principles similarly set by the European Court of Justice,

[58] The most relevant ones being *Ulmer* and *VOB*. On the point see Rosati [28] p. 511.

[59] As in Geiger-Izyumenko [6] pp. 1 *et seq.*

ranging from the strict interpretation of exceptions and their conditions (*Infopaq*, §§56-56) – albeit balanced with their purpose-oriented reading (*FAPL*, §163) - to the requirement that Member States comply with general principles of EU law, including proportionality and the three-step test, when exercising their discretion in implementing exceptions (*Painer*, §105). However, despite the contrasting precedents and the unclear compatibility with the legislative text, the Court has long avoided undertaking the task of defining the boundaries of the horizontal effects of fundamental rights in EU copyright law.[60]

The field of exceptions has not been immune either from questions triggered by the unclear relationship between the InfoSoc Directive as *lex generalis* and directives regulating narrower sectors. In fact, the few cases concerning exceptions other than those listed by Article 5 of the InfoSoc Directive make abundant use of the *lex specialis* argument to circumscribe the scope of its decisions to the sector-specific directive involved in the case, in order to avoid the creation of precedents that could challenge the outcome of a literal interpretation of the InfoSoc Directive or the WIPO Copyright Treaty (WCT). A telling example is *VOB*, where the Court emphasised the *lex specialis* nature of the Rental Directive and the absence of the lending right within the WCT to justify the extension of the public lending exception to e-books, despite the Agreed Statement to Articles 6 WCT concerning the rights of rental and distribution limits the scope of the latter to tangible copies.[61] While this approach is theoretically respectful of the role of the legislator in taking decisions concerning policy and eventually correcting flaws and gaps in the legislative texts, it has not helped smoothening the harshest inconsistencies of EU copyright law, nor has it assisted Member States in dealing with them and in understanding the space left to them to exercise their discretion.

The most pertinent problem the European Court of Justice has left behind, however, is the clarification of some of the basic elements of the fair balance doctrine. Ten years of decisions, from *Promusicae* on, have drawn a scattered conceptual map for performing the balance between copyright and fundamental rights, articulated around three steps, where after (a) identifying the right or freedom conflicting with

[60] Id., p.44.

[61] *VOB*, para 36.

copyright; and (b) identifying its connection with the specific provision or injunction at stake in the case; the Court proceeds with (c) verifying the fairness of the balance, assessed on the basis of criteria that have recently converged on the test drawn by Article 52(1) of the EU Charter of Fundamental Rights.[62] Along these lines, the European Court of Justice first verifies whether the contested measure negatively affects the essence of the freedom or right involved, since such a violation excludes *per se* the presence of a fair balance. If the essence is not prejudiced, the Court applies a proportionality test that is differently framed depending on the sector analysed.[63] While in the more developed sector of Internet Service Provider injunctions the test is structured around the full range of criteria under Article 52 of the Charter (a legitimate aim, appropriateness, necessity and strict proportionality), the assessment of the fair balance used to define the scope of rights and exceptions is much less articulated, and is spelled out in detail only in few cases, with the majority of decisions providing only cursory and concise references.[64] The evaluation of the legitimate aim and appropriateness of the measure is absorbed within the essence check, which focuses not on the preservation of the core of the fundamental right(s) involved but on the preservation of the effectiveness of the exclusive right or the exception. This is followed by a relatively cursory evaluation of the necessity and strict proportionality of their restriction for the protection of the conflicting right or freedom.[65]

Notwithstanding the fact that recent decisions have provided more guidelines for national courts, the fair balance doctrine has remained underdeveloped, with several important gaps left uncovered. The Court, in fact, has never attempted to define the essence of copyright under Article 17(2) CFREU,[66] and has only vaguely identified its specific subject matter, that is the core of the economic and moral

[62] I analyse the matter in more details in Sganga [30] p. 683.

[63] More generally, see Kosta [21] pp. 61 *et seq.*

[64] For further references see Sganga [30], p.694.

[65] Ibid.

[66] The debate on the role of the notion of essence in the fundamental right balance under the CFREU has become particularly intense in recent years. On the point see Brkan [1] p. 337. The Court suggested that a fair balance is excluded if such a core is violated, as in other fields of EU law. See also Ojanen [26] p. 318.

rights to be balanced against other fundamental rights and freedoms.[67] It has for long failed to clarify the interplay between sources in construing the content of conflicting rights, in particular regarding the role of the ECHR, and the possibility of complementing the interpretation of the Charter's fundamental rights with common constitutional traditions[68] (as has been done in the case of the right to property[69]). And while the fair balance doctrine has remained hazy, the scope of its potential impact on the judicial development of EU copyright law beyond the borders set by legislative sources has been similarly blurred.

This was the framework that the EU legislator was confronted with when evaluating the impact of the InfoSoc Directive and engaging in policy discussions on exceptions and on the focus, content and nature that they should have had in the next stages of copyright harmonisation.

4 Towards the CDSM Directive: the drowned and the saved

The first time the EU Commission reflected on the state of the art of exceptions in EU copyright law was on the occasion of the Green Paper *Copyright in the Knowledge Economy* (2008).[70] Building on a review of the Single Market,[71] which emphasised the need to foster the free movement of knowledge and innovation as

[67] Precedents from other fields have indicated the need to avoid taking as metrics the maximum potential remuneration possible. See clearly in *FAPL* at para 94; Case C-62/79, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others* [1980] ECR 881, paras 15-16; Joined Cases 55/80 and 57/80 *Musik-Vertrieb Membran and K-tel International v GEMA* [1981] ECR 147, paras 9, 12; Joined Cases C-92/92 and C-326/92, *Phil Collins v Imtrat Handelsgesellschaft mbH e Patricia Im-und Export. Verwaltungsgesellschaft mbH e Leif Emanuel Kraul v EMI Electrola GmbH* [1993] ECR I-05145, para 20; Case C-115/02 *Rioglass and Transremar* [2003] ECR I-12705, para 23; Case C-222/07 *UTECA* [2009] ECR I-1407, para 25.

[68] As in Case C-601/15, *N* . [2016] EU:C:2016:84, §§45-46 and Joined Cases C-217/15 and C-350/15 *Orsi and Baldetti* [2017] EU:C:2017:264, para 15.

[69] See, *e.g.*, Case C-44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727; Case C-4/73 *Nold v. Commission* [1974] ECR 491.

[70] Green Paper *Copyright in the Knowledge Economy* COM (2008) 466 final, 16 July 2008.

[71] Communication *A Single Market for 21st Century Europe*", COM (2007) 724 final, 20 November 2007.

a fifth fundamental freedom,[72] the Green Paper focused on the impact of the InfoSoc Directive on the dissemination of research, science and educational materials. More specifically, it asked whether an exhaustive list of non-mandatory exceptions such as the one proposed by Article 5 of the InfoSoc Directive could be considered adequate to perform its role, in light of evolving internet technologies and socio-economic expectations.[73] Parallel to this, the document identified four exceptions as being both the most relevant for the dissemination of knowledge and as being still missing, and called for stakeholders' views. The Commission called for a blanket exception for the digitisation of libraries' and archives' collections and their subsequently being made available;[74] a broader exception to increase access and accessibility for people with disabilities;[75] a standardised, mandatory exception allowing the online dissemination of works for study and research purposes;[76] and an exception to cover user-generated content.[77]

Years later, the Commission launched a public consultation on the modernisation of EU copyright rules (2013)[78] which, among several other questions it raised, again requested stakeholders and the general public to provide feedback on the problems raised by the optional nature, lack of flexibility and territoriality of exceptions and limitations.[79] At the same time, it tabled the possibility of revising existing exceptions or introducing new ones in response to emerging needs. The focus was on access to library collections (preservation and archiving, off-premises access, e-lending, mass digitisation), distant learning, research, disabilities, text and data mining, user-generated content and the scope of the private copying and

[72] Green Paper *Copyright in the Knowledge Economy* (n 70) p. 2.

[73] Id., pp. 5-6.

[74] Id., pp. 7-11.

[75] Id., pp.13-15.

[76] Id., pp.16-18.

[77] Id., pp.19-20.

[78] Commission, *Public Consultation on the Review of the EU Copyright Rules*, not accessible online (removed).

[79] Questions 21-23 (current legal framework), questions 24-25 (flexibility) and questions 26-27 (territoriality).

reprography exceptions.[80] The report on responses (2014)[81] highlighted, as had been foreseeable, diverging perceptions and positions among stakeholders. Right-holders opposed further harmonisation, flexibility and the transformation of exceptions in mandatory rules, while institutional users and end-users, flanked by the general public and in some instances by intermediaries, advocated for the opposite perspective. Similar opposing views characterised views on the presence of shortcomings or needs that would justify the introduction of new exceptions or the amendment of existing ones.[82]

In the first policy paper following the consultation – the Communication *A Digital Single Market Strategy for Europe -*[83] the Commission linked the modernisation of the European copyright framework to the goal of providing better access to digital content, which is considered one of the main drivers of the growth of the digital economy.[84] Together with portability, cross-border access and regulation of intermediaries, the Commission highlighted the need to harmonise specific exceptions, with the aim of achieving greater legal certainty for the cross-border use of protected materials for specific purposes, such as research, education, text and data mining,[85] the latter being particularly important for its impact on innovation in AI and the data economy. In the Communication that followed – *Towards a modern, more European copyright framework* -,[86] the Commission specified the policy interventions needed to proceed with the modernisation of EU copyright rules to meet the goals of the Digital Single Market strategy. It highlighted the need to adapt exceptions to digital and cross-border environments, emphasising the problems created by the optional nature of current exceptions, by

[80] Questions 28-31 (preservation an archiving), questions 32-35 (off-premises access to library collections), questions 36-39 (e-lending), questions 40-41 (mass digitisation), questions 42-46 (distant learning), questions 47-49 (research), questions 50-52 (disabilities), questions 53-57 (text and data mining), questions 58-63 (user-generated content), questions 64-71 (scope of private copying and reprography exception).

[81] Commission, 'Report on the responses to the Public Consultation on the Review of the EU Copyright Rules', not accessible online (removed).

[82] Id., p.22.

[83] COM (2015) 192 final, 6 May 2015,

[84] Id., p.6.

[85] Id., p.7.

[86] COM (2015) 626 final, 9 December 2015.

their vague definitions, and by the national fragmentation that ensued.[87] It then argued that this situation posed problems particularly for exceptions related to education, research, access to knowledge and the preservation of cultural heritage in the digital age. On this basis, it restricted the scope of the upcoming legislative intervention to a handful of matters, ranging from the implementation of the Marrakesh Treaty on the disability exception to the introduction of exceptions relating to text and data mining for research purposes, to the digitisation of and remote access to libraries' collections, to illustration for (online) teaching, and to freedom of panorama.[88]

This long path culminated with the Communication *Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market*[89] (2016), published to introduce the proposal of a Directive on Copyright in the Digital Single Market[90]and the related impact assessment.[91] The newly-proposed exceptions were made mandatory in order to avoid legal uncertainty in cross-border digital uses of protected works, while maintaining a high level of protection of rights, and limited to illustration for digital teaching, the digital preservation of libraries' collections and to text and data mining. Some outstanding matters such as the facilitation of the remote consultation of works for research were postponed for further assessment, while others were crossed out from the list, such as the panorama exception, in the belief that Member States already enjoyed sufficient margin of manoeuvre to lay this down and that several of them had already done so.[92]

---

[87] Id., p.6.

[88] Id., pp. 7-8.

[89] COM (2016) 592 final, 14 September 2016.

[90] *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*, COM (2016) 593, 14 September 2016.

[91] Commission, *Impact Assessment on the modernisation of EU copyright rules*, SWD(2016) 301 final, 82.

[92] Communication *Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market*, pp. 6-7. The decision was backed by the results of the public consultation on the role of publishers in the copyright value chain and on the 'panorama exception', held by the Commission from March to September 2016, the responses to which are available at https://ec.europa.eu/digital-single-market/en/news/synopsis-reports-and-contributions-public-consultation-role-publishers-copyright-value-chain (last accessed 13 May 2020).

Ten years of consultations and policy debates led to the emergence of a wide array of flaws in the field of exceptions. Only a few of these managed to remain under the EC spotlight and be made the subject of a legislative intervention, while others – from e-lending to digital exhaustion,[93] user-generated content and remote access to digital collections - were abandoned, with no sign that they will be considered again in the future. Most importantly, however, the Commission decided not to face the general problems raised by the territoriality, optional nature and limited flexibility of existing EU copyright exceptions. It only used the lessons derived from past mistakes in order to change its approach to the harmonisation process, introducing between the lines the principle that exceptions having inevitable and substantial cross-border effects must be made mandatory and be well defined in order to avoid the shortcomings of copyright territoriality. This is, in fact, the underlying thread linking the exceptions introduced in the CDSM Directive.

5 Copyright exceptions in the CDSM Directive

The CDMSD introduces three new horizontal exceptions to copyright, which are declared mandatory and not overridable by contract to ensure the smooth functioning of the Digital Single market and to ensure legal certainty in cross-border settings.[94] Articles 3 to 6 of the CDSM Directive provide exceptions or limitations for text and data mining, for digital and cross-border teaching activities and for the preservation of cultural heritage, amending the InfoSoc and Database Directives. In line with previous legislative acts, the new derogating measures are said to have the goal of achieving a fair balance between the rights and interests of

[93] Addressed by the Grand Chamber of the Court of Justice in case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* [2019] EU:C:2019:1111.

[94] CDSM Directive, Recital 5. The existing exceptions and limitations in Union law should continue to apply, including to text and data mining, education, and preservation activities, as long as they do not limit the scope of the mandatory exceptions or limitations provided for in this Directive, which need to be implemented by Member States in their national law. Directives 96/9/EC and 2001/29/EC should, therefore, be amended.

authors, other rightholders and users, and to be limited in their application by the three-step test.[95]

The highly debated text and data mining exception were introduced in response to the alleged insufficiency of existing limitations to cover all forms of conducts involved in the wide array of existing text and data mining (TDM) technologies,[96] and to apply also against terms of licence that would otherwise exclude such uses. Their introduction answers to the need to preserve the Union's competitiveness as a research hub in the era of data science, where digital technologies have progressively assumed a key role in public and private research.[97]

Leaving unprejudiced existing provisions which have already found application for TDM activities, such as the mandatory exception of temporary reproduction under Article 5(1) of the InfoSoc Directive,[98] the CDSM Directive introduces two TDM-related provisions. The first one, devoted to TDM for the purpose of scientific research, requires Member States to introduce an exception in favour of research organisations and cultural heritage institutions for reproductions and extractions of protected works and databases to which they have lawful access. Recital 14 of the CDSM Directive specifies that an access is lawful if the content is acquired *via* open access, licences and subscriptions, and free online availability. In line with EU re-search policies, the exception is meant to cover also research activities carried out in the context of public-private partnership.[99] At the same time, the definition of research organisations and cultural heritage institutions is carefully circumscribed so as to reach a common understanding across the Union, in the light of their great diversity.[100] Additional safeguards include the possibility for

[95] CDSM Directive, Recital 6.

[96] CDSM Directive, Recital 7.

[97] CDSM Directive, Recital 10.

[98] CDSM Directive, Recital 9, which refers to TDM techniques that do not require making copies beyond the scope of the exception.

[99] CDSM Directive, Recital 12.

[100] 100 Ibid., referring to universities, other higher education institutions and their libraries, and other entities such as research institutes and hospitals that carry out research. The list is deemed exemplificative, but the different entities must share their not-for-profit nature and public-interest mission, the latter one being reflected, e.g., through public funding or recognition in laws and public contracts. The definition does not cover entities where commercial undertakings exercise decisive

rightholders to apply strictly necessary measures to ensure the security and integrity of networks and databases, and a duty for beneficiaries of the exception to store the copies if an appropriate level of security is provided. Member States are left free to decide, upon discussions with stakeholders, on the conditions and arrangements necessary for beneficiaries to be able to retain copies of extracted materials for research purposes.[101] No discretion is allowed, however, on whether to provide fair compensation for rightholders, since the nature and scope of the exception are said to cause minimal harm to rightholders' interests.[102] Along the same lines, Article 4 of the CDSM Directive provides a general, all-purpose text and data mining exception which, unlike Article 3, can operate only if TDM has not been expressly reserved by rightholders in an appropriate manner.

Before and after the enactment of the CDSM Directive several scholars engaged in an intense debate on the policy options available for the EU legislator in regulating text and data mining technologies.[103] A number of their observations were taken into account and reflected in the legislative text, leading to a clearer legal framework through more detailed definitions, the mandatory nature of the exceptions, and the non-overridability by contract of Article 3 of the Directive. This will likely lead to a homogeneous decrease in the economic burden suffered by research institutions. Yet, a number of issues have remained unsolved, such as the missed opportunity to provide special treatment for SMEs, while the difficult demarcation between Articles 3 and 4 of the Directive is destined to trigger regulatory fragmentation in the big data economy, with all the systematic consequences that may ensue from this. This option, although it brings standardisation and thus legal certainty in cross-border activities, fails to take sufficient account of the substantial differences in the research environment of the various Member States, depriving some ecosystems of the benefits of a well-

influence or control. Recital 13 covers publicly accessible libraries, museums, archives, audiovisual heritage institutions, and similar facilities of educational establishments, research organisations and public sector broadcasting organisations.

[101] CDSM Directive, Recital 15. Uses for peer review, joint research and the like remain covered by the exception of Article 5(3)(a) InfoSoc.

[102] CDSM Directive, Recital 17.

103 See, *e.g.*, Geiger-Frosio-Bulayenko [3] p. 814; Hilty-Sutterer [15]; Margoni-Kretschmer [24].

functioning TDM exception.[104] At the same time, some risk of fragmentation of national solutions may arise from the fact that Article 3(4) of the CDSM Directive remits to Member States the task of encouraging stakeholders to define commonly-agreed best practices on the application of obligations and measures on the security and integrity of networks and copy retention.

The second mandatory exception introduced by the CDSM Directive allows the digital use of protected works for the sole purpose of illustration for teaching, to the extent justified by its non-commercial purpose. Article 5 of the Directive conditionalises the enjoyment of the exception to the indication of the source of the materials used, and to the fact that the use takes place under the responsibility of an educational establishment or through a secure electronic environment open only to the establishments' students and teaching staff. Although the exception is mandatory, Member States are free to decide whether to exclude its application for specific uses or types of works (to the extent that suitable licences are easily available and visible in an appropriate manner on the market), and whether to require the payment of fair compensation.[105] In order to overcome the negative effects of the national regulatory fragmentation that may follow, Article 5 of the Directive introduces a place-of-origin rule, providing that the use of protected works for the sole purpose of teaching shall be deemed to occur solely in the Member State where the educational establishment is located.

The new provision undoubtedly has the merit of solving uncertainties in the cross-border offering of digital courses and degrees, tackling the fragmentation and narrow scope of national solutions with a blanket provision. Yet, the margin of appreciation left to Member States may trigger a legislative race to the bottom in sensitive matters such as the provision of fair compensation,[106] the definition of the extent to which a work can be used and the definition of the notion of secured electronic environment, the favouring of licence solutions above the exception, and

[104] Similarly, see Rosati [27] p. 429.

[105] CDSM Directive, Article 5(2), and Recital 23 (licences) and 24 (fair compensation).

[106] To avoid tilting the fair balance, however, Recital 24 CDSMD requires Member States to set the level of fair compensation by taking into due account national educational objectives and the harm to rightholders, and encourage the use of systems that do not create an administrative burden for educational establishments.

the qualification of the "adequacy", "availability" and "visibility" of licensing options.[107] In addition, the broad discretion attributed to national legislators does not solve the unclear relationship between Article 5 CDSMD and the plethora of different national teaching exceptions introduced under Article 5 of the InfoSoc Directive, leaving the problem for the European Court of Justice to decide in the years to come.

The third and last exception introduced by the CDSM Directive allows a cultural heritage institution to make copies of protected materials that are permanently in their collections, in whatever format or medium, for the purposes of and to the extent necessary to their preservation. The provision, mandatory and not overridable by contract, comes as a welcome step to crystallise the *Ulmer* decision into a binding norm, eliminating national differences in the transposition of Articles 5(2)(c) and 5(3)(n) of the InfoSoc Directive. This promises to lay the groundwork for better cooperation among institutions, to enhance interoperability and facilitate the development of common standards, and to reduce transaction costs for licensing when needed, while allowing cultural heritage institutions to directly manage preservation projects by abating some of their costs. At the same time, the Directive does not provide a clear definition of cultural heritage institutions, creating grounds for uncertainty regarding the applicability of *lex specialis* definitions such as those offered by the Orphan Works Directive.[108] Member State discretion is reduced by the decision of the EU legislator to limit the exception solely to the purposes of digitisation, while it remains unclear the extent to which Recital 27, by stating that "acts of reproduction (. . .) for purposes other than the preservation of works (. . .) should remain subject to the authorisation of rightholders, unless permitted by other exceptions or limitations provided for in Union law", may limit the flexibility

[107] In fact, Recital 23 of the CDSM Directive specifies only that these goals can be reached by basing such schemes on collective licensing or extended collective licensing and that, in order to guarantee legal certainty, Member States should specify under which conditions an educational establishment can enjoy the exception or should obtain a license.

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

left to national legislators by the *Ulmer* decision with regard to Article 5 of the InfoSoc Directive.

The Directive also makes provision regarding optional InfoSoc exceptions – quotation, criticism, review, caricature, parody and pastiche[109]- requiring Member States to make them mandatory in favour of users uploading and making content available on online-sharing service providers, in the context of the implementation by the latter of content-filtering technologies (see Article 17(7) and Recital 70 of the Directive). While the decision is in line with the overall approach adopted by the Directive *vis-à-vis* exceptions, and it follows the interpretation the European Court of Justice offered in *Deckmyn*, where the protection of freedom of expression justifies harmonising and implicitly conceptualising as mandatory the parody exception, it undoubtedly creates a hiatus with the optional nature of the list of exceptions provided under Article 5 of the InfoSoc Directive, where quotation, criticism, review, caricature, parody find their general regulation. It remains to be clarified whether the attribution of a mandatory nature to specific exceptions, motivated by the need to ensure the uniform protection of users' fundamental rights across the Union, should and will support similar considerations and effects on exceptions under Article 5 of the InfoSoc Directive lying beyond the scope of Article 17 of the CDSM Directive.

6 Fundamental rights and flexibility in copyright exceptions: keeping the floodgates shut? The Grand Chamber's decisions in *Funke Medien, Pelham* and *Spiegel Online*

While the EU legislator persisted in its inertia, responding only to selected pressing problems and offering marginal hints on the approach to be undertaken in order to solve the hiatus created by highly harmonised exclusive rights operating against fragmented territorial exceptions, the European Court of Justice again got the opportunity to push forward the harmonisation of EU copyright exceptions with three contemporary referrals by the *Bundesgerichtshof – Funke Medien, Pelham*

[109] InfoSoc Directive, Article 5(3)(d) (quotation for criticism or review); Article 5(3)(k) (parody, caricature, pastiche).

and *Spiegel Online*.[110] The three decisions, issued separately on the same day by the Grand Chamber, pronounced on the degree of flexibility and discretion left to Member States and their courts in the field of exceptions. With a grand opening of a new boundary-setting season in European Court of Justice case law, *Funke Medien, Pelham* and *Spiegel Online* clarified two controversial points left unsolved by the Court's precedents in the field, namely (i) the extent to which fundamental rights under the EU Charter of Fundamental Rights should be taken into account when defining the scope of exceptions and limitation, and (ii) whether they might justify the judicial introduction of exceptions beyond the scope of Article 5 of the InfoSoc Directive.[111]

6.1 The facts and AG Szpunar's Opinions

In *Funke Medien* the plaintiff, owner of the website of a German newspaper (*Westdeutsche Allgemeine Zeitung*), filed an administrative request for access to classified military reports to members of the federal Parliament and government on matters concerning the deployments of Federal Armed Forces. The request was rejected, but Funke Medien still obtained the documents from an undisclosed source and published them online. The Federal Republic of Germany applied for an injunction to force the removal of the papers on grounds of copyright infringement. The request was granted by the first instance court, rejected on appeal, and the subsequent appeal before the *Bundesgerichthof* produced the reference to the European Court of Justice. *Pelham* was a by-product of a long judicial saga where Mr Hutter, the leader of the band *Kraftwerk*, sued Mr Pelham for having infringed their reproduction right in the song "*Metall auf Metall*" (1977) and related rights of reproduction and distribution of the phonogram by using two seconds of it in a loop in the defendant's hip-hop song "*Nur mir*" (1997). When also the BGH rejected Mr Pelham's argument that his sampling was exempted from copyright infringement since it constituted an exercise of the right to free use (§24 UrhG), which allows uses of protected works to create new in-dependent works, he claimed before the *Bundesverfassungsgericht* (BVerfG, Federal Constitutional

[110] Supra, note 7.

[111] *Funke Medien*, para 15; *Pelham*, para 25; *Spiegel Online*, para 15.

Court) that the restrictive interpretation of the exception violated his freedom of creative expression. Upholding the claim, the BVerfG sent the case back to the BHG, originating the second referral to the European Court of Justice.[112]

Spiegel Online revolved around the scope of the quotation exception and the balance between copyright and freedom of press. In 1988 Mr Beck, a German politician, published, under a pseudonym a manuscript on criminal policy relating to sexual of-fences against minors, which had the title changed and some sentences shortened by the publisher without his consent and despite his objections. The manuscript was used against him during the 2013 parliamentary election campaign. To defend himself, Beck provided several newspapers with the original manuscript to prove that the criticised parts were caused by the amendments made by the publisher uploading it on his website. Spiegel Online published an article confuting Beck's statements, and to back its claims it provided a hyperlink to the original version of his contribution. Mr Beck had his claim of copyright infringement upheld at first instance and on ap-peal. Spiegel Online appealed again in front of the BGH, which referred the case to the European Court of Justice.[113]

AG Szpunar's long and articulated Opinions all featured a strict approach towards the question of the degree of flexibility fundamental rights could introduce within the copyright system.

In *Funke Medien* the Advocate General excluded the possibility that the questions raised by the *Bundesgerichtshof* could be addressed with a general answer, arguing that this would cause either extreme rigidity or result in excessive judicial

[112] Along with the questions in common with *Funke Medien* and *Spiegel Online*, specific points in *Pelham* were whether the reproduction right under Article 2(c) InfoSoc and Article 9(1)(b) of the Rental II Directive covered also very short audio snatches of another phonogram; whether §24 UrhG on free uses, not included in the list of exceptions of Article 5 InfoSoc, could be considered compatible with EU law; and whether the quotation exception under Article 5(3)(d) could be applied in cases where it was not evident that another person's work or subject matter was being used.

[113] Aside from the points raised also in *Funke Medien* and *Pelham*, in *Spiegel Online* the BGH requested clarification (i) on the applicability of the quotation exception (Article 5(3)(d) InfoSoc) in case of hyper-linking to an independent file, with no integration of the quoted text into the new text; (ii) on whether the notion of "lawfully made available to the public" under the same provision requires the author's consent; and (iii) on whether the fact that it was possible and reasonable for Spiegel Online to obtain Beck's consent hindered the application of the exception on reporting of current events under Article 5(3)(c).

discretion.[114] He favoured, instead, a case-by-case approach, which allowed a correct application of the proportionality principle in a balancing exercise.[115] His starting assumption was that copyright already features instruments that allow balancing with fundamental rights, and which are presumed to be sufficient to achieve it "unless a question of validity of those provisions come into play".[116] Among these tools, exceptions are conceived to strike this balance while preserving the substance of authors' rights,[117] and can be defined as internal limits to copyright.[118] Fundamental rights, instead, are external limits to copyright, intervening to constrain authors' rights every time the enforcement of copyright rules would lead to their violation.[119] This may happen only in exceptional cases, since a systematic conflict between a fundamental right and a copyright rule would suggest the invalidity of the latter.[120] In no case, however, could this lead to the development of a general doctrine allowing the introduction of exceptions beyond the borders set by the legislature to protect fundamental rights. In fact - the Court states - "it is one thing to give precedence to freedom of expression over copyright in a specific and very particular situation. It is quite another to introduce into the harmonised copyright system, outside the provisions of substantive EU law governing that area, exceptions and limitations which, by their nature, are intended to apply generally".[121]

Along these lines, in *Pelham* the AG avoided using fundamental rights to rule on the applicability of the three exceptions of Article 5 of the InfoSoc Directive involved in the case – *de minimis* reproduction, quotation and parody – instead

[114] Opinion in *Funke Medien*, para 29.

[115] Id., para 31.

[116] Id., para 30.

[117] Id., para 37.

[118] Id., para 40.

[119] Id. ara 41.

[120] Ibid. AG Szpunar underlined how this was also the opinion of the ECtHR in *Ashby Donald and Others v. France* (2013) ECHR 287, and in *Fredrik Neij and Peter Sunde Kolmisoppi v. Sweden* IHRL 2038 (ECHR 2013).

[121] *Id.*, para 71. This sentence seems to lay the foundations for the position that AG Szpunar would adopt in the following two Opinions in *Pelham* and *Spiegel Online*, balancing the opening towards a broader use of fundamental rights in EU copyright law which some authoritative scholars have read behind the words of the Opinion in *Funke Medien* (Geiger- Izyumenko [6] p. 46).

providing a strict literal and systematic reading of legislative sources.[122] The Opinion ruled out the possibility of introducing new exceptions beyond the list provided by the InfoSoc Directive,[123] and took the opportunity to define the boundaries of Member States' and judicial discretion in going beyond the boundaries set by EU copyright law using the fundamental rights argument. Building on the *Melloni* doctrine,[124] it argued that under Article 53 CFREU Member States could apply their constitutional standards of protection of fundamental rights to assess the validity of measures implementing EU law only if the primacy, unity and effectiveness of the latter remained preserved.[125] According to the Advocate General, in the context of EU copyright law, national discretion is limited by the autonomous concepts of EU law contained in the InfoSoc Directive, by the boundaries set by Article 5 of the InfoSoc Directive and, in line with *Deckmyn*, by the obligation to implement specific exceptions in order to ensure a fair balance between copyright and EU fundamental rights.[126] Such obligations cannot be circumvented by using national constitutional standards,[127] and for this reason, the approach followed by the German Constitutional Court should be understood as contrary to EU law.[128] More generally, the Opinion emphasised that the balance between rights and freedoms is a task for the legislature,[129] subject to judicial controls "within the limits of the applicable provisions enjoying a presumption of validity, including with regard to fundamental rights".[130] In this sense, the role of fundamental rights within EU copyright law can only be that of

[122] Opinion in *Pelham*, paras 67, 70 on quotation and caricature, parody of pastiche.

[123] Id., para 54.

[124] Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] EU:C:2013:107.

[125] Id., para 63. The question raised by the *Bundesgerichtshof* built on the BVerfG doctrine that requests assessing the constitutional legitimacy of national measures implementing EU Directives under the CFREU only if the legislator did not have any discretion, and under the German Constitution when a margin of appreciation was instead present. Id., para 72.

[126] Id., paras 76-77.

[127] Id., para 78.

[128] Id., paras 81-82, 89. For a critique see Jutte-Quintais [20] p. 654.

[129] See particularly at paras 94-95, where the AG refers to the ECtHR's doctrine in *Ashby Donald* (n 122).

[130] Id., para 94.

"a sort of *ultima ratio* which cannot justify departing from the wording of the relevant provisions except in cases of *gross violation of the*[*ir*] *essence*".[131]

The Opinion in *Spiegel Online* reiterated the same principles, excluding the idea that Article 167(4) TFEU on the protection and promotion of cultural diversity in the Union could broaden the discretion of Member States in implementing EU copyright directives.[132] In addition, it took the opportunity to reject the proposal, advanced by some scholars, of construing an open-ended balancing clause based on Article 11 of the EU Charter of Fundamental Rights (freedom of expression),[133] arguing that this would prejudice EU harmonisation by leaving too much discretion to national courts,[134] while the balance between fundamental rights – all deserving equal protection – was ultimately to be set by the legislature.[135]

6.2 The Grand Chamber's decisions

The three cases were decided by the Grand Chamber (rapporteur: Judge Ilesic) on the same day (29 July 2019). Their approach to the questions raised by the referring court was more balanced than the positions adopted by the Advocate General's Opinions, and offered important answers concerning the most controversial aspects of the interplay between fundamental rights and copyright as this had been construed up to that point by the case law of the Court of Justice.

In contrast to exclusive rights, which are fully harmonised by the InfoSoc Directive,[136] the European Court of Justice believes that the language used by Articles 5(2) and (3) of the InfoSoc Directive, coupled with the *travaux préparatoires*, clearly shows that the extent of the discretion left to Member States in regulating exceptions depends on the impact of the degree of harmonisation on

[131] Id., para 98 (emphasis added)

[132] See the Advocate General's Opinion in *Spiegel Online*, para 23, which rejects also the argument accord-ing to which the importance attributed to freedom of expression constituted a German cultural specificity.

[133] Most recently Geiger-Izyumenko [6] p. 1 *et seq*.

[134] See the Advocate General's Opinion in *Spiegel Online*, para 63.

[135] Id., para 70.

[136] *Funke Medien*, paras 29-38; *Pelham*, paras 78-85.

the smooth functioning of the internal market.[137] In any case, in implementing these provisions national legislators must abide by general principles of EU law (*e.g.*, proportionality), by the conditions set by Article 5 of the InfoSoc Directive, by the three-step-test, by the need to respect the goal of the Directive and to safeguard the effectiveness, purpose and fair balance of the exception, and by the Charter of Fundamental Rights.[138] The European Court of Justice confirmed the application of the *Melloni* doctrine, allowing national authorities and courts to apply national standards of protection of fundamental rights only if this does not result in lowering the degree of protection offered by the Charter and does not prejudice the primacy, unity and effectiveness of EU law.[139]

The interplay between exceptions and fundamental rights is depicted as a mechanism featuring different nuances. The exhaustive nature of the list provided by Article 5 of the InfoSoc Directive, the need to apply exceptions consistently across the EU, and to preserve legal certainty and the functioning of the internal market led the European Court of Justice to exclude the possibility of using fundamental rights to introduce exceptions beyond the scope of the InfoSoc provision.[140] However, for the Court the fact that the fair balance was chiefly set by the legislator and generally achieved by Article 5(2) and (3) of the InfoSoc Directive did not imply,[141] as it had for the AG, the need to opt for a strict literal reading of the Directive other than in cases of gross violation of the essence of a fundamental right. Confirming, instead, the principles laid down from *Promusicae* on,[142] the European Court of Justice underlined that Article 17(2) of the Charter attributes neither an absolute nor inviolable status to copyright,[143] and that national courts must ensure that the effectiveness of exceptions is safeguarded, providing

[137] *Funke Medien*, paras 39-44; *Spiegel Online*, paras 23-38.

[138] *Funke Medien*, paras 45-53; *Spiegel Online*, paras 31-38.

[139] *Funke Medien*, paras 30, 32; *Pelham*, paras 78, 80; *Spiegel Online*, paras 19, 21.

[140] *Funke Medien*, paras 56-63; *Pelham*, paras 58-64; *Spiegel Online*, paras 41-48.

[141] *Funke Medien*, para 58; *Pelham*, para 59; *Spiegel Online*, para 43.

[142] *Funke Medien*, para 68; *Spiegel Online*, para 52.

[143] *Funke Medien*, para 72; *Pelham*, para 33; *Spiegel Online*, para 56.

also extensive interpretations when these are needed, particularly when the protection of fundamental rights and freedoms is at stake.[144]

The Court followed the same principle to define the scope of exceptions, in line with *Deckmyn*. In *Spiegel Online* it excluded the possibility that the exception of reproduction for the purpose of reporting current events (under Article 5(3)(c) of the InfoSoc Directive) could be subject to the author's prior consent, arguing that the imposition of such a requirement would hinder the fulfillment of the provision's goal of fast dissemination of information among the general public, thus frustrating the exercise of freedom of expression and of the press.[145] Analogously, in *Pelham* it used the notion of fair balance to define the content of exclusive rights, excluding the possibility that a 2-second sample could entail a partial reproduction under Article 2 of the InfoSoc Directive,[146] since sampling is a form of artistic expression covered by freedom of the arts (Article 13 CFREU and 10(1) ECHR),[147] which does not prejudice a producer's investments and capability to achieve a satisfactory return if embedded in another song in a modified form unrecognisable to the ear.[148] Looking at the function of copyright, the Court excluded that rightholders could prevent such an activity, since this would hinder the exercise of a fundamental right "despite the fact that such sampling would not interfere with the opportunity which the producer has of realising satisfactory returns on his or her investment".[149]

6.3 Taking stocks and looking ahead

The Grand Chamber's reasoning provided useful hints on several matters. It made a first attempt to define the sources for the definition of content and scope of freedoms and rights involved in the copyright balance, stretching the list beyond the Charter and the European Convention on Human Rights to Member States'

[144] *Funke Medien*, para 71; *Spiegel Online*, para 55.

[145] *Spiegel Online*, paras 71-73.

[146] *Pelham*, para 33.

[147] Id., para 35.

[148] Id., para 37. The same reference to the functions of the right features the definition of the scope of Article 9 Rental, based on Recitals 2 and 5, which justifies the attribution of a distribution right to phonogram producers with the need to fight piracy and grant them the possibility to recoup their risky investment (paras 44-46).

[149] Id., para 38.

common constitutional traditions and international human rights instruments. At the same time, it returned to the functions of copyright to identify the core content of exclusive rights to be taken into account when performing the strict proportionality assessment. How-ever, the most significant contribution *Funke Medien, Pelham* and *Spiegel Online* brought to the development of EU copyright law was the reordering of the case law of the Court of Justice in the field of exceptions, and the clarification of the room for manoeuvre left for Member States and courts to shape copyright limitations through the instrument of fundamental rights.

The boundaries of *Drittwirkung* in EU copyright law have been redesigned by taking stock holistically of the most important precedents in the field. Rather than favouring the legislative *status quo*, as suggested by the Advocate General's Opinions, the Grand Chamber reiterated the need to depart from a strict reading of limitations to maintain their effectiveness, particularly when directed to protect fundamental rights. And while it clearly excluded the idea that fundamental rights could justify the judi-cial introduction of new exceptions beyond the legislative text, the Court confirmed the flexibility left to courts by stating that Article 5 of the InfoSoc Directive attributed rights to users, and not mere defences.

The room left to national legislators and courts to adapt exceptions to their social, economic and cultural needs, and to interpret them in light of their own standard of protection and the hierarchy of fundamental rights has also been subject to a full restatement.

In contrast to exclusive rights, copyright limitations are not fully harmonised. Their degree of harmonisation depends on the impact their fragmentation may have on the internal market. The discretion left to Member States is limited by the boundaries of Article 5 of the InfoSoc Directive – the three-step test included – in addition to the goals of the directive, the wide array of general principles of EU law, and the need to preserve the effectiveness and purpose of each exception.[150] In addition, and in line with *Deckmyn*, the Court reiterated that the decision on the implementation of optional exceptions and the definition of their scope should also

[150] *Funke Medien*, paras 45-53; *Spiegel Online*, para 31-38.

align with fundamental rights protection. This entails a further reduction of the margin of appreciation left for national legislators, for an exception may become implicitly mandatory if no other measure could reasonably be implemented to avoid copyright protection violating or disproportionately compressing a given fundamental right.

The direction taken by the European Court of Justice is in line with and complementary to the approach adopted by the EU legislator in the past years which culminated in the CDSM Directive, and is directed to a greater harmonisation of exceptions for reasons of preservation of the functioning of the internal market and protection of fundamental rights. The Orphan Works Directive, the Marrakesh Directive and the CDSM Directive justify the mandatory nature of the exceptions they introduce on this two-fold basis. The CDSM Directive, however, takes a step for-ward by declaring mandatory exceptions that are merely optional under Article 5 of the InfoSoc Directive, albeit only in favour of users uploading content on content-sharing online platforms, grounding the regulatory option on the need to ensure the uniform protection of fundamental rights in the implementation of content-filtering technologies. The policy choice, in line with *Deckmyn*, traces a path that once again intertwines with the European Court of Justice's indications. The implications are yet to unfold, but the signs of convergence and greater harmonisation featuring the most recent interventions two years carry the promise of a more ordered, clearer and comprehensive development of the EU copyright exceptions system than has been the case throughout most of the three decades of EU copyright history.

7 Conclusions

The harmonisation of EU copyright exceptions has for long been characterised by substantial flaws and pitfalls. Their lack of flexibility has often triggered shortcomings in the copyright balance. Legal certainty and cross-border exchanges have been frustrated by territoriality, fragmentation of national solutions caused by the optional nature of most of the limitations introduced by EU directives, and weak coordination of definitions and concepts across *leges generales* and *leges speciales*.

The phenomenon has attracted the attention of scholars, activists and a proportion of the stakeholders, but has not been tackled by the EU legislator until recent times. From 2008 on, however, exceptions have prominently featured in the case law of the Euro-pean Court of Justice, and have gained space in the policy debate, becoming the main object of key preparatory works and, more recently, of two pieces of legislation – the Orphan Works Directive and the Marrakesh Directive. In 2019, the CDSM Directive introduced three new horizontal limitations, declaring them mandatory and not over-ridable by contract. At the same time, the Directive attributed a mandatory nature to a number of optional exceptions under Article 5 of the InfoSoc Directive, in order to protect users' fundamental rights – and particularly freedom of expression – against the implementation of content-filtering technologies by online content-sharing platforms. A few months later, the Grand Chamber of the Court of Justice issued three decisions on the same day on the impact which fundamental rights may and should have on the scope and interpretation of exceptions, and on the possibility of stretching this beyond the boundaries set by EU law. The three rulings redefined the room left to national legislators and courts to adapt exceptions to their social, economic and cultural needs, confirming the *Melloni* doctrine and its application in the field of EU copyright law. At the same time, they confirmed the lessons taught by numerous European Court of Justice precedents on copyright limitations, from *Promusicae* to *FAPL*, *Ulmer*, *VOB* and *Deckmyn*, consolidating the link between the Court's case law and the legislative approach to the nature of exceptions and the implications of their connections to fundamental rights.

The European Court of Justice has not completely released EU copyright exceptions from the rigidity of exhaustive lists, confirming the need to respect the boundaries set by legislative acts. However, it has reiterated that their application cannot be straitjacketed by strict interpretations if this runs counter to the preservation of their effectiveness, and that their scope can and should be extended when necessary to protect fundamental rights and freedoms. The protection of fundamental rights may also justify the transformation of optional exceptions into mandatory provisions having a minimum common content across the Union. While the position adopted by the Court and confirmed by the CDSM Directive has reduced the margin of discretion left to national legislators, it has increased legal

certainty and the degree of flexibility of EU copyright law. Several shortcomings remain unaddressed, such as the general territoriality of exceptions and their fragmented regulation, scattered as they are across uneven and loosely connected sources. This fragmentation is particularly challenging when it results in the lack of a uniform definition of concepts across sources. At the same time, a number of problematic issues which emerged during public consultations and preparatory works have been left unsolved, while the approach advanced in the CDSM Directive is destined to trigger additional questions. It needs to be clarified, for instance, what the relationship between mandatory and optional exceptions should be when their scope, concepts and definitions overlap; what the role of the three-step-test *vis-à-vis* mandatory exceptions should be; and whether the *Deckmyn* doctrine can operate as it is *vis-à-vis* mandatory exceptions – requiring also the disapplication of an exception should this be needed to protect a fundamental right.

The road towards an EU copyright code which could finally tackle most of these challenges is still long, and the European Court of Justice will be surely called to intervene repeatedly on such matters. Yet, the steps recently made towards a more consistent, certain and balanced system of exceptions have been remarkable, and bode well for what the future of EU copyright harmonisation may hold.

References

1. Brkan, M.: The concept of essence of fundamental rights in the EU legal order: peeling the onion to its core. Electron. Commer. Law Rep. **2**, 332 (2018)
2. Copyright, E.: Society: opinion on the judgment of the CJEU in Case C-201/13 Deckmyn. Eur. Intellect. Prop. Rev. **37**(3), 127 (2015)
3. Geiger, C., Frosio G., Bulayenko, O.: Text and data mining in the proposed copyright reform: making the EU ready for an age of big data? Int. Instrum. Controls **49**, 814 (2018)
4. Geiger, C., Gervais, D., Senftleben, M.: The three-step-test revisited: how to use the test's flexibility in National Copyright law. Am. Univ. Int. Law Rev. **29**(3), 581 (2016)
5. Geiger, C., Hilty, R., Griffiths, J., Suthersanen, U.: Declaration a balanced interpretation of the "three-step test". JIPITEC **1**, 119 (2010)

6. Geiger, C., Izyumenko, E.: Towards a European 'fair use' grounded in freedom of expression. Am. Univ. Int. Law Rev. **35**(1), 1 (2019)
7. Geiger, C., Schoherr, F.: Defining the scope of protection of copyright in the EU: the need to reconsider the acquis regarding limitations and exceptions. In: Synodinou, T.E. (ed.) Codification of European Copyright Law. Challenges and Perspectives. Kluwer Law International, The Hague (2012)
8. Geiger, C.: "Constitutionalising" intellectual property law? The influence of fundamental rights on intellectual property in the European Union. Int. Instrum. Controls **37**(4), 371 (2006)
9. Geiger, C.: Flexibilising copyright – remedies to the privatisation of information by copyright law. Int. Instrum. Controls **39**, 178 (2008)
10. Griffiths, J.: Taking power tools to the acquis - the court of justice, the charter of fundamental rights and European Union Copyright Law. In: Geiger, C. (ed.) Intellectual Property and the Judiciary. Edward Elgar, Cheltenham-Northampton (2018)
11. Griffiths, J.: The "three-step test". In: European Copyright Law – Problems and Solutions. IPQ, vol. 42 (2009)
12. Griffiths, J.: Constitutionalising or harmonising? The Court of Justice, the right of property and European copyright law. Eur. Law Rev. **38**, 65 (2013)
13. Guibault, L.: Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright. Kluwer Law International, The Hague (2002)
14. Guibault, L.: Why cherry-picking never leads to harmonisation: the case of the limitations of copyright under directive 2001/29/EC. JIPITEC **1**, 55 (2010)
15. Hilty, R., Sutterer, M.M.: Position Statement of the Max Planck Institute for Innovation and Competition on the Proposed Modernisation of European Copyright Rules (4 March 2017), available at https://pure.mpg.de/rest/items/item_2527200/component/file_2527201/content
16. Hugenholtz, P.B., Senftleben, M.: Fair Use in Europe: in Search of Flexibilities, available at http://ssrn.com/abstract=2013239
17. Hugenholtz, P.B.: The Wittem Group's European Copyright Code. In: Synodinou, T.E. (ed.) Codification of European Copyright Law. Kluwer, The Hague (2012)
18. Husovec, M.: Intellectual property rights and integration by conflict: the past, present and future. Camb. Yearb. Eur. Legal Stud. **18**, 239 (2016)
19. Janssens, M.C.: The issue of exceptions: reshaping the keys to the gates in the territory of literary, musical and artistic creation. In: Derclaye, E. (ed.) Research Handbook on the Future of EU Copyright. Edward Elgar, Cheltenham-Northampton (2009)
20. Jutte, B.J., Quintais, J.P.: Advocate general turns down the music – sampling is not a fundamental right under EU copyright law. Eur. Intellect. Prop. Rev. **41**, 654 (2019)
21. Kosta, V.: Fundamental Rights in EU Internal Market Legislation. Bloomsbury, London (2015)

22. Leistner, M.: Europe's copyright law decade: recent case law of the European court of justice and policy perspectives. Common Mark. Law Rep. (CD-ROM) **51**, 599 (2014)
23. Lucas, A.: For a reasonable interpretation of the three-step test. Eur. Intellect. Prop. Rev. 6, 277 (2010)
24. Margoni, T., Kretschmer, M.: The Text and Data Mining exception in the Proposal for a Directive on Copyright in the Digital Single Market: Why it is not what EU copyright law needs (25 April 2018), available at http://www.create.ac.uk/blog/2018/04/25/why-tdm-exception-copyright-directivedigitalsingle-market-not-what-eu-copyright-needs/
25. Mylly, T.: The constitutionalisation of the European legal order: impact of human rights on intellectual property in the EU. In: Geiger, C. (ed.) Research Handbook on Intellectual Property and Human Right. Edward Elgar, Cheltenham-Northampton (2015)
26. Ojanen, T.: Making the essence of fundamental rights real: the court of justice of the European Union clarifies the structure of fundamental rights under the charter. Electron. Commer. Law Rep. **12**(2), 318 (2016)
27. Rosati, E.: An EU text and data mining exception for the few: would it make sense? J. Intellect. Prop. Law Pract. **13**(6), 429 (2019)
28. Rosati, E.: Just a laughing matter? Why the decision in Deckmyn is broader than parody. Common Mark. Law Rep. (CD-ROM) **52**, 511 (2015)
29. Senftleben, M.: From flexible balancing tool to quasi-constitutional straitjacket – how the EU cultivates the constraining function of the three-step test. In: Mylly, T., Griffiths, J. (eds.) The Transformation of Global Intellectual Property Protection. Oxford University Press, Oxford (2020). (forthcoming)
30. Sganga, C.: A decade of fair balance doctrine, and how to fix it: copyright versus fundamental rights before the CJEU from *Promusicae* to *Funke Medien*, *Pelham* and *Spiegel Online*. Eur. Intellect. Prop. Rev. **11**, 683 (2019)
31. Sganga, C.: Propertising European Copyright. History, Challenges and Opportunities. Edward Elgar, Cheltenham-Northampton (2018)
32. Van Eechoud, M.: Harmonizing European Copyright Law. The Challenges of Better Lawmaking. Kluwer Law International, The Hague (2009)