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Fundamental Rights as a Limit to Copyright Protection in the EU

Dissertation to obtain a Master's Degree in Law, in the specialty of International and European Law

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I hereby declare that the work I present is my own work and that all my citations are correctly acknowledged. I am aware that the use of unacknowledged extraneous materials and sources constitutes a serious ethical and disciplinary offence.

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Declaration

It is stated that, the body of the present Dissertation, consisting of the Introduction, three Chapters, and Conclusion, occupies a total of 188 274 characters including spaces.

“The main attack on copyright is that it is in opposition to the free flow of information and the public’s right to know and use”

- David Ladd, 1985

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List of Abbreviations:

CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of the Human Rights
EU	European Union
ICESCR	International Covenant on Economic, Social and Cultural Rights
SCA	Swedish Copyright Act
SVT	Swedish State Television
TEU	Treaty of the European Union
UDRH	Universal Declaration of Human Rights
WIPO	World Intellectual Property Organization

Abstract:

The EU copyright legal framework is rooted in the idea of protection of fundamental rights. While copyright represents a part of the right to intellectual property enshrined in Article 17(2) of the CFREU, its regulation has been historically influenced by the search for a *fair balance* with other fundamental rights and freedoms, such as freedom of expression and information. According to the CJEU, this delicate balance is achieved through copyright's internal balancing mechanisms: the originality threshold and idea-expression dichotomy, the scope of exclusive rights, and copyright exceptions and limitations. However, is fair balance sufficiently incorporated in these internal balancing mechanisms? Or, should they be complemented by external balancing mechanisms? This research focuses on the role that fundamental rights play in defining copyright's scope of protection in the EU. Taking into consideration the factual context of the Swedish *Iron Pipes* case, it will argue that internal balancing mechanisms are not always enough to achieve a fair balance between copyright and other fundamental rights. In this light, it will be concluded that an external, fundamental-rights based limitation can help create a fair balance in cases where the aforementioned internal mechanisms are unable to adequately protect fundamental rights other than copyright. In addition, it will be argued that allowing such an exception would have the potential to somewhat mitigate the rigidity of the system of exceptions and limitations laid down in the InfoSoc Directive. Finally, it will strive to reconcile an external, fundamental rights-based limitation with the CJEU's judgements in *Funke Medien* and *Spiegel Online.* It will do so by contending that allowing such a limitation will not lead to an increase in legal uncertainty in the context of EU copyright law. Moreover, it will argue that the CJEU did not necessarily rule out all forms of external, fundamental rights-based limitations. It will be proposed that, in cases where fundamental rights are not sufficiently protected under national laws, fundamental rights should be allowed to constitute external limitations to copyright protection within the scope of the exceptions provided under EU law.

Resumo:

O quadro jurídico da UE em matéria de direitos de autor está enraizado na ideia de proteção dos direitos fundamentais. Embora os direitos de autor representem uma parte do direito à propriedade intelectual consagrado no artigo 17(2) da CFREU, a sua regulamentação tem sido historicamente influenciada pela procura de um justo equilíbrio com outros direitos e liberdades fundamentais, tais como a liberdade de expressão e de informação. De acordo com o TJUE, este equilíbrio é alcançado através dos seguintes mecanismos internos: o crivo de originalidade, a dicotomia ideia-expressão, o âmbito dos direitos exclusivos, e as exceções e limitações aos direitos de autor. Contudo, serão estes mecanismos internos suficientes para acautelar o justo equilíbrio? Ou deverão estes ser complementados por mecanismos externos? A presente tese centra-se no papel que os direitos fundamentais desempenham na definição do âmbito de proteção dos direitos de autor na UE. Tendo em consideração o circunstancialismo do caso sueco *Iron Pipes*, será argumentado que os mecanismos internos suprarreferidos nem sempre são suficientes para alcançar um justo equilíbrio entre os direitos de autor e os demais direitos fundamentais. Neste sentido, concluir-se-á que uma limitação externa baseada em direitos fundamentais pode ajudar a criar um justo equilíbrio nos casos em que os mecanismos internos mencionados supra não sejam capazes de proteger adequadamente direitos fundamentais para além dos direitos de autor. Além disso, será argumentado que permitir uma exceção de tal teor poderia, potencialmente, mitigar a rigidez de que padece o sistema de exceções e limitações estabelecido na Diretiva 2001/39/CE. Finalmente, procurar-se-á conciliar uma limitação externa, baseada em direitos fundamentais, com os acórdãos do TJUE em *Funke Medien* e *Spiegel Online*. Neste âmbito, será defendido que permitir uma limitação de tal teor não conduzirá necessariamente a um aumento da incerteza jurídica. Ademais, argumentaremos que o TJUE não excluiu necessariamente todas as formas de limitações externas, baseadas em direitos fundamentais. Será proposto que, nos casos em que não estejam suficientemente assegurados ao abrigo das leis nacionais, os direitos fundamentais devem ser autorizados a constituir limitações externas à proteção dos direitos de autor dentro do âmbito das exceções previstas na legislação da UE.

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Introduction

The world was forced to adapt to the digital knowledge economy over the past few decades, and intellectual property law, particularly copyright law, has not been immune to this technological revolution. We are now faced with a borderless online reality where users continuously create, share, upload, and download content, making it extremely difficult, if not outright impossible, to retain control over the exploitation of works. This rapid wave of technological development combined with the incapacity of the copyright legal system to adapt and respond to new concerns in a timely manner, has heightened the demand for introducing measures of flexibility into the European Union's (EU) copyright legal framework.[1] Its rigidity is particularly evident when it comes to reconciling authors' and users' rights.

Most countries throughout the world recognize the need to strike a balance between the interests of users and the interests of copyright and related rights holders.[2] This trend finds its roots in international copyright law, particularly in the 1971 Paris Act of the Berne Convention for the Protection of Literary and Artistic Works (hereinafter Berne Convention).[3] The Convention contains the results of a compromising exercise between the national delegations that wanted to expand user privileges and those who sought to keep them to a bare minimum.[4] Ever since, the concept of *fair balance* has found its way into international and EU copyright law. In the context of international copyright law, the term *balance* first appeared in the TRIPS Agreement of 1994,[5] whose article 7 specifies that "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the *mutual advantage of producers and users* of technological knowledge and in a manner conducive to social and economic welfare, *and to a balance of rights and*

[1] Hugenholtz, P. Bernt., et Senftleben. Martin R. F. Fair Use in Europe: In Search Flexibilities. 2011. p 4, 7-9.
[2] Echoud, Mireille van; Hugenholtz. P Bernt; Gompel, Stef van; Guibault, Lucie *et* Helberger, Natali. Harmonizing European Copyright Law: The Challenges of Better Lawmaking. Kluwer Law International. 2009. p 95.
[3] Berne Convention for the Protection of Literary and Artistic Works, of September 9, 1886 as amended on September 28 1979.
[4] Guibault, Lucie. The Nature and Scope of Limitations and Exceptions to Copyright and Neighboring Rights with regard to the General Interest Missions for the Transmission of Knowledge: Prospects for their Adaptation to the Digital Environment. 2003. p 2.
[5] Agreement on Trade-Related Aspects of Intellectual Property Rights, adopted in April, 1994 (hereinafter TRIPS Agreement).

obligations" (emphasis added).[6] The WIPO Copyright Treaty[7] followed, explicitly addressing in its preamble the need to "maintain a *balance between the rights of authors and the larger public interest,* particularly education, research and access to information" (emphasis added). At the EU level, the concept of fair balance was included in the InfoSoc Directive, more specifically in its recital 31 which provides that "A fair balance of rights and interests between the different categories of rightsholders, as well as between the different categories of rightsholders and users of protected subject-matter must be safeguarded".

The fair balance between copyright holders' and users' interests is mostly ensured through copyright's internal balancing mechanisms, *i.e.* through the originality threshold and idea-expression dichotomy, the scope of exclusive rights, and copyright exceptions and limitations. The latter being the internal balancing mechanism of reference. Copyright exceptions and limitations can be simply defined as statutory derogations to the protection conferred to copyright holders. In practice, copyright exceptions and limitations translate into uses of work that, under certain conditions and for specific purposes, are legally permitted without the need for prior authorization from the respective rightsholder.

In this regard, it is noteworthy that the EU copyright acquis has evolved in such a way that we now have, aside from a few of mandatory exceptions, an exhaustive list of optional exceptions and limitations from which Member States can choose. The EU legislator first took this *numerus clausus* approach with regards to Directive 96/9/EC on the Legal Protection of Databases (hereinafter Database Directive),[8] which included three optional exceptions to copyright.[9] In light of article 6 of the Database Directive, Member States have the option of providing limitations for the purposes of: *i)* private uses; *ii)* illustration for teaching or scientific research; and *iii)* for the purposes of public security or of an administrative or judicial procedure.[10] Furthermore, article 6 provides that other

[6] Mandic, Danilo, Balance: Resolving the conundrum between copyright and technology. 2011. p 4.
[7] World Intellectual Property Organization Copyright Treaty, adopted on December, 1996 (hereinafter WIPO Copyright Treaty).
[8] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
[9] Sganga. Caterina. A new era for EU copyright exceptions and limitations? Judicial flexibility and legislative discretion in the aftermath of the Directive in the Digital Single Market and the trio of the Grand Chamber of the European Court of Justice *in* ERA Forum. 2020. p 4.
[10] Article 6 (2) (a) – (c) of the Database Directive.

limitations are allowed where they are traditionally authorized under national laws.[11]

Afterwards, the Directive 2001/29/ EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society (hereinafter InfoSoc Directive)[12] – the centerpiece of this study – followed suit with, aside from a mandatory exception for acts of temporary transient or incidental reproduction (cfr. article 5(1) InfoSoc Directive), an exhaustive list of twenty optional exceptions and limitations to the rights of reproduction and/or communication to the public (cfr. article 5(2) and (3) InfoSoc Directive). Additionally, article 5(5) of the same Directive establishes a three-step test[13] that has generally been interpreted as further rigidifying the exhaustive list of exceptions – although other interpretations have been proposed. This framework of exceptions and limitations is easily understandable in light of the goals of harmonizing national laws in the EU, in general, and national copyright laws, in particular, as well as the general goal of increasing legal certainty. Nevertheless, it has resulted in a number of shortcomings.

First and foremost, this *"cherry-picking"* approach[14] ultimately led to a problem of legal fragmentation within the EU. Indeed, whilst, as the title of the InfoSoc Directive suggests, the aim of establishing an exhaustive list of optional exceptions and limitations was to increase harmonization within the Union, such was not the end result. Importantly, exceptions and limitations are extremely connected to the social and cultural traditions of each State.[15] It was thus foreseeable that, in the face of an optional list of exceptions and limitations, each country would take the opportunity to adopt, implement and interpret the available exceptions in a way that best fit their traditions.[16] The outcome is that Member States have applied article 5 of the mentioned Directive in a myriad of ways, picking and choosing between the different limitations, and giving them narrower or broader interpretations based on their interests.[17] This fragmentation is highly problematic in the context of the digital knowledge economy, where the absence of

[11] Article 6 (2) (d) of the Database Directive.
[12] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
[13] According to the three-step test, exceptions and limitations shall only be applied i) in certain special cases, ii) which do not conflict with a normal exploitation of the protected subject-matter, and iii) do not unreasonably prejudice the legitimate interests of the rightholder.
[14] Guibault, Lucie. Why cherry-picking never leads to harmonization: the case of the limitations on copyright under Directive 2001/29/EC in Journal of Intellectual Property, Information Technology and Electronic Commerce Law, 1(2). 2010.
[15] Echoud, M. van *et al. Op cit.* p 10.
[16] Guibault. *Op cit.* 2010. 57- 58.
[17] *Ibidem.*

territorial boundaries leads to issues of determining the applicable law to a given situation, thus resulting in legal uncertainty. Furthermore, this also demonstrates the fact that the InfoSoc Directive does not establish a minimum standard of protection for fundamental rights other than intellectual property rights. Member States have the discretion to decide which exceptions and limitations they want to adopt, as well as how to implement them. This suggests that in situations where a Member State chooses not to incorporate a certain exception into national law or does so in an overly restrictive manner, fundamental rights may not be adequately protected. Illustratively, article 5(3)(h) of the InfoSoc Directive, also known as the "panorama exception", states that Member States may provide for an exception to the exclusive rights of reproduction and communication to the public in respect of uses of architectural or sculptural works located permanently in public spaces. This exception refers to uses such as disseminating pictures of monuments or sculptures online or via print publications. Not all Member States have implemented this exception (e.g., Italy and France), and the ones who have implemented it did so in different ways.[18] This lack of consistency in implementation poses challenges in the digital single market, preventing individuals from publishing photographs of copyright protected works in social media, online encyclopedias, *etc*. Moreover, it raises the question of whether users' freedom of expression and the public interest are sufficiently safeguarded in those countries who have abstained from implementing the "panorama exception".

Secondly, as scholars have argued, a closed and strict system of exceptions and limitations will hardly ensure a fair balance of rights and interests in the face of a conflict between intellectual property and other fundamental rights, such as freedom of expression and information, freedom of the press, the right to education. [19] The closed list of article 5 of the InfoSoc Directive does not provide sufficient leeway for EU copyright law to adapt to a dynamic and continuously evolving technological scenario and digital markets.[20] Which brings us to an essential shortcoming: the lack of flexibility. For instance, even if a new, unregulated use of a protected work was considered to be socially valuable, it would still be regarded as a copyright infringement if it was either

[18] European Parliamentary Research Service, Review of the EU copyright framework: The implementation, application and effects of the "InfoSoc Directive" (2001/29/EC) and of its related instruments. October 2015. p 214.
[19] *Cfr*. Hugenholtz et al. *Op cit*. 2011.
[20] See Rendas, Tito. Copyright, Technology and the CJEU: an Empirical Study *in* 49(2) IIC - International Review of Intellectual Property and Competition Law 153. 2018. p 5; Griffiths, Jonathan. Unsticking the Centre-Piece- the Liberation of European Copyright Law?. JIPITEC 87. 2010.

unauthorized by the rightsholder or did not fall under one of the exceptions and limitations established in EU copyright law. It can thus be argued that, an exhaustive list of copyright exceptions and limitations is not capable of adequately accommodating new uses that the EU legislator had not previously foreseen. As a consequence, situations where users' fundamental rights and freedoms are at great risk arise.

In this light, the question of whether fair balance is sufficiently incorporated in the internal balancing mechanisms emerges. In other words, are these internal mechanisms enough to safeguard fundamental rights, or should they be complemented by external ones? In this respect, it is relevant to trace a distinction between these two concepts. Internal balancing mechanisms, are those mechanisms that operate to establish a balance between rightsholders and users' interests, which are provided by EU copyright law or by the copyright laws of the Member States. For instance, the exceptions and limitations laid down in article 5 of the InfoSoc Directive are qualified, for the purposes of the present research, as internal limitations. Differently, external balancing mechanisms are those that are not set forth in EU copyright law or in the copyright laws of the Member States. Instead, external mechanisms find their basis in legal branches other than copyright law. Nevertheless, this research shall focus on external balancing mechanisms based on fundamental rights. Illustratively, a fundamental-rights based external limitation could be the direct invocation of freedom of expression and information as established in the Charter of Fundamental Rights of the European Union (CFREU)[21] as a limit to copyright protection.

In essence, the present thesis intends to comprehend the role that fundamental rights play or ought to play in defining or, better, limiting copyright's scope of protection. In order to achieve this objective, it will be researched whether fundamental rights can or should represent internal and / or external limitations to copyright protection. Furthermore, the research will entail an analysis of the margin of appreciation national judges and legislators have under EU copyright law when implementing or interpreting the scope of the internal balancing mechanisms, in general, and copyright exceptions and limitations, in particular.

The analysis of the role of fundamental rights in EU copyright law is especially

[21] Charter of Fundamental Rights of the European Union, Official Journal of the European Union C 326, 26 October 2012.

interesting in light of recent developments in the field. Over the past two decades, the tension between copyright and other fundamental rights has been the subject of an ongoing debate. Indeed, scholars have been expressing concerns regarding the continuing expansion of the protection offered by intellectual property rights claiming that the 'legal monopoly' granted by these rights had perhaps become excessive. In 2004, referring to copyright, Christophe Geiger – one of the leading scholars in this field – argued that the roles had been reversed: rather than copyright being considered as the exception to the general principle of freedom of expression, it had become the rule, and freedom of expression the exception. [22] More recently, Sabine Jacques drew attention to the fact that, despite periodical updates to copyright laws, the alterations have mostly been aimed at safeguarding the interests of the rightsholders, upsetting the fair balance that had been established by the legislator between copyright protection and other fundamental rights.[23]

Moreover, the evidence of the growing importance of fundamental rights and freedoms in shaping the EU's copyright paradigm can be found in the increasing presence of fundamental rights discourse in case law and doctrinal works. The Court of Justice of the European Union (CJEU), the European Court of the Human Rights (ECtHR), and national courts have all recently addressed questions regarding the relationship between copyright and other fundamental rights. In 2013, the ECtHR decided on two cases involving the conflict between copyright the right to freedom of expression.[24] As to the CJEU, the discussion received new impetus in 2019, with three references by the German Federal Supreme Court, requesting guidance on the legal interpretation of the trade-off between copyright and freedom of expression and information.[25] Whilst these judgements have cleared up some doubts, they have also introduced new ones, making it extremely relevant to dissect this case-law in order to understand the role that fundamental rights are allowed

[22] Geiger, C. Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?. International Review of Intellectual Property and Competition Law 35(3). 2004. p 272-273.
[23] Jacques, Sabine. On the Wax or Wane? The Influence of Fundamental Rights in Shaping Exceptions and Limitations *in* The Routledge Handbook of EU Copyright Law edited by Eleanora Rosati, Routledge. 2021. p 282.
[24] Case of Ashby Donald and others v France (5th Section), no. 36769/08, ECtHR 2013. [*Ashby Donald*]. Case of Neij and Sunde Kolmisoppi v. Sweden (5th Section), no. 40397/12, ECtHR 2013. [*Pirate Bay*].
[25] See C-516/17, Spiegel Online GmbH v Volker Beck, ECLI:EU:C:2019:625 [*Spiegel Online*]; C-469/17, Funke Medien NRW GmbH v Bundesrepublik Deutschland, ECLI:EU:C:2019:623. [*Funke Medien*]; C-[25] See C-516/17, Spiegel Online GmbH v Volker Beck, ECLI:EU:C:2019:625 [*Spiegel Online*]; C-469/17, Funke Medien NRW GmbH v Bundesrepublik Deutschland, ECLI:EU:C:2019:623. [*Funke Medien*]; C-476/17, Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben. [*Pelham*] ECLI:EU:C:2019:624.

to play when it comes to copyright exceptions and limitations in the EU.

Against this backdrop, it must be clarified that the research focuses solely on EU copyright law. Nonetheless, it is crucial to recognize the influence that international copyright law, such as multilateral agreements and conventions, exercises on the EU copyright acquis. Such influence is particularly noticeable in the definition of concepts which are not fully harmonized at the EU level, *e.g.,* the copyright subject-matter, among others. Further, it is also important to keep in mind that copyright law is not fully harmonized at the EU level, still being subject to the *principle of territoriality*. This means that copyright is only protected under the national laws of each Member State.[26] However, and as will be explained in more depth in the following pages, the national copyright laws of Member States have become progressively more harmonized through EU directives and as a result of the CJEU's case law.[27] In this sense, references to national and international legal instruments and to rulings from national courts, or the ECtHR will mostly serve for illustrative, comparative or complementary purposes.

Moreover, it should be taken into account that the focus of this thesis is copyright law, rather than national or EU constitutional law. This caveat is necessary in order to understand that, although a reference will be made to the legal frameworks of fundamental rights and to the theories of horizontal effects of fundamental rights, an in-depth analysis of these subjects is outside the scope of this study. Therefore, further research on the role of fundamental rights in shaping copyright protection in the EU would require more extensive research on the aforesaid topics.

The structure of this dissertation is as follows. Firstly, and to provide some context, an overview of the relevant legal frameworks will be sketched out (Chapter 1). This chapter will begin with a general review of the framework of fundamental rights in the EU. Two main legal instruments shall be considered for this purpose: first and foremost, the CFREU; secondly the European Convention on Human Rights (hereinafter ECHR)[28]. The horizonal effects of fundamental rights will then be discussed. Following, reflections on copyright's dimension as a fundamental right and on the interplay between copyright

[26] Lundstedt, Lydia. Territoriality in Intellectual Property Law. PhD Thesis. Department of Law, Stockholm University. 2016. p 419.
[27] *Ibidem.*
[28] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

and other fundamental rights will be presented. The EU copyright acquis will then be analyzed. In this vein, the copyright subject-matter and duration of copyright, as well as the exclusive rights that are granted under EU copyright law will be addressed. Afterwards, conceptual considerations regarding the terms "exceptions and limitations" will be drawn, some key legislative provisions will be highlighted. In addition, the most recent developments in the field of copyright exceptions and limitations will be mentioned.

In Chapter 2, the role of fundamental rights as limits to copyright protection in the EU shall be addressed. Firstly, focus will be directed to the notion of fair balance. Secondly, the following copyright's internal balancing mechanisms will be discussed in turn: *i)* originality and the idea-expression dichotomy; *ii)* the scope of exclusive rights; and *iii)* copyright exceptions and limitations. In addition, the matter of fundamental rights-inspired judicial interpretations as internal limitations to copyright will be presented. Thirdly, there will be a discussion on copyright's external balancing mechanisms. The study will focus on fundamental rights-based external mechanisms. In this context, the debate will take into account case law from the ECtHR and CJEU.

A more critical approach will be taken in Chapter 3, picking up the threads of the previous Chapters. In this spirit, the Swedish *Iron Pipes* scandal will be used as a case study, with a view to understand whether internal balancing mechanisms are sufficient to achieve a *fair balance.* Thereby, the factual background of the case and a brief summary of the Swedish Supreme Court's ruling in the case will be presented. Afterwards, taking into account the factual context of the aforementioned case, a copyright internal and external balancing analysis will be performed. Lastly, an attempt will be made to reconcile an external, fundamental rights-based limitation with the CJEU's judgments in *Funke Medien* and *Spiegel Online.* Finally, conclusions shall be drawn, summarizing and reflecting on the thesis' findings, as well as providing a few recommendations.

CHAPTER I – Copyright as a Fundamental Right: The EU Perspective

1.1. The EU Fundamental Rights Framework

The present opening chapter aims to sketch an overview of the context surrounding the constitutional dimension of copyright protection, providing the necessary background to the research question of this thesis. It is thus pertinent to begin with a brief summary of the evolution of the EU's fundamental rights framework. However, in order to complete this task, we must first take a look at the matter from a broader European perspective.

The European Convention of Human Rights (ECHR) was the first legal document to give the rights outlined in the Universal Declaration of Human Rights (UDRH) binding effect,[29] and it represents Europe's first attempt at regulating fundamental rights. The Convention was enacted by the Council of Europe in the aftermath of the Second World War, in 1950, having entered into effect in 1953. Since then, it has been regarded as the most important human rights instrument in Europe.[30] The Convention has been ratified by 46 States, including all 27 EU Member States. However, as the CJEU noted in *Opinion 2/94*,[31] the Treaty of the European Community did not grant competence to the European Community (today EU) to accede to the ECHR, as no provision on the aforementioned Treaty confers to any of the Union institutions the power to enact rules regulating human rights or to conclude international agreements in this field.[32]

This was the setting that sparked the birth of the Charter of Fundamental Rights of the EU (CFREU). The Charter was signed and "proclaimed" in December of 2000 by the European Parliament, the Council of Ministers, and the European Commission.[33] Initially, upon its proclamation, the CFREU was devoid of any binding effect. The Charter mainly codified the rights and freedoms already recognized by the EU institutions, with some provisions reflecting the rights previously set forth in the ECHR.[34] The adoption of the

[29] Council of Europe. The European Convention on Human Rights: A Living Instrument. 2020. p 5.
[30] See Frosio, G. *et* Geiger, C. Taking Fundamental Rights Seriously in the Digital Service Act's Platform Liability Regime *in* European Law Journal 2022 (forthcoming). 2022. p 14.
[31] Opinion 2/94 of the Court of Justice on the Accession by the Communities to the Convention for the Protection on Human Rights and Fundamental Freedoms. 28 March 1996.
[32] Summary of the Opinion 2/94 of the Court of Justice on the Accession by the Communities to the Convention for the Protection on Human Rights and Fundamental Freedoms. 28 March 1996. para 6.
[33] Anderson Q. C., David *et* Murphy, Cian C. The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe. EU Working Paper Law 2011/08. 2011. p 2.
[34] Smith, Rihona. Interaction between international human rights law and the European legal framework *in* Research Handbook on Human Rights and Intellectual Property edited by C. Geiger, Edward Elgar, University of Melbourne. 2015. p 55.

Treaty of Lisbon in 2009 drastically changed the legal status of the CFREU, making it part of EU primary law.[35] Indeed, Article 6(1) of the Treaty of the European Union (hereinafter TEU) as amended by the Treaty of Lisbon provides that the EU recognizes the rights, freedoms and principles set out in the CFREU, also stating that the Charter "shall have the same legal value as the Treaties".

On a different note, the Treaty of Lisbon also impacted the relationship between EU law and the ECHR. Firstly, the Treaty altered the EU's competence to accede to the ECHR, as paragraph 2 of article 6 TEU provides that the EU shall accede to the Convention. Although this change has yet to occur, it is noteworthy to mention that as of 2020, the EU Commission and the Member States of the Council of Europe reopened the negotiations towards the EU's accession to the ECHR.[36] Secondly, the TEU recognized the fundamental rights as guaranteed in the ECHR as general principles of EU law.[37]

Thereafter, the European Union is under the aegis of two distinct fundamental rights regimes, which may lead one to wonder about the relationship between the two of them. Article 52 of the CFREU, which sets the scope and interpretation of the rights and freedoms recognized by the Charter, provides somewhat of an answer to this question. In fact, this article establishes that the meaning and scope of the rights outlined in the Charter must match those of the corresponding rights in the ECHR.[38] In this manner, article 52 guarantees that the CFREU is interpreted and applied in a way that is consistent with the ECHR. However, the level of protection ensured by the ECHR is only perceived as a minimum standard, as article 52(3) goes on to state that EU law may offer a higher level of protection. Furthermore, considering the circumstances surrounding the creation of the CFREU, it should come as no surprise that some of its provisions are clear replications or adaptations of the rights set forth by the ECHR. Furthermore, article 53 of the CFREU adds yet another safeguard to the consistency between the CFREU and the ECHR, by stating that nothing in the Charter shall be read as restricting or adversely affecting human rights and fundamental freedoms as recognized, inter alia, in the ECHR. In light of this context, it is extremely relevant to consider the European legal framework of fundamental rights as well as ECtHR rulings when analyzing the role of fundamental rights in defining

[35] Anderson *et al. Op cit.* p 2.
[36] Council of Europe Portal. European Union accession to the European Convention on Human Rights – Questions and Answers.
[37] *Cfr.* Article 6(3) TEU.
[38] *Cfr.* Article 53(3) CFR.

the scope of copyright of protection in the EU.

Lastly, a few points should be made regarding the possibility of restricting fundamental rights. The CFREU and the ECHR both agree that fundamental rights may be limited in certain circumstances. On the one hand, the ECHR individually establishes the possibility of restricting some of the rights established therein. For example, article 10 of the Convention, which sets forth the right of freedom of expression, provides that the exercise of such a right may be subject to restrictions as prescribed by law and necessary in a democratic society.[39] On the other hand, article 52(1) of the CFREU introduces a general provision that specifies the criteria that must be satisfied in order for a limitation of a fundamental right or freedom to be lawful. In light of this article, any limitation on the exercise of a fundamental right and freedom must *i)* be provided for by law; *ii)* respect the essence of those fundamental rights or freedoms; and *iii)* it must be proportional.

This logic of restriction between fundamental rights to accommodate other rights and the public interest serves as the foundation for the *fair balance principle*, which will be discussed later in this study. In fact, it is this relativist perspective on fundamental rights that sets the tone for striking a balance between copyright and other fundamental rights and freedoms.

a. The Horizontal Effects of Fundamental Rights

The question regarding to what extent fundamental rights, as enshrined in the CFREU, should have horizontal effects has been the subject of great discussion. The concept of *horizontal effects* of fundamental rights can be simply explained as the effects produced by fundamental rights on relationships between individuals or citizens, as opposed to the *vertical effects* of fundamental rights which translates into the effects of the mentioned norms in the relationship between individuals and the State.[40]

According to the classification developed by Alexy, it is possible to distinguish between three complementary levels of effects of fundamental rights to interindividual disputes: *i)* indirect horizontal effects; *ii)* State-sponsored horizontal effects, and *iii)* direct

[39] *Cfr.* Article 10(2) ECHR.
[40] Alexy, Robert. Teoria dos Direitos Fundamentais, 2ª Edição, Malheiros Editores. 2015. p 523-524.

horizontal effects.[41]

In light of the first level, the effects of fundamental rights in relations between individuals are restricted to those that can come from a fundamental-rights-oriented legal interpretation of legal provisions.[42] The indirect effects only emerge in the context of judicial interpretation: fundamental rights are perceived as legal principles which inform the interpretation of other legal provisions. Thus, fundamental rights norms are not sufficient to support a dispute between individuals.

Differently, the second level suggests that any effects of fundamental rights in interindividual relations stem from the fundamental rights obligations which are imposed on the State.[43] In this vein, fundamental rights impose *de facto* obligations on individuals *via de juris* obligations imposed on the State.[44] According to this approach, the State is perceived as being involved in every interindividual disputes and as having the obligation of upholding fundamental rights therein.[45] A second conceptualization of State-sponsored horizontal effects would be the imposition of positive obligations to uphold fundamental rights on the part of the State.[46]

Lastly, the direct horizontal effect entails the imposition of fundamental rights obligations on individuals. This approach allows for the possibility of invoking a fundamental rights norm in an inter-individual dispute, either backing a claim or supporting a defense.[47] Therefore, at this level the obligations stem directly from the fundamental rights provisions.[48]

The principle of direct horizontal effect as regards primary law is a long-settled principle of EU law. In *Van Gend en Loos v Netherlands Inland Revenue Administration*, the CJEU, referring to the Treaty of the European Economic Community, confirmed the application of primary law to interindividual relations. Indeed, the CJEU ruled that the provisions of the Treaty "must be interpreted as producing direct effects and creating

[41] Alexy. *Op cit.* 2015. p 529.
[42] Alexy. *Op cit.* 2015. p 529.
[43] *Idem.* p 530.
[44] Frantziou, Eleni. The Horizontal Effect of the Charter of Fundamental Rights of the European Union: Rediscovering the Reasons for Horizontality *in* European Law Journal, Vol. 21, Issue 5. 2015. p 6.
[45] Frantziou, Eleni. The Horizontal Effect of the EU Charter of Fundamental Rights: A Constitutional Analysis (Doctoral Dissertation), University of London, Faculty of Laws. 2019. p 41.
[46] *Ibidem.*
[47] Frantziou. *Op cit.* 2015. p 6.
[48] Frantziou. *Op cit.* 2019. p 41.

individual rights which national courts must protect".[49] This direct effect, however, is dependent on the fulfillment of three conditions: the obligations must be *i)* clearly defined, *ii)* unconditional, and *iii)* must not require additional measures.[50]

Hence, considering the CFREU's status as EU primary law, it would be expected that the provisions that meet the above identified conditions are susceptible to having a direct horizontal effect. Nevertheless, article 51(1) of the CFREU[51] has led scholars to contend that the provisions of the Charter are solely addressed to institutions, bodies, offices, and agencies of the Union, leaving EU citizens outside of this group.

There is, however, an argument to be made that article 51(1) CFREU does not necessarily exclude a horizontal effect of the Charter's provisions, as it does not explicitly or implicitly suggest that the provisions are not addressed as citizens, neither does it deny a horizontal effect of any sort. It simply states as a matter of fact that it is addressed to institutions, bodies offices, and agencies of the EU. Additionally, this line of reasoning appears to be supported by the CJEU's ruling in *Defrenne.*[52] The court held that that despite some provisions being formally addressed to Member States, this does not prevent rights from being conferred on any individual who has an interest in the performance of the obligations imposed by the provision.[53] Moreover, as argued by Frantziou, many of the Charter's substantive provisions directly or indirectly extend to private conduct.[54] As an example, the scholar mentions that the rights to privacy and the protection of data are not limited to public action.[55]

This does not mean that the challenges that come with recognizing fundamental rights' horizontal effects should be overlooked. For instance, one objection is raised in relation to the EU's constitutional pluralism, *i.e.,* to the coexistence of complex and multileveled

[49] Case C-26/62, Van Gen den Loos *v* Netherlands Inland Revenue Administration. ECLI:EU:C:1963:1. [*Van Gen den Loos v Netherlands Inland Revenue Administration*].
[50] *Van Gen den Loos v Netherlands Inland Revenue Administration*.
[51] Article 51(1) CFREU provides that "1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties."
[52] C-149/77, Gabrielle Defrenne *v* Société Anonyme Belge de Navigation Aérienne Sabena. ECLI:EU:C:1976:56. [*Defrenne*]
[53] *Defrenne.* Paras 31-39.
[54] Frantziou. *Op cit*. 2019. p 74-75.
[55] *Ibidem.*

systems of fundamental rights. As noted by Frantziou, direct horizontality is often paired with a balancing between competing rights. Admitting the direct horizontality of a right enshrined in the CFREU would imply a cumbersome analysis of whether the minimum standards of the competing rights as provided for in different instruments, such as the ECHR, are met.

The scope of this thesis is too limited to engage in a detailed discussion on the extent to which the CFREU has or should have horizontal effects. However, it is important to keep this debate in mind when considering what role fundamental rights should play - or should be permitted to play - in limiting copyright's scope of protection. Indeed, as will be further developed below, if fundamental rights were afforded a direct horizontal effect, this could possibly mean that users of copyrighted works would be able to resort to a fundamental rights-based defense against a copyright infringement case.

b. Copyright as a Fundamental Right and its Clashes with Other Fundamental Rights

The 1948 UDHR was the first international document to conceptualize intellectual property[56] as a human right.[57] Article 27(2) of the Declaration recognizes a right to the protection of moral and material interests emanating from any scientific, literary, or artistic production of which he/she is the author. At the time, the adoption of such a right had to overcome criticism that it did not require any additional protection beyond that provided by property rights or that intellectual property was not a human right.[58]

Nowadays, with the notable exceptions of some scholars,[59] the perception of intellectual property rights as fundamental or human rights[60] is almost undisputed. This is the case because a number of international and regional Treaties now explicitly or

[56] Although reference will be made to a general right of intellectual property, the considerations below are directly applicable to copyright, as the latter represents a fraction of the right to intellectual property.
[57] Torremans, Paul. Right to Property *in* The EU Charter of Fundamental Rights: A Commentary edited by Steve Peers, tamara Hervey, Jeff Kenner and Angela Ward, London Hart Publishing, 2014. p 495.
[58] Chapman, Audrey R. Approaching Intellectual Property as a human right: obligations related to Article 15(1)(c) *in* Copyright Bulletin, Volume XXXV, No. 3, 2001. p 11. Torremans. *Op cit.* 2014. p 497.
[59] According to F. Shasheed, intellectual property rights should not be equated with human rights. While some aspects of intellectual property protection are required by the right to science and culture, others go beyond what is required by this right. Regarding copyright protection, the author argues that current copyright laws often go beyond what would be necessary to uphold the right to authorship protection and may even conflict with the right to science and culture. See Shasheed, F. Report of the Special Rapporteur in the field of cultural rights: Copyright Policy and the Right to Science and Culture (A/HRC/28/57). United Nations. 2014.
[60] The terms "fundamental" and "human" rights are often used interchangeably by authors.

implicitly recognize intellectual property as a fundamental or human right. The International Covenant on Economic, Social, and Cultural Rights (hereinafter ICESCR) followed in the footsteps of the UDHR by recognizing the right of everyone to benefit from the protection of the moral and material interests, resulting from any scientific, literary, or artistic production of which they are the author.[61]

Within the framework of the ECHR, property is protected in Article 1 of the Protocol no. I to the ECHR (Protocol 1).[62] Although this provision does not explicitly mention intellectual property, it is widely accepted that it is covered by Article 1 of Protocol 1. The ECtHR has confirmed this interpretation in *Anheuser* Busch *Inc.* v. *Portugal*,[63] where it was noted that "intellectual property as such incontestably enjoyed the protection of that provision [Article 1 of Protocol No.1]".[64]

As regards the CFREU, article 17(2) categorically provides that "intellectual property shall be protected". According to the explanation on article 17, the explicit mention to intellectual property was justified due to the "growing importance [of intellectual property] and Community secondary legislation".[65] The explanation also clarifies that intellectual property is covered by the same guarantees provided in article 17(1) as to the general right to property.[66] This clarification proved necessary since the approach adopted by the EU legislator in this provision is remarkably different from the one adopted as to the general right to property. Indeed, there is no mention of potential restrictions, either statutory or based on the public interest. Instead, the EU legislator seemingly attributes an absolute character to intellectual property rights. For this reason, this article has been extensively analyzed and criticized.[67] In this respect, Geiger has contended that, even though it is clear that such an article cannot be construed as implying an absolute nature of intellectual property, it would have been advisable to explicitly clarify the limited

[61] *Cfr.* Article 15 (1) (c) ICESCR, which almost exactly replicates article 27(2) UDHR.
[62] Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952.
[63] Case of Anheuser-Busch Inc. v. Portugal, no. 73049/01, ECtHR 2007. [*Anheuser-Busch Inc. v Portugal*].
[64] *Anheuser-Busch Inc. v Portugal.*
[65] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02) – Explanation on Article 17.
[66] *Idem.*
[67] See Geiger, C. Intellectual Property Shall be Protected!? – Article 17(2) of the Charter of Fundamental Rights of the European Union: a Mysterious Provision with an Unclear Scope *in* European Intellectual Property Review 31(3). 2009. Griffiths, J *et* McDonagh, L. Fundamental Rights and European IP law – the case of art 17(2) of the EU Charter, *in* Constructing European Intellectual Property Achievements and New Perspectives, edited by C. Geiger, Edward Elgar. 2013. Torremans. *Op cit.* 2014.

nature of intellectual property rights.[68]

Despite the poor choice of words of the EU legislator, there is currently little to no doubt as to the fact that intellectual property rights are not absolute rights. Article 17(2) of the CFREU is consensually interpreted as a mere confirmation that the regime set forth in paragraph 1 of the same article is also applicable to intellectual property.[69] Therefore, it is understood that intellectual property rights are liable to be restricted in light of other fundamental rights and the public interest.

In fact, since the 1990s, the interplay between intellectual property rights, particularly copyright and other fundamental rights, has received considerable attention. The wording of Recital 3 of the InfoSoc Directive reflects the relevance of this discourse. It provides that the harmonization of the laws of Member States on copyright and related rights relates to the compliance with fundamental principles of law, including intellectual property, freedom of expression and the public interest. Nevertheless, the discussion surrounding the interaction between the two regimes has received new impetus in recent years. This is often attributed to the expansion of the protection of fundamental rights and freedoms under national and supranational law during the past few decades.[70]

According to scholars, there are two main ways to conceptualize the relationship between copyright and other fundamental rights.

Firstly, the aforementioned can be conceptualized as one of *conflict*.[71] The very structure of copyright law, which will be described in more detail in the following sections, implies that rightsholders are free to use the protected works in any way they see fit, while excluding unauthorized uses by others. While copyright law has the noble aim of promoting innovation and creativity, it also has the side effect of preventing others from engaging in uses of protected works in ways that entail their unauthorized communication, reproduction, and distribution. Consequently, it may have the side effect of restricting users' fundamental rights, particularly their freedom of expression and

[68] Geiger, C. Copyright's Fundamental Rights Dimension at EU Level, *in* Research Handbook on the Future of EU Copyright, edited by Estelle Derclaye, Edward Elgar. 2009. p 36.
[69] Montagnani, Maria Lillà *et* Trapova, Alina. Copyright and Human Rights in the Ballroom: A Minuet between the United States and the EU *in* Mitchell Hamline Review, vol. 46, Issue 3. 2020. p 629.
[70] Jacques. *Op cit.* 2021. p 284.
[71] See Helfer, Laurence R. Mapping the interface between human rights and intellectual property *in* Research Handbook on Human Rights and Intellectual Property, edited by Christophe Geiger, Edward Elgar. 2015. p 11.

information, freedom of the press, and right to education.

In *Ashdown*,[72] the Court of Appeal for England and Wales concisely articulated this conflict by finding that: "[…] *The [Copyright] Act gives the owner of the copyright the right to prevent others from doing that which the Act recognises the owner alone has a right to do. Thus copyright is antithetical to freedom of expression. It prevents all, save the owner of the copyright, from expressing information in the form of the literary work protected by the copyright*."[73]

EU copyright law also acknowledges this antagonistic dynamic.[74] Indeed, the above-cited Recital 3 of the InfoSoc Directive provides that the compliance with fundamental legal principles, such as freedom of expression and the public interest, relates to the harmonization of copyright law. Additionally, Recital 2 of the Directive on the Enforcement of intellectual property rights[75] (hereinafter Enforcement Directive) states that while the protection of intellectual property should permit the author to profit legitimately from his or her work, it should also permit its dissemination and should not obstruct freedom of expression, the free flow of information, or the protection of personal data. These two recitals make it clear that the EU legislator acknowledges the possibility of conflict between fundamental rights and copyright laws.[76]

Moreover, this conflictual relationship can be understood in one of two ways. To better understand them, it is useful to return to the metaphor of the isolated islands in the middle of the ocean, which was first advanced by Foyer and Vivant[77] and has since been widely referenced by scholars. On the one hand, fundamental rights and freedoms can be perceived as islands of freedoms in the vast ocean of exclusivity that is copyright. According to this approach, copyright is the main general right, and fundamental rights, such as freedom of expression and information, are perceived as deviations from the general right. On the other hand, some authors contend that the opposite is true, *i.e.*, that copyright is an island of exclusivity against a vast ocean of fundamental rights and

[72] Case no. A3/2001/0213, *Ashdown v. Telegraph Group Ltd.*, England and Wales Court of Appeal (Civil Division), 2001. [*Ashdown*]
[73] *Ashdown*, para 30.
[74] Lee, Yin Harn. Copyright and Freedom of Expression: A Literature Review. CREATEe Working Paper 2015/04. 2015. p 63.
[75] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of intellectual property rights. [hereinafter Enforcement Directive]
[76] Lee. *Op cit.* 2015. p 63.
[77] Foyer, J. *et* Vivant, M. "Le droit des brevets", 1991 *apud* Geiger, C. *Op cit.* 2004. p 272.

freedoms. Accordingly, copyright is perceived as an exception to a general principle of freedom.[78]

Secondly, the interplay between copyright and other fundamental rights can be perceived through a lens of *coexistence and cooperation.*[79] This approach relates to the question as to how to encourage authors to create and innovate while yet ensuring that the public has adequate access to their works.[80] According to this approach, copyright and other fundamental rights work *hand in hand*. Since copyright is a fundamental right, it is supported by the same values and has the same objectives as all other fundamental rights. For example, it can be argued that copyright safeguards the right to education by providing private incentives to academics, professors, and creators and thus ensuring the plurality of ideas.[81] Or that it fosters freedom of expression by encouraging authors to create through rewards.

As Helfer has noted, this approach gives more emphasis to balancing mechanisms found within intellectual property law,[82] *i.e.,* internal balancing mechanisms. For instance, addressing the interplay between copyright and freedom of expression and copyright and the right to education, Derclaye contends that there is no real conflict between the rights because the inbuilt limits of copyright - the idea/expression dichotomy, the threshold of originality, exceptions and limitations, and copyright duration - are sufficient to ensure the realization of both rights.[83] In this light, Derclaye argues that as there are only *apparent* conflicts between copyright and fundamental rights, the solution can be found internally, *i.e.,* within copyright law.

Although it is true that the inbuilt limits of copyright strive to ensure the realization of other fundamental rights, there is an argument to be made that Derclaye's stance is too trusting in the EU and Member States' legislators. The scholar does recognize that a true conflict may arise, but only if the intellectual property rights are excessively broad.[84]

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[78] Geiger, C. *Op cit*. 2004. p 272.
[79] Lee. *Op cit.* 2015. p 63.
[80] Helfer, Laurence R. Mapping the interface between human rights and intellectual property *in* Research Handbook on Human Rights and Intellectual Property, edited by Christophe Geiger, Edward Elgar. 2015. p 13. See also Derclaye, Estelle. Intellectual Property Rights and Human Rights: Coinciding and Cooperating *in* Intellectual Property and Human Rights, *edited by* Paul Torremans, Kluwer Law International. 2008. p 134.
[81] Derclaye. *Op cit*. p 157.
[82] Helfer. *Op cit*. 2015. p 13.
[83] *Idem*. p 142 - 146.
[84] Derclaye. *Op cit*. p 159.

Illustratively, Derclaye states that a true conflict could arise between copyright and the right to education if a State did not have a teaching exception in place.[85] The issue is that since the teaching exception in the InfoSoc Directive is an optional one, the absence of such an exception is a real possibility. Moreover, even though a Member State may have a teaching exception in place, its implementation can be very restrictive in nature, leaving out a number of socially valuable uses. For example, Italy, Spain, Denmark, and Finland do not have an exception in place permitting translations of protected subject matter for educational purposes.[86] Therefore, a student in these countries cannot, for instance, be assigned the task of translating a poem into another language.[87] Differently, there are countries - including Portugal, Spain, Italy, and Germany - that only permit the use of protected works for educational purposes by schools or formal educational institutions, excluding other non-commercial educational institutions such as museums and libraries.[88] These examples serve to demonstrate that the current EU copyright framework may not always offer enough safeguards to guarantee the full enjoyment of fundamental rights.

Against this backdrop, scholarly literature has recently tended to place more emphasis on the *conflict* approach, than on the *coexistence* one.[89] This evolution might be the result of concerns related to the expansion of the protection offered by copyright. Indeed, scholars have been expressing concerns regarding the continuing expansion of the protection offered by copyright claiming that the 'legal monopoly' granted by this bundle of rights had perhaps become excessive. Already in 2001, Hugenholtz noted that European scholars and judges had been expressing fears regarding "the seemingly unstoppable growth of copyrights".[90] A few years later, in 2004, referring to copyright, Geiger argued that the roles had been reversed: rather than copyright being considered the exception to the general principle of freedom of expression, it had become the rule and freedom of expression the exception.[91] More recently, Sabine Jacques drew attention

[85] Derclaye. *Op cit*. p 146.
[86] Nobre, Teresa. Copyright and Education in Europe: 15 everyday cases in 15 countries. Final Report, COMMUNIA International Association of the Digital Public Domain. 2017. p 6.
[87] COMMUNIA, Leveraging copyright in support of education, COMMUNIA policy paper on exceptions and limitations for education. 2016.
[88] Nobre, Teresa. *Op cit.* 2017. p 6.
[89] Wager, Hannu *et* Watal, Jayashree. Human rights and intellectual property law *in* Research Handbook on Human Rights and Intellectual Property, edited by Christophe Geiger, Edward Elgar. 2015. p 169.
[90] Hugenholtz, P. Bernt. Copyright and Freedom of Expression in Europe *in* Innovation Policy in an Information age, *edited by* Rochelle Cooper Dreyfuss, Harry First and Diane L. Zimmerman, Oxford University Press. 2001. p 1.
[91] Geiger, C. *Op cit.* 2004. p 272-273.

to the fact that, despite periodical updates to copyright laws, the alterations have mostly been aimed at safeguarding the interests of the rightholders, upsetting the fair balance that had been established by the legislator between copyright protection and other fundamental rights.[92]

Nevertheless, it is of great importance to understand that the two conceptualizations are not necessarily incompatible. Acknowledging the *conflictual* dimension of the relationship between copyright and other fundamental rights, should not be equated with blindly negating the former and disregarding its social value. Copyright is of great importance in a democratic society because it fosters intellectual development, education, creativity, and plurality of ideas. However, recognizing the *supportive* dimension of this relationship does not imply denying the existence of conflicts between the two sets of rights.

1.2. The EU Copyright Acquis: An Overview

According to Lucas-Schloetter, three distinct phases can be identified when addressing the evolution of EU copyright law.[93] The first phase, which lasted from 1957 (the year the Treaty of Rome was adopted) until the mid-1980s, was marked by the relationship between copyright law and primary European Community (EC) law. Indeed, these two legal branches were mostly autonomous from one another, with intellectual property law being perceived as a purely national or international affair, [94] as opposed to a regional one. The primary EC law only had an impact on intellectual property law insofar as it related to the rules governing competition or on the free movement of goods and services, *i.e.,* sets of rules which are indispensable for the functioning of the internal market.[95]

A second phase followed, defined by the start of the harmonization of copyright law within the EC. It is safe to say that the process of harmonizing copyright law within the EU began in the late 1980s, despite it being difficult to pinpoint at an exact date. Some authors claim that the adoption of the Single European Act in 1987 marked the start of

[92] Jacques. *Op cit.* 2021. p 282.
[93] Lucas-Schloetter, Agnès. Is there a Concept of European Copyright Law? History, Evolution, Policies and Politics and the Acquis Communautaire *in* EU Copyright Law, 2nd Edition, edited by Irini A. Stamatoudi and Paul Torremans, Edward Elgar. 2021. p 6.
[94] At the international level, the Berne Convention, which was last amended in 1979, established some basic principles and minimum standards for the protection of author's rights.
[95] Echoud, M. van *et al. Op cit.* p 2.

this process,[96] while others point to the publication of the Green Paper on Copyright and the Challenge of Technology by the Commission of the European Communities in 1988.[97] Conversely, it appears quite consensual that the motivations behind this harmonization were the removal of potential barriers for the circulation of goods and services within the EC internal market.[98] The harmonization efforts took the form of directives and regulations, the first of which was the Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (hereinafter Software Directive I). Since then, the EU copyright acquis has significantly expanded. The current landscape of EU copyright law comprises 2 regulations and 12 directives, which regulate and harmonize the economic rights of various categories of right holders.

Lastly, Lucas-Schloetter identifies a third phase in the evolution of EU copyright law, beginning in 2007, which is characterized by the CJEU playing a more prominent role. Arguably, the CJEU has taken full advantage of the opportunity to play a major part in harmonizing copyright law within the EU through its rulings on preliminary references and through its binding legal interpretations.[99] The interventionist role of the CJEU in the realm of copyright has been emphasized by scholars, arguing that the court's case law has an influence on both the *exercise* and the *very existence* of copyright.[100]

In spite of all these harmonizing measures and efforts, it is worth recognizing that copyright is still regulated under the national laws of Member States, *i.e.*, there has not been a complete horizontal harmonization of copyright law within the EU. In fact, as mentioned above, copyright is still subject to the *principle of territoriality*, which essentially means intellectual property rights are confined within the territory of the State which has granted them.[101] This aspect is of the utmost importance for the present study because, as will be further explained below, while some main concepts and institutions have now been completely harmonized within the EU either via legislative instruments or CJEU rulings, others are at the Member States' appreciation; such is the case of

[96] See Lucas-Schloetter. *Op cit.* p 8.
[97] See Jongsma, Daniël. Creating EU Copyright Law: Striking a Fair Balance. Helsinki: Hanken School of Economics. 2019. p 4.
[98] See Recitals 1 and 6 of the InfoSoc Directive, and Recital 1 of 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 (hereinafter DSM Directive). See also Echoud, M. van *et al. Op cit.* p 4-5. Lucas-Schloetter. *Op cit.* p 7-8. and Jongsma. *Op cit.* 2019. p 4.
[99] Lundstedt. *Op cit*. p 419. Lucas-Schloetter. *Op cit*. p 10.
[100] Lucas-Schloetter. *Op cit*. p 10.
[101] Lundstedt. *Op cit*. p 1.

exceptions and limitations, at least to a certain extent.

Before delving deeper into this matter, it is important to clarify what constitutes the common core of the copyright's subject-matter and its duration, as well as which exclusive rights are granted to copyright holders in the EU.

a. Copyright Subject-Matter, Exclusive Rights and Duration

Copyright vests in its rightful owner, *i.e.,* the author of the protected work, a set or bundle of exclusive rights. Nonetheless, the said work must first be eligible for copyright protection. In this vein, it is important to answer the question: *What is the copyright subject-matter?* Or, in other words, *what can be protected by copyright?* To do so, it is necessary to peel back the different layers of copyright law.

Beginning at the international level, attention is to be drawn to the Berne Convention, which provides that *literary and artistic works* are to be protected by copyright.[102] Article 2(1) of the same Convention further explains and illustrates this expression, clarifying that it shall cover any "production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression (…)", and including a non-exhaustive list of examples of works that may be protected by copyright. Ultimately, as Jane Ginsburg has eloquently stated "copyright protects creative works of the human mind".[103] Nevertheless, on its own, this notion is not sufficient: it must be complemented by the principle of the *idea/ expression dichotomy,* which is established both in Article 9 of the TRIPS Agreement and Article 2 of the WIPO Copyright Treaty. According to this principle, rather than protecting the ideas themselves, copyright protects how those ideas, processes, or methods are expressed. The significance of this is that while the ideas need not be new or original, the manner in which they are expressed or materialized must be.[104]

Proceeding to the second layer of copyright law, it is first necessary to highlight that the EU legislator has failed to fully harmonize the concept of *work* for the purposes of copyright protection. Different reasons hide behind this lack of harmonization.[105] To begin with, when one considers the rationale and underlying competence rules behind the

[102] Articles 1 and 2 of the Berne Convention.
[103] Ginsburg, Jane. Overview of Copyright Law *in* Oxford Handbook of Intellectual Property, edited by Rochelle Dreyfuss and Justine Pila, Columbia Public Law Research Paper No. 14-518. 2016. p 4.
[104] WIPO Intellectual Property Handbook: Policy, Law and Use. 2008. p 42.
[105] Echoud, M. van *et al. Op cit.* p 31.

harmonization process – which are jointly that of removing restraints on the functioning of the internal market – it is easily understandable why priority is given to harmonizing matters such as the economic rights of authors rather than the subject-matter of copyright. Additionally, the definition of the subject-matter is intrinsically linked with the traditions of each Member State, making it harder for an agreement to be reached. For this reason, the EU Directives resort to a variety of terminologies to refer to the subject-matter protected by copyright. For instance, throughout the text of the Directive on the term of protection of copyright and certain related rights[106] (hereinafter Term Directive) the following different expressions are used: "literary or artistic work within the meaning of Article 2 of the Berne Convention",[107] "author's own intellectual creation",[108] "authors' works"[109] and simply "works".[110] The same pattern can be found in other EU copyright Directives.

In spite of this, it is possible to find a common denominator in a number of directives, which consolidated in the CJEU case law: the notion of author's own intellectual creation. In occasion of a preliminary ruling request to interpret article 2(a) of the InfoSoc Directive, the CJEU, in its landmark decision on the *Infopaq* case,[111] concluded that, within the meaning of the cited article, copyright applies only to a work, that is original in the sense that it is an author's own intellectual creation.[112] In this way, and by establishing a threshold of originality that is applicable throughout all Member States, the CJEU took on the role as the harmonizer of EU copyright law and harmonized the concept of authors' own intellectual creations by shaping it as an autonomous concept of EU law. As regards what is to be understood by this notion, the CJEU has since provided some guidance. In *Painer*[113] the Court ruled that an "intellectual creation is an author's own if it reflects the author's personality", and that such is the case if the author expressed his creative abilities to create the work by making free and creative decisions.[114] On another

[106] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.
[107] Recital 16 and Article 1 of the Term Directive.
[108] Recital 16 and Article 6 of the Term Directive.
[109] Recital 7 of the Term Directive.
[110] Recitals 13 and 21, and Articles 2, 4 and 5 of the Term Directive.
[111] Case C-5/08, Infopaq International A/S *v* Danske Dagblades Forening. ECLI:EU:C:2009:465 [*Infopaq*].
[112] *Infopaq*. paras 37 and 39.
[113] Case C-145/10, Eva-Maria Painer v Standard VerlagsGmbH and Others, ECLI:EU:C:2011:798. [*Painer*].
[114] *Painer*. paras 88-89.

occasion, in *Levola Hengelo,*[115] when deciding whether the taste of a spreadable cheese could be considered a *work* for the purposes of copyright protection, the CJEU noted that the expression of the authors' creative choices needs to be made with a certain degree of objectivity and precision.[116] The Court ultimately came to the conclusion that the taste of a food product did not satisfy such criteria.[117] As a result, the copyright subject-matter is an extremely ample notion, which is currently liable to encompass a wide spectrum of works, ranging from 11-word excerpts to cinematographic works and sculptures, as long as they express and reflect their creators' originality and intellect with sufficient objectivity. The subject of the current and very heated debate is whether or not artificial intelligence-generated output qualifies as a "work" for the purposes of copyright protection.[118]

Taking these considerations into account and having some grasp of which works can be protected by copyright, it is now relevant to answer the question of: *How are authors' own intellectual creations protected?* An introductory, but nonetheless important, idea is that of copyright's *legal monopoly.* Indeed, the rightsholder is free to use the protected work in any way he/she intends to, while excluding unauthorized uses by others. In practice, this legal monopoly translates into a bundle of exclusive rights which can be divided into two main categories: moral and economic rights.

The former category of rights is closely tied to the romantic conception of the author,[119] as it concerns the protection of his/hers non-economic or immaterial interests.[120] Indeed, it has been argued that the rationale behind the protection of such rights is the belief that the work is an *"extension of the artist's personality, an expression of his innermost being".*[121] At international level, moral rights are regulated under article 6bis of the Berne Convention, which distinguishes between the right of paternity, *i.e.*, the right of publicly claiming authorship of the work, and the right of integrity, that is, the

[115] Case C-310/17, Levola Hengelo BV *v* Smilde Foods BV, ECLI:EU:C:2018:899 [*Levola Hengelo*]..
[116] *Levola Hengelo*. para 40.
[117] *Levola Hengelo*. paras 41-44.
[118] See, for exemple, Hugenholtz, P. Bernt *et* Quintais, João Pedro. Copyright and Artificial Creation: Does EU Copyright Law Protect AI-Assisted Output? *In* IIC – International Review of Intellectual Property and Competition Law 52. 2021. Craig, Carys J. AI and Copyright *in* Artificial Intelligence and the Law in Canada, *edited by* Florian Martin-Bariteu and Teresa Scassa. 2021.
[119] Jaszi, Peter. Toward a Theory of Copyright: The Metamorphoses of "Authorship" *in* Duke Law Journal 455-502. 1991. p 496-7.
[120] Echoud, M. van *et al. Op cit.* p 68.
[121] Merryman, J *et* Elsen, A. Law, Ethics, and the Visual Arts 145, 2nd edition. 1987 a*pud* Jaszi, *Op cit.* p 497.

right to object to any distortion or any derogatory alteration of the work that would harm the author's honor or reputation.[122] The EU legislator has abstained from harmonizing moral rights, which means that it is up to the laws of each Member State to regulate such rights in conformity with the Berne Convention.

As to the latter category, economic rights have been heavily regulated at both international and EU levels, having been almost fully harmonized by the EU legislator. For the purposes of the present study, it is fundamental to bear in mind three different types of economic rights: *i)* the reproduction right, *ii)* the distribution right, and *iii)* the right of communication to the public.

Firstly, the right of reproduction entitles the rightsholder to authorize or prohibit the production of copies of the protected work. This right is established in article 9 of the Berne Convention and article 2 of the InfoSoc Directive, with the latter expanding the concept of reproduction to include any direct, indirect, temporary, permanent, total or partial copying of the protected work.

Secondly, the right of distribution, which is established in article 4 of the InfoSoc Directive, can be briefly defined as the right of authorizing or prohibiting the distribution to the public of the original or a copy of the protected work by sale or otherwise. The Berne Convention does not provide for a general right of distribution, only establishing a right of distribution regarding cinematographic works. However, at the international level, we can find a general right of distribution in article 6 of the WIPO Copyright Treaty.

Lastly, regarding the right of communication to the public it is important to mention that this right is dealt with differently at the international and EU levels. On the one hand, at the international level, rather than being a general, single right of communication to the public, the legislator opted for dealing with different types of communication to the public separately.[123] Accordingly, the Berne Convention establishes a right of public performance and of communication to the public of a performance (article 11), broadcasting rights (article 11*bis*), and a right of public recitation and of communication to the public of a recitation (article 11*ter*). Differently, the WIPO Copyright Treaty seemingly provided for a more general right of communication to the public, adding to

[122] Article 6bis (1) of the Berne Convention.
[123] Echoud, M. van *et al. Op cit.* p 71.

the ones established in the Berne Convention. Article 8 of the WIPO Copyright Treaty extends the concept of communication to the public to the making available of protected works in such a way that members of the public may access the mentioned work from a place and at a time individually chosen by them. On the other hand, the EU legislator opted for establishing a general right of communication to the public in article 3 of the InfoSoc Directive, which comprises all of the different types of communication mentioned above.

Furthermore, it is important to acknowledge the existence of other types of economic rights, such as translation and adaptation rights (*cfr.* articles 8, 12 and 14 of the Berne Convention), related rights of performers, producers and broadcasters (*cfr.* articles 9(3), 11bis of the Berne Convention, and articles 2(b),(c),(d) and (e) and 3(2) of the InfoSoc Directive), among others.

Last but not least, it is worth noting that copyright duration is fully harmonized at the EU level by the Term Directive, which raised the standards of protection set forth by international law.[124] For instance, whereas article 7(1) of the Berne Convention only mandates that works be protected for, at least, fifty years *post mortem auctoris*, *i.e.*, after the death of the author, article 1(1) of the Term Directive establishes that literary or artistic works within the meaning of article 2 of the Berne Convention shall be protected for a minimum term of seventy years following the author's death, regardless of the date when the work was made fully available to the public.

Notwithstanding this general rule, the Term Directive establishes special rules which apply to different categories works or to related rights. For example, article 2 of the Directive provides that the of protection of cinematographic or audiovisual works shall expire seventy years after the death of the last of the following persons to survive: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work. Furthermore, different durations are provided in the cases of works of joint authorship (article 1(2) Term Directive), anonymous or pseudonymous works (article 1(3) Term Directive), related rights (article 3 Term Directive), works whose protection

[124] As was previously seen, moral rights are not harmonized within the EU, so the Term Directive only applies to economic rights. Recital 20 and Article 9 of the Term Directive confirm this idea by providing that the Directive is without prejudice to national laws regulating moral rights.

expired before being lawfully communicated to the public (article 4 Term Directive), *etc.*

b. Copyright Exceptions and Limitations: Legal Terminology

Despite granting a vast array of exclusive rights, the *monopoly* copyright affords its rightsholders is not without limits. In some instances, users' interests take precedence over the authors' exclusive rights in the name of the common good. The delicate balance between these two sets of interests in mainly achieved through copyright's system of exceptions and limitations.

Exceptions and limitations serve the vital functions of keeping the focus on the legal protection of authors, artists, performers, and investors, while fostering innovation and creativity. From a social standpoint, they play the pivotal role of promoting inclusivity and enabling access to knowledge, information, and culture. Furthermore, exceptions and limitations are essential to the creative process since they allow authors to draw inspiration from one another's creations.

In the present study, for practical reasons, and due to its limited scope, the terms *exceptions* and *limitations* will be used interchangeably, thus following the footsteps of the international and EU legislators, which, at least seemingly, treat the two notions as synonyms.[125] Illustratively, the title of article 13 of the TRIPS Agreement refers to "exceptions and limitations", abstaining from establishing a difference between the two terms. In the same line, article 5 of the InfoSoc Directive is titled "Exceptions and limitations" without further explaining either of the concepts. Notwithstanding this, it is worth keeping in mind the conceptual debate that surrounds the two notions for the remainder of this study. The fact that the definition of copyright exceptions and limitations is a nebulous one has prompted many scholarly criticisms, as well as several attempts at defining them.

According to Ginsburg, the difference between exceptions and limitations lies in the remuneration of the copyright owner. While the former allows the user to engage in the permitted use without having to pay the rightholders, the latter allows the use but only in

[125] Kur, Annette. Of Oceans, Islands and Inland Water – How much Room for Exceptions and Limitations under the Three Step-Test? Max Planck Papers on Intellectual Property, Competition & Tax Law Research Paper Series No.08-04. 2008. p 5.

exchange of a payment.[126] Differently, Christie understands exceptions as *carve-outs* from the exclusive rights of the rightholder, *i.e.*, as removals from such exclusive rights. The author claims these *carve-outs* can be partial or total, depending on whether they are monetarily compensated or not. As for limitations, Christie contends that they constitute limits beyond which the exclusive rights do not extend. For the author, limitations delineate copyright's scope of protection.[127] A similar proposal can be found on the WIPO Study on Limitations and Exceptions, where limitations are defined as provisions that impose or allow the exclusion of protection of specific categories of subject-matter, and exceptions are described as provisions that allow the granting of immunity for uses that would otherwise constitute an infringement.[128]

On a different note, Geiger maintains that the term *limitations* is more appropriate than the term *exceptions*, because intellectual property rights should be conceived as the exception to a "greater principle of freedom", and not the other way around. Limitations, according to him, should be merely perceived as tools that allow legislators do define or delimit the exact scope of the exclusive rights.[129] According to the scholar, an interpretation of these legal tools as straight-forward *exceptions* would entail that they would *prima facie* have to be assessed under the principle of restrictive interpretation and that their analogical application is precluded.

Due consideration must also be given to Rendas' argument that, from a legal-technical perspective, the term exceptions is more adequate to describe the rules that set forth permitted uses. [130] The scholar contends that the permitted uses "defeat" the otherwise applicable exclusive right, removing the liability for infringement.[131] Moreover, the scholar disputes the idea that exceptions have to be interpreted restrictively, basing this

[126] Ginsburg. *Op cit.* p 23. See also Sirinelli, P. Exceptions and Limits to Copyright and Neighbouring Rights. Conference Paper, WIPO Workshop on Implementation Issues of the WIPO Copyright Treaty and the WIPO Peformances and Phonograms Treaty. 1999. p 6.
[127] Christie, Andrew F. Maximising Permissible Exceptions to Intellectual Property Rights *in* The Structure of Intellectual Property Law: Can One Size Fit All?, edited by Anette Kur and V Mizaras, Edward Elgar, University of Melbourne Legal Studies Research Paper No. 553. 2011.
[128] WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, prepared by Sam Ricketson [WIPO Study on Limitations and Exceptions]. 2003. p 3.
[129] Geiger, C. Flexibilising Copyright – Remedies to the Privatisation of Information by Copyright Law *in* International Review of Intellectual Property and Competition Law, v. 39. 2008. p 193. See also the Commentary of article 5 in Geiger, C. *et* Schönherr, Franchiska. The Information Society Directive *in* EU Copyright Law, edited by I. Stamatoudi and P. Torremans, Edward Elgar. 2014.
[130] Rendas, Tito. Are copyright-permitted uses 'exceptions', 'limitations' or 'user rights'? The special case of Article 17 CDSM Directive *in* Journal of Intellectual Property Law & Practice, vol. 17, no. 1. 2017.
[131] *Idem.* p 57.

argument in the case law of the CJEU.[132] Although Rendas rightfully concludes that exceptions can be interpreted "holistically, taking into account their context and purpose",[133] this conclusion has to be taken *cum grano salis*, as the court's case law has been inconsistent in this context (see *infra*). In his view, the term *limitations* better describes the limits which define copyright's subject-matter, as well as the scope of exclusive rights.[134]

Although I am partial to conceptualization of intellectual property as an island in an ocean of freedom, Rendas' conceptualization better aligns with the rules on the burden of proof. While the elements of the exclusive right's definition are part of the rightholder's claim, exceptions serve as a defense.[135] If permitted uses were to be construed as limitations, this would imply that they are elements of the exclusive right, unreasonably placing the burden of proof on the rightsholder.[136] Alternatively, if they are viewed as exceptions, the user who wants to avail themselves of such permission is responsible for demonstrating that the necessary requirements are met.[137] Most importantly, Geiger's and Rendas' stances on the matter highlight the fact that, despite appearing to be merely theoretical, these conceptual differences actually have a practical bearing on how so-called exceptions and limitations should be interpreted, as well as on the respective burden-of-proof.

c. Copyright Exceptions and Limitations: Key Legislative Provisions

In the EU, there is no single instrument that covers all copyright exceptions. Instead, they are established in different pieces of legislation, or, in the ironic words of Jongsma, *"they are organized in a disorderly manner"*.[138]

Until 2001, the EU system of exceptions and limitations was marked by vertical approaches, meaning that the Directives and the exceptions contained within were only applicable to specific categories of works, rights or ways of exploitation.[139] The Software Directive I, which was the first attempt by the EU legislator to harmonize exceptions,

[132] *Idem.* pp 58-60.
[133] *Idem.* p 64.
[134] *Idem.* p 58.
[135] *Idem.* p 57.
[136] *Ibidem.*
[137] *Ibidem*
[138] Jongsma. *Op cit. 2019.* p 52.
[139] Guibault, Lucie. Le tir manqué de la Directive européenne sur le droit d'auteur dans la société de l'information *in* Les Cahiers de propriété intellectuelle 539. 2002. p 1.

included ones that were exclusively applicable to computer programs. Another example of this vertical approach is the Database Directive, whose exceptions, as the title of the Directive implies, are only applicable to databases.

The latter Directive is also very relevant for the fact that it was the first time that the EU legislator adopted a non-mandatory, or optional, approach, allowing the Member States to select which, if any, of the constraints they wanted to implement. In its article 6, the Database Directive establishes that Member States may provide for limitations on the *suis generis* rights established in article 5 of the same Directive in the following cases: *i)* reproduction for private purposes of a non-electronic database; *ii)* use for the sole purpose of teaching or scientific research; *iii)* where there is use for the purposes of public security or for the purposes of an administrative or judicial procedure; and *iv)* where other exceptions to copyright which are traditionally authorized under national law exist. Hence, national legislators were allowed to extend this list of exceptions to accommodate their own copyright traditions. Additionally, the three-step test[140] made its first appearance in EU copyright law in this Directive, limiting the exceptions allowed under article 6.

Nevertheless, the adoption of the InfoSoc Directive, in 2001, led to a paradigm shift. In this Directive, the EU legislator opted for a horizontal approach to the harmonization of exceptions and limitations, creating a list composed of both mandatory and optional limitations to the exclusive rights harmonized therein (*i.e.*, the rights of reproduction, of distribution, and of communication to the public), which were to be applied to the entirety of the subject-matter covered by copyright, save for computer programs and databases,[141] which were already regulated under specific directives.

Article 5 of the InfoSoc Directive, which provides the main framework for limitations within the EU, is thus comprised of a mandatory exception for acts of temporary transient or incidental reproduction (*cfr*. article 5(1)) and an exhaustive list of twenty optional exceptions and limitations to the rights of reproduction and/or communication to the public (*cfr*. article 5(2) and (3) InfoSoc Directive). Regarding the optional exceptions to

[140] The three-step-test derives from article 9 (2) of the Berne Convention, where it was established in relation to the right of reproduction. Later, with the InfoSoc Directive, the three-step test was transposed into EU copyright law.

[141] See Jongsma, Daniël. *Op cit.* 2019. p 52. The author contends that the framework of exceptions and limitations provided by the InfoSoc Directive is applicable *mutatis mutandis* to the exclusive rights harmonized by the Database Directive via article 6(2)(d) of this Directive.

the right of reproduction (*cfr*. article 5(2)), it includes exceptions in respect of reprographic reproductions (article 5(2)(a)), private copying (article 5(2)(b)), reproductions by publicly accessible libraries, educational establishments, or museums, or by archives (article 5(2)(c)), ephemeral recordings by broadcasters (article 5(2)(d)), and recording by social institutions (article 5(2)(e)). As to article 5(3), it contains optional exceptions to both the rights of reproduction and of communication to the public, namely in respect of uses for illustration for teaching or scientific research (article 5(3)(a)), for the benefit of people with disabilities (article 5(3)(b)), for press review and the reporting of current events (article 5(3)(c)), for quotation (article 5(3)(d)), uses for purposes of public security and public proceedings (article 5(3)(e)), uses of political speeches and public lectures (article 5(3)(f)), uses in official or religious celebrations (article 5(3)(g)), uses of publicly located architectural or sculptural works (article 5(3)(h)), incidental inclusions (article 5(3)(i)), uses for advertising and art exhibition or sale (article 5(3)(j)), for parody (article 5(3)(k)), for equipment repairs (article 5(3)(l)), for building reconstruction (article 5(3)(m)), uses for the purpose of research or private study (article 5(3)(n)), and lastly, the so-called grandfather-clause(article 5(3)(o)), which enables Member States to preserve exceptions that already existed under national law, but only in cases of minor uses. Regarding the right of distribution, according to article 5(4) of the InfoSoc Directive, Member States are allowed to establish exceptions or limitations insofar as they provide a similar exception to the right of reproduction pursuant to paragraphs 2 and 3 of the cited article.

Furthermore, these limitations are complemented by a three-step test (*cfr*. article 5(5) InfoSoc Directive), which limits their judicial application.[142] In line with this test, the limitations provided in the preceding paragraphs of article 5 may only be applied in *i)* certain special cases, which *ii)* do not conflict with a normal exploitation of the work or other subject-matter, and *iii)* do not unreasonably harm the rightholders' legitimate interests.

In short, the InfoSoc Directive harmonized copyright exceptions and limitations by adopting a *numerus clausus* approach, establishing a horizontal, exhaustive list[143] of

[142] See Rendas. *Op cit*. 2018. p 4.

[143] The exhaustive nature of the catalogue provided in article 5 is confirmed in Recital 32 of the InfoSoc Directive, which clearly states that "This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public". Nonetheless, some scholars contend that such closed character is not unequivocal, because article 5(3)(o) of the same Directive

mostly optional exceptions from which Member States can choose. In this sense, the Directive is the primary legal framework for exceptions and limitations within the EU.

Despite the InfoSoc Directive being the pillar of the regulation of copyright exceptions and limitations in the EU, there are other Directives adding to this picture. The Rental Directive[144] followed this *optional-style approach*[145], indeed article 6 (1) of the Directive provides that Member States *may* introduce a public lending exception in their national laws. Moreover, article 10 of the Rental Directive states that limitations to related rights *may* be provided in case of private uses (article 10(1)(a)), uses of short excepts (article 10(1)(b)), ephemeral fixation by a broadcasting organization (article 10(1)(c)), and uses for purposes of teaching or scientific research (article 10(1)(d)). Similarly to the InfoSoc Directive, the application of limitations contained in the Rental Directive is restricted by the three-step test.

In 2012, the Orphan Works Directive[146] introduced a mandatory exception to the rights of reproduction and of making available to the public provided for in articles 2 and 3 of the InfoSoc Directive to ensure that certain organizations (*eg.* publicly accessible libraries, educational establishments, museums) can reproduce and make the orphan work available to the public.[147] Following, in 2017, the Marrakesh Directive[148] established a horizontal mandatory exception to the exclusive rights contained in the Database, Infosoc Term and Software II[149] Directives for the purposes of making accessible copies of works or other subject matter or for communicating, making available, distributing or lending an accessible format copy.[150]

permits Member States to provide for limitations not covered by the list.

[144] Directive 2006/115/EC of the European Parliament and the Council of 12 December 2006 on rental and lending right and on certain rights related to copyright in the field of intellectual property (hereinafter Rental Directive).

[145] Sganga. *Op cit.* 2020. p 6.

[146] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (hereinafter Orphan Works Directive).

[147] *Cfr*. article 6 of the Orphan Works Directive.

[148] 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 and amending Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society (hereinafter Marrakesh Directive).

[149] Directive 2009/24/EC of the European Parliament and the Council of 23 April 2009 on the legal protection of computer programs (hereinafter Software II Directive).

[150] Article 3 of the Marrakesh Directive.

d. Copyright Exceptions and Limitations: Most Recent Developments

Most recently, the CDSM Directive[151] introduced four new mandatory exceptions and limitations relating to text and data mining, digital cross-border educational activities and preservation of cultural heritage. Before the adoption of this Directive, the EU Commission issued a series of Communications in which it emphasized the need for modernizing and adapting copyright law, in general, and its system of exceptions and limitations, in particular, to the digital economy.[152] For instance, in the Communication "A Digital Single Market Strategy for Europe", the Commission pledges to make legislative proposals that increased greater legal certainty for the cross-border use of content for specific purposes, such as research, education, text and data mining, through harmonized exceptions, with the aim of reducing the differences between national copyright laws and maximizing online access to works by users across the EU.[153] Later, in the Communication "Towards a modern, more European copyright framework", the Commission linked the fragmentation of copyright exceptions and limitations within the EU to their optional nature. Moreover, it was emphasized that some exceptions, particularly those that are crucial to education, research and access to knowledge, need to be reassessed in light of the digital reality and across borders.[154] Finally, this process resulted in a proposal in 2016 for a Directive on Copyright in the Digital Single Market, which introduced new mandatory exceptions in the fields of education, research and preservation of cultural heritage.[155]

In 2019, the CDSM Directive in its final version was adopted, expanding quite significantly the scope of exceptions and limitations in EU copyright law.[156] Indeed, in this Directive, the EU legislator did not embrace an *optional-style* approach but

[151] 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 (hereinafter CDSM Directive).
[152] For a more detailed analysis of the process that led to the adoption of the CDSM Directive, see Sganga. *Op cit.* 2020. pp 18-22.
[153] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: A Digital Single Market for Europe, 6 May 2015, COM (2015) 192 final. pp 7-8.
[154] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: Towards a modern, more European copyright framework, 9 December 2015, COM (2015) 626 final. pp 6-8.
[155] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market, 14 September 2016, COM (2016) 592 final. pp 6-7.
[156] Borghi, Maurizio. Exceptions as Users' Rights *in* The Routledge Handbook of EU Copyright Law edited by Eleonora Rosati, Routledge, 2021. p 274.

introduced four mandatory exceptions that cannot be overridden by contract.[157] In addition to safeguarding users, these exceptions support authors in their pursuit of knowledge and creativity.

The first two exceptions concern text and data mining[158] (hereinafter TDM). Firstly, article 3 of the CDSM Directive requires Member States to introduce an exception for reproductions and extractions made by research organizations and cultural heritage institutions in order to carry out, for the purposes of scientific research, TDM of works or other subject matter to which they have lawful access (*cfr.* article 3(1) CDSM Directive). Secondly, article 4 provides a general exception for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of TDM (*cfr.* article 4(1) CDSM Directive). However, the use of works and other subject matter must not have been expressly reserved by their rightholders in an appropriate manner, such as machine-readable means in the case of content made publicly available online (*cfr.* article 4(3) CDSM Directive), for this latter exception to apply.

Article 5 of the CDSM Directive introduces an exception for the digital use of works in cross-border educational activities, thus revising the exception for illustration for teaching.[159] The scope of this new exception is very limited because it only covers uses that are carried out solely for the purpose of illustration for teaching and are overseen by an educational establishment. Moreover, it only covers those uses to the extent that they are necessary to achieve the non-commercial goal.[160] Hence, excluding educational uses for commercial goals as well as uses by institutions other than educational establishments, such as museums, libraries, and other cultural institutions.[161] Additionally, article 5(2) of the CDSM Directive further limits the scope of this exception by allowing Member States to provide that the exception does not apply to specific uses or types of works if there are suitable licenses in place that cover the acts authorized by the exception. Secondly, article 6 of the CDSM Directive sets forth an exception in favor of cultural heritage institutions, allowing them to make copies of subject matter that are permanently in their collections,

[157] Article 7(1) CDSM Directive, also known as the "umbrella provision", establishes that any contractual provision contrary to the exceptions set out in the Directive shall be unenforceable.
[158] Article 2(2) of the CDSM Directive defines text and data mining as "any automated analytical technique aimed at analyzing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations".
[159] Article 5(3)(a) InfoSoc Directive.
[160] Article 5(1)(a)(b) CDSM Directive. Quintais, JP. The new copyright in the Digital Single Market Directive: a critical look *in* European Union Intellectual Property Review, 42(1). 2020. p 5.
[161] Quintais. *Op cit.* 2020. p 5.

in any format or medium, for purposes of preservation of such works and to the extent necessary for such preservation.

CHAPTER II – The Role of Fundamental Rights as Limits to Copyright

2.1. The Notion of Fair Balance

In the context of international copyright law, the term *balance* first appeared in the TRIPS Agreement of 1994,[162] whose article 7 specifies that "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the *mutual advantage of producers and users* of technological knowledge and in a manner conducive to social and economic welfare, *and to a balance of rights and obligations*." (emphasis added). This article summarizes the objectives of the protection and enforcement of intellectual property rights, recognizing its potential to promote technological innovation and dissemination in a way that benefits both producers and users. The WIPO Copyright Treaty followed, explicitly addressing in its preamble the need to "maintain a *balance between the rights of authors and the larger public interest*, particularly education, research and access to information" (emphasis added). At the EU level, the concept of fair balance was included in the InfoSoc Directive, more specifically in its recital 31 which provides that "A fair balance of rights and interests between the different categories of rightsholders, as well as between the different categories of rightsholders and users of protected subject-matter must be safeguarded".

Although these references suggest the relevance of fair balance in copyright law and policy, the term is still poorly defined. The legislative texts differ in the sense that different subjects are mentioned: producers, users, authors, public, and categories of rightsholders. Further, the object of the balancing itself also differs, with references being made to rights, obligations and interests. Nonetheless, the three abovementioned legislative texts have one thing in common: they fail to clarify what should be understood by fair balance in the context of the copyright law and how such a balance should be struck. Therefore, it is necessary to look into scholarly literature articles and judicial decisions in order to decipher its meaning.

The origins of the fair balance principle can be traced back to the case law of the ECtHR. [163] Indeed, the principle is a judicial creation of the European Court, which

[162] Mandic, Danilo, Balance: Resolving the conundrum between copyright and technology. 2011. p 4.
[163] Jongsma. Daniël. Three Types of Balancing in EU Copyright Law: the (mis)uses of the concept of "fair balance". 2019a. p 5. See also Mowbray, Alastair. A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights *in* Human Rights Law Review 10:2. 2010.

declares that the fair balance principle has its foundations on the essence of the ECHR.[164] Illustratively, in the *Sporrong and Lönnroth v Sweden case*,[165] the Court held that for the purposes of Article 1 of the Protocol 1 ECHR, it must be determined "whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights", emphasizing that the search for this balance is inherent to the entire ECHR.[166] The ECtHR has since applied this principle to analyze the proportionality of State interferences with the applicants' rights and to decide when the ECHR imposes implicit positive obligations on States.[167] The fair balance principle is thus closely linked to a proportionality analysis,[168] having been equated by Oliver and Stothers with a "variant of the principle of proportionality".[169] The fair balance principle, much like the principle of proportionality, is by its very nature vague, abstract, and subject to a wide margin of appreciation.[170]

In practice, balancing can be defined as the process whereby courts and legislators weigh conflicting rights and interests in order to arrive at a stable, equilibrated solution, that requires judges and legislators to identify which of the conflicting rights is the heaviest, allowing this one to prevail with the minimum sacrifice to the other. [171] Thus, safeguarding both of the conflicting rights. For example, in the InfoSoc Directive, the EU legislator sought to establish a balance between the interests of copyright holders and users of protected works through a set of exceptions and limitations to the former's exclusive rights.

Applying these notions to the field of intellectual property, it can be concluded that balance means achieving an optimal level of protection, one that suitably safeguards and rewards creativity and inventiveness, offering a good incentive to create, while not discouraging the creativity and inventiveness of others.[172] The complexity lies in finding

[164] Mowbray. *Op cit.* 2010. p 315.
[165] Case of the *Sporrong and Lönnroth v Sweden*, (Plenary) Appl. no. 7151/75; 7152/75, ECtHR 1982. [*Sporrong and Lönnroth v Sweden*].
[166] *Sporrong and Lönnroth v Sweden.* para 69.
[167] Mowbray. *Op cit.* 2010. p 315.
[168] Jongsma. *Op cit.* 2019a. p 5.
[169] Oliver, Peter and Stothers, Christopher. Intellectual Property Under the Charter: Are the Court's Scales Properly Calibrated? *in* Common Law Review 54. 2017. p 545.
[170] Oliver, *et al. Op cit.* 2017. p 546. Mowbray. *Op cit.* 2010. p 290.
[171] Giovanella. *Op cit*. 2017. pp 6, 11.
[172] Gervais, Daniël J. The Changing landscape of International Intellectual Property *in* Journal of Intellectual Property Law & Practice, Vol. 1, no. 4. 2006. p 254.

the optimal degree of protection.

In recent years, the CJEU has undertaken the role of giving structure to this nebulous principle. When delivering preliminary rulings concerning secondary legislation in the area of copyright, it has often emphasized the need to strike a fair balance between the competing fundamental rights of rightholders and users. [173]

In *Promusicae*,[174] the CJEU's first decision on fair balance, the Court was asked whether the InfoSoc Directive, the Directive on electronic commerce,[175] and the Enforcement Directive, read in light of Articles 17 and 47 of the ECHR, must be interpreted as requiring Member States to establish an obligation to disclose personal data in the course of civil proceedings to ensure effective copyright protection.[176] The court recognized that the preliminary question brought up the need to reconcile the requirements of the protection of various fundamental rights, specifically the rights to respect for private life, to protection of property, and to an effective remedy. In ruling against the existence of an obligation to disclose personal data, the CJEU recalled that, when transposing the aforementioned directives, Member States should rely on an interpretation of the directives that allows a "fair balance to be struck between the various fundamental rights protected by the Community legal order."[177]

The relevance of this decision also stems from the fact that it was the first time that the CJEU recognized the application of the horizontal effects of fundamental rights in the context of copyright law.[178] The horizontal effects remain on an indirect level since, as contended by Sganga,[179] in *Promusicae,* the CJEU invited national judges to use fundamental rights as legal principles that inform the interpretation of secondary EU law. Nonetheless, in this decision, the CJEU ultimately failed to provide the national court

[173] Griffiths, Jonathan. Constitutionalising or harmonizing? – the Court of Justice, the right to property and European copyright law *in* European Law Review 38. 2013a. p 11.
[174] Case C-275/06, Produtores de Música de España (Promusicae) v Telefónica de España SAU. ECLI:EU:C:2008:54. [*Promusicae*]
[175] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereinafter Directive on electronic commerce').
[176] *Promusicae.* para 41.
[177] *Promusicae.* paras 68 – 70.
[178] Sganga, Caterina. 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 *in* European Intellectual Property Review. 2019. pp 1, 3.
[179] *Ibidem.*

with further guidance on how to implement the fair balance principle in practice.

Since *Promusicae,* the CJEU has reiterated the reference to the fair balance principle thereby playing a prominent role in shaping this principle. [180] The CJEU's proactive role has led some authors to assert that it "has the (arguably to some extent self-imposed) task to (re)define the meaning of the many copyright's central concepts",[181] which includes the critical function of "determining the scope of protection offered by copyright in the EU".[182] In particular, the fair balance principle has had material significance in three groups of cases: *i)* cases relating to the interpretation and application of EU copyright law, particularly in interpreting exclusive rights and copyright exceptions and limitations; *ii)* cases relating to the enforcement of copyright against internet service providers (ISPs)*;* and *iii)* cases relating to fair compensation of the rightsholder.[183]

Nevertheless, the Court's inconsistent and unstructured use of the fair balance principle continues to draw criticism.[184] This is due to the absence of a concrete methodology for carrying out the balancing exercise. Against this backdrop, scholars have been urging the CJEU to develop a structured approach to the fair balance principle.[185] Otherwise, this principle would remain an "empty slogan merely giving fundamental rights gloss to the CJEU case law" [186] and it would be used merely to promote the CJEU's political agenda of harmonizing EU copyright law.[187]

In the following sections some of the general CJEU's guidelines as regards the fair balance principle will be discussed. This exercise will be done under the pretext of analyzing copyright's internal and external balancing mechanisms.

[180] For further readings on the principle of fair balance in the context of the CJEU case law, see Jongsma. *Op cit.* 2019; Jongsma, *Op cit.* 2019a; and Sganga. *Op cit*. 2019.
[181] Jongsma. *Op cit.* 2019. p 61.
[182] *Ibidem.*
[183] Jongsma. *Op cit.* 2019. pp 125 *et ss*.
[184] See Peukert, Alexander, The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature *in* Research Handbook on Human Rights and Intellectual Property edited by C. Geiger, Edward Elgar, University of Melbourne. 2015. Jonsgma *Op cit.* 2019. p 153. Griffiths. *Op cit.* 2013a. p 15.
[185] Jongsma. *Op cit.* 2019. pp 154.
[186] Mylly, Tuomas. The constitutionalization of the European legal order: impact of fundamental rights on intellectual property in the EU *in* Research Handbook on Human Rights and Intellectual Property edited by C. Geiger. p 41.
[187] Griffiths. *Op cit.* 2013a. pp 12 -13.

2.2. Copyright's Internal Balancing Mechanisms

As it was explained above and irrespective of any criticism that might be leveled against it, the concept of fair balance underpins EU copyright law. Accordingly, this branch of law has inbuilt balancing mechanisms that strive to achieve a just equilibrium between the interests of rightholders, users of protected subject matter, and the general public. Internal balancing mechanisms are tools that can be found within EU copyright law that are designed to maintain the balance between copyright and other fundamental rights.[188]

Recently, the CJEU ruled that these internal mechanisms can be found in the InfoSoc Directive itself, as it provides copyright owners with exclusive rights and establishes exceptions and limitations to those very rights.[189] Copyright internal balancing takes place at three different levels: *i)* when defining the protectable subject-matter; *ii)* when defining the scope of exclusive rights; *iii)* when interpreting copyright exceptions and limitations.

a. The Originality Threshold and the Idea-Expression Dichotomy

A first stage of internal balancing takes place at the level of the subject-matter protected by copyright. As it was explained in Chapter I of the present study (*cfr*. section 1.2.2.), in order for a certain subject-matter to be afforded copyright protection, it needs to be both *i)* an author's own intellectual creation, and *ii)* an original expression of an idea. These two notions serve as key tools that operate to maintain a balance between copyright and other fundamental rights. They exclude subject-matter from copyright protection *ab initio*, acting, in the words of Drassinower, as *gatekeepers to the world of copyright.*[190]

Particularly, the exclusion of certain subject matter from copyright's scope of exclusivity has been seen as an internalization of the balance between copyright and other fundamental rights. Copyright does not protect creations that do not meet the threshold of originality, nor does it protect the *ideas* that underlie the copyright-protected works themselves. Drawing the line between subject-matter that is protectable and unprotectable

[188] Montagnani *et al. Op cit.* 2020. p 618.
[189] *Funke Medien*, para 58. *Pelham*, para 60. *Spiegel Online*, para 43.
[190] Drassinower, Abraham. Exceptions Properly So-called *in* Language and Copyright, edited by Y. Gendreau *et* A. Drassinower. Carswell, Bruylant. 2009. p 212.

entails taking into account the desire to incentivize and reward authors while allowing others' freedom to build on the relevant subject-matter.[191] This is due to the premise that such unoriginal creations or ideas should remain free,[192] *i.e.*, no one should be afforded a legal monopoly over them.

As was seen above, in *Levola Hengelo,* the CJEU concluded that a taste could not be considered a *work* for the purposes of copyright protection. The CJEU's ruling in this case may be justified by considerations that the public interest in legal certainty trumps the goal of incentivizing or rewarding authors for their creations.[193] More recently, in *Funke Medien,* in response to a reference by the German Federal Supreme Court, the CJEU had the chance to draw some considerations on whether military status reports could be classified as *works* for the purpose of the InfoSoc Direction.[194] The Court ultimately left such classification to the appreciation of the national court. However, it clarified that the aforementioned reports can only be protected by copyright if they are "an intellectual creation of their author which reflect the author's personality and are expressed by free and creative choices made by the author in drafting those reports".[195] Thus, it can be argued that freedom of expression and information considerations could operate here to define the contours of copyright's subject-matter, excluding that which is purely informative.[196] Unfortunately, the German Federal Supreme Court abstained from indulging in such considerations. The German Court settled the case on the basis of a copyright exception for reporting of current events by the press, noting that it was immaterial to the ruling whether or not the military reports should be considered *works.*[197]

b. The Scope of the Exclusive Rights

A second stage where internal balancing operates is in the context of defining the scope of the exclusive rights. Owners of intellectual property are granted a bundle of moral and

[191] Jongsma. *Op cit.* 2019. p 199.
[192] Deursen, Stijn van *et* Snijders, Thom. The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Acquis *in* International Review of Intellectual Property and Competition Law 49. 2018. p 1083.
[193] Jongsma. *Op cit.* 2019. p 199.
[194] *Funke Medien*. paras 16-25.
[195] *Funke Medien*. paras 24-5.
[196] Geiger, Chistophe et Izyumenko, Elena. From Internal to External Balancing, and Back? Copyright Limitations and Fundamental Rights *in* the Digital Enviornment in Digitalización, acceso a contenidos y propiedad intellectual, edited by C. Saiz Garcia and Julian Lopez. 2022. p 8.
[197]Bundesgerichtshof, Press Release: Zur urheberrechtlichen Zulässigkeit der Veröffentlichung militärischer Lageberichte, Nr. 045/2020. April 2020.

economic exclusive rights. In practice, for there to be a copyright infringement, the alleged infringing acts must be covered by the scope of the exclusive rights. This means that the infringing act needs to entail, for example, a reproduction, a communication to the public or a distribution of a copyright protected work. However, the entitlements these rights confer on authors are constrained by the very definition of the rights themselves.

In this context, it is relevant to make two clarifications. Firstly, the definition of the scope of exclusive rights as a balancing tool differs from the ones that we saw above – originality and idea-expression dichotomy. Rather than questioning whether a certain subject-matter is deserving of copyright protection, what is being decided is whether or not performing a certain act in relation to a protected work is permitted. Secondly, the mechanism currently under analysis must also be distinguished from that which operates at the level of copyright exceptions and limitations, which will be assessed in the following section. Exceptions and limitations only intervene after it is established that the act being performed in relation to a protected work falls within the scope of an exclusive right. In sum, what is being assessed is the scope of the author's entitlements in respect to their work.[198]

An instance where fundamental rights were used to define author's entitlements can be found in *GS Media.*[199] The case concerned the publication of hyperlinks to copyrighted photographs by GeenStijl, a website owned by GS Media, without the consent of the respective rightsholder, Sanoma.[200] In this context, Sanoma brought a copyright infringement claim against GS Media. The case eventually reached the CJEU, that was asked to decide whether a reference to another website that is owned and managed by a third party via a hyperlink to protected work constituted a communication to the public as defined by article 3(1) of the InfoSoc Directive.[201] The Court started by recognizing that, the InfoSoc Directive's objective is to establish a high level of protection for authors, and in this vein, exclusive rights should be interpreted broadly. However, the Directive also aims to establish a fair balance between the interests of copyright holders and the interests and fundamental rights of users of protected works, specifically their freedom of

[198] Drassinower. *Op cit.* 2009. p 214.
[199] Case C-160/15, GS Media BV *v* Sanoma Media Netherlands, Playboy Enterprises International Inc., Britt Geertruida Dekker. ECLI:EU:C:2016:644. [*GS Media*]
[200] *GS Media.* paras 6 – 8.
[201] *Idem.* paras 24-5.

expression and information,[202] and the general interest.[203] After reiterating the various criteria that must be met for there to be a communication to the public,[204] the CJEU refused to take a generalist approach and categorize all posting of hyperlinks to protected works as falling under this concept. The court upheld GS Media's claim that such generalization would have "highly restrictive consequences for freedom of expression and information" and would conflict with the fair balance that the InfoSoc Directive aims to maintain.[205] The court acknowledged the significance of hyperlinking to the sound functioning of the internet, and the importance of the latter to freedom of expression and of information.[206] Therefore, the CJEU concluded that it would be unreasonable for individuals who wish to post hyperlinks to ascertain whether the respective rightsholder had given their consent. Accordingly, it held that a copyright infringement would only arise if the person knew or should have known that the work had been unlawfully made available.[207]

Later on, in *Renckhoff,*[208] the CJEU was once again invited to analyze the concept of communication to the public. The dispute centered around the posting, on a school website, of a photograph taken by Mr. Renckhoff without his consent.[209] The photograph had previously been made freely available on a website.[210] In this instance, the CJEU had to determine whether the concept of communication to the public covers the posting on one website of a photograph that was previously posted on another website without restrictions and with the rightsholder's consent.[211] The court once again returned to the dogma of the broad interpretation of exclusive rights,[212] but this time it maintained that allowing the posting of the photograph without the copyright holder's consent would upset the fair balance between copyright and users' fundamental rights.[213] Responding to a claim that the right to education[214] must be taken into consideration, the CJEU noted

[202] Article 11 ECHR.
[203] *Idem.* paras 30-1.
[204] There are two main criteria to consider when determining whether a conduct qualifies as an act of communication to the public within the meaning of article 3(1) of the InfoSoc Directive: i*)* an act of communication of a work; and *ii)* to a public.
[205] *GS Media.* para 44.
[206] *GS Media.* para 45.
[207] *GS Media.* para 47-9.
[208] Case C-161/17, Land Nordrheim-Westfalen *v* Dirk Renckhoff. ECLI:EU:C:2018:634. [*Renckhoff*]
[209] *Renckhoff.* para 6-7.
[210] *Idem.* para 7.
[211] *Renckhoff.* para 13.
[212] *Idem.* para 18.
[213] *Idem.* para 41.
[214] Article 14 ECHR.

that the balance between this right and copyright can be achieved through the implementation of the optional teaching expression set forth in article 5(3)(a) of the InfoSoc Directive.[215]

Fundamental rights have also been employed by the CJEU to shape the entitlements stemming from the reproduction right. In *Pelham,* a copyright infringement claim was raised by Kraftwerk against Mr. Pelham and Mr. Haas after the latter sampled 2 seconds of one of Kraftwerk's songs using that sample in one of their own songs.[216] The CJEU had to assess whether the reproduction right within the meaning of article 2(c) of the InfoSoc Directive should be interpreted as enabling a copyright holder to prevent a third party from sampling the former's song and using such sample in another song. The court found that the reproduction of a sound sample, even if very short, of a song must be regarded as a partial reproduction of that song for the purposes of article 2(c) of the InfoSoc Directive.[217] Nevertheless, the court ruled that this is not the case when a user, exercising their right to artistic freedom,[218] samples a song in order to use it in a new work in a modified form that is unrecognizable to the ear.[219] Underlying this conclusion is the premise that a fair balance must be struck between copyright and other fundamental rights, including freedom of the arts.[220]

In these three rulings, the internalized balancing between authors' and users' interests is clearly reflected. In *GS Media*, while recognizing that the InfoSoc Directive aims to provide authors with a broad level of protection, the court restricted the right of communication to a public by excluding certain acts from falling under its scope. The Court claimed that such exclusion was necessary to protect internet users' freedom of expression and information. Contrastingly, in *Renckhoff*, the court found that it is not necessary to interpret the right of communication to a public in a way that excludes from its scope certain educational uses to protect the right to education because Member States have the option to introduce a copyright limitation to safeguard such right.[221] Furthermore, the court appeared to imply that such exception was sufficient to achieve a fair balance between the two competing rights. However, if such is the case, it is relevant

[215] *Renckhoff.* paras 42-3.
[216] *Pelham.* para 16.
[217] *Pelham.* para 29.
[218] Article 13 ECHR.
[219] *Pelham.* para 31.
[220] *Idem.* para 35.
[221] Jongsma. *Op cit.* 2019. p 200.

to start raising the question of what should happen in the event of a conflict in a State without a copyright exception for educational purposes. Finally, in *Pelham* the court departed once again from its dogma of a broad interpretation of exclusive rights, allowing the freedom of the arts to delimit the contours of the reproduction right. Against this backdrop, it is made clear that fundamental rights play a role in shaping the author's, and thereby restricting, entitlements with respect to their work.

c. Copyright Exceptions and Limitations

A third level of internal balancing can be found in the context of the interpretation and implementation of copyright exceptions and limitations. As was seen above, copyright exceptions and limitations translate into uses of works that, under certain conditions, are legally permitted without the need for prior authorization from the respective right holder. This means that these exceptions only intervene after it is established that the use of the protected work falls under the scope of an exclusive right.

In this context, there is room for internal balancing to take place. Copyright exceptions and limitations were introduced in the InfoSoc Directive precisely to serve a balancing purpose.[222] Since then, the role they play in establishing and maintaining a fair balance has been emphasized in both scholarly literature and judicial decisions. For instance, in its 2008 Green Paper on Copyright in the Knowledge Economy, the Commission highlighted that copyright laws "have traditionally attempted to strike a balance between ensuring a reward for past creation and investment and the future dissemination of knowledge products by introducing a list of exceptions and limitations".[223] Later, Dreier contended that exceptions "do not merely fine-tune copyright protection" by determining its exact scope, they also balance the "interests of authors, rightholders, competitors and end-users".[224]

Notwithstanding the absence of a complete harmonization of exceptions and limitations, the court has played quite an activist role in this area, having, in the words of

[222] See Recital 31 of the InfoSoc Directive, which suggests that the role of copyright exceptions and limitations is to safeguard a fair balance of rights and interests between the different categories of rightholders and users of protected works.
[223] Commission, Green Paper on Copyright in the Knowledge Economy, 16 July 2008, COM(2008) 466 final. p 5.
[224] Dreier, Thomas. Limitations: The Centerpiece of Copyright in Distress – An Introduction. 2010 *in* Journal of Intellectual Property, Information Technology and Electronic Commerce Law 50. 2010. p 50.

Xalabarder, found "fertile ground for its innovative rulings".[225] In this regard, it is once again relevant to briefly draw attention to the CJEU's landmark decision in the *Infopaq* case. This judgment is a milestone in the court's case law due to the reasoning it gave regarding the interpretation of exceptions under the InfoSoc Directive. When interpreting the exception laid down in article 5(1) of the InfoSoc Directive, the CJEU confirmed the principle according to which exceptions are to be interpreted restrictively in the sense that they derogate from a general rule. The CJEU then stated that the aforesaid principle is applicable to the interpretation of article 5(1) of the InfoSoc Directive, which departs from the general rule of requiring the rightsholder's consent for any reproduction of a protected work.[226] Further, the CJEU ruled that the exception must also be interpreted in light of the three-step test established in article 5(5) of the InfoSoc Directive.[227]

In *Football Association Premier League*,[228] a case concerning as well the exception contained in article 5(1) of the InfoSoc Directive, the CJEU began to change its stance. Although the Court took the opportunity to reiterate the application of the principle of narrow interpretation to the exception set forth in article 5(1) of the InfoSoc Directive,[229] it stated that the interpretation of the conditions present in this article must "enable the effectiveness of the exception thereby established to be safeguarded and permit observance of the exception's purpose".[230] The Court continued by stating that, according to its object, the exception contained in the aforementioned article permits and ensures the development and operation of new technologies while preserving a fair balance between the interests of rightholders and users of protected works who want to use those technologies.[231]

The CJEU followed this line of reasoning also in *Painer.* The dispute centered on the publication of portrait photographs of a girl who had been abducted. The portrait was taken by Ms. Painer and later published by several newspaper publishers without her

[225] Xalabarder, Rachel. The Role of the CJEU in Harmonizing EU Copyright Law in International Review of Intellectual Property and Competition Law, 47. 2016. p 638.
[226] *Infopaq*, para 57.
[227] *Idem*, para 58.
[228] Joined Cases C-403/08 and C-429/08, Football Association Premier League Ltd and Others *v* QC Leisure and Others (C-403/08) and Karen Murphy *v* Media Protection Services Ltd (C-429/08), ECLI:EU:C:2011:631. [*Football Association Premier League*].
[229] *Football Association Premier League.* para 162.
[230] *Idem.* para 163.
[231] *Idem.* para 164.

authorization and without referencing her as the photographer.[232] In this context, the referencing court submitted preliminary questions regarding the interpretation of the exception contained in article 5(3)(d) of the InfoSoc Directive, *i.e.*, the quotation exception.[233] The Court started by highlighting that a fair balance between the rights and interests of the rightsholder and the rights and interests of users must be ensured.[234] Following, it contended that whilst the principle of narrow interpretation is applicable, the exception's effectiveness and its purposes must also be safeguarded.[235] In this vein, it held that article 5(3)(d) of the InfoSoc Directive is intended to strike a balance between the freedom of expression of users and authors' reproduction right. The CJEU ruled that, in this case, the balance is struck by favoring users' freedom of expression over the author's interest in being able to prevent the reproduction of extracts from his work which has already been lawfully made available to the public, while ensuring that the author has the right to have his name indicated.[236] This ruling is of particular importance because it marks the first time that the CJEU hinted that fundamental rights may have a bearing on how copyright exceptions and limitations are interpreted.[237]

In *Deckmyn,*[238] the CJEU once again found itself playing an active role in the harmonization of EU copyright law. The case concerned an infringement of the right of communication to the public and the interpretation of the parody exception (*cfr.* article 5(3)(k) of the InfoSoc Directive). Mr. Deckmyn, a politician, handed out calendars, which had a drawing on the cover page that resembled a protected work completed by Mr. Vandersteen. In this context, the latter brought an action against Mr. Deckmyn, claiming that such drawing and its communication to the public constituted an infringement of their respective copyrights.[239] The CJEU contended that the parody exception aims to strike a fair balance between users' freedom of expression and authors' reproduction right.[240] The Court further found that a fair balance should be reached in this instance by upholding

[232] *Painer.* paras 27–35.
[233] *Idem.* para 43.
[234] *Idem.* para 132.
[235] *Idem.* para 133.
[236] *Idem.* paras 134–5.
[237] Leistner, Mathias. Europe's Copyright Law Decade: Recent Case Law of the European Court of Justice and Policy Perspectives *in* Common Market Law Review 51. 2014. p 585.
[238] Case C-201/12, Johan Deckmyn and others *v* Helena Vandersteen and others, ECLI:EU:C:2014:2132. [*Deckmyn*].
[239] *Deckmyn.* paras 7-10.
[240] *Idem.* para 134.

the users' freedom of speech over the author's interests.[241] Regrettably, the court did not explain how it came to this conclusion.

In addition, the court was asked whether the concept of parody is an *autonomous concept of EU law.* The Court responded affirmatively. In light of the need for uniform application of EU law and of the principle of equality, the terms of a provision of EU that does not expressly refer to the Member State's law for the purpose of determining its meaning and scope mut be given an autonomous and uniform interpretation throughout the EU. This interpretation must also take into account the provision's context and underlying goal.[242] Ultimately, as noted by Xalabarder, the CJEU achieved an "*express harmonization"* of the exceptions and limitations provided in article 5 of the InfoSoc Directive, by classifying this list as autonomous concepts of EU law and, thus, enforcing its uniform interpretation across Member States, irrespective of what national laws convey. Hence, limiting the scope of such exceptions.[243]

More recently, in *Funke Medien* and *Spiegel Online*, the CJEU has ruled that the exceptions and limitations contained in article 5 of the InfoSoc Directive are specifically intended to ensure a fair balance between the interests of rightholders and users of protected works.[244] And thus, they need to be interpreted in such a way that, while being consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter.[245]

In *Funke Medien,* the court ruled that the publication of the military reports could fall under the exception set forth in article 5(3)(c) of the InfoSoc Directive on the reporting of current events.[246] In its argumentation, the CJEU cited ECtHR case law and provided some guidance on factors to take into account when balancing copyright and freedom of expression. For instance, the court highlighted the need to consider the nature of the information being expressed, namely whether it is of political relevance.[247]

In *Spiegel Online*, a case concerning the publication of a politician's manuscript on an internet news portal operated by Spiegel Online, the CJEU was invited to interpret articles

[241] *Idem.* para 135.
[242] *Idem.* paras 14-7.
[243] Xalabarder. *Op cit.* p 638.
[244] *Spiegel Online.* para 54. *Funke Medien.* para 70.
[245] *Spiegel Online.* para 59. *Funke Medien.* para 76.
[246] *Funke Medien.* para 75.
[247] *Idem.* para 74.

5(3)(c) and (d) of the InfoSoc Directive, *i.e.*, the reporting of current events and the quotation exceptions. First, the CJEU was requested to determine whether these two provisions should be read as constituting measures of full harmonization.[248] The CJEU responded in the negative, stating that Member States enjoy a significant margin of appreciation, allowing them to strike a balance between the relevant interests. The court did, however, add that Member States' margin of appreciation in implementing and interpreting the exceptions is constrained by their obligations to comply with general principles of EU law, and to preserve the effectiveness of the exceptions, in order to safeguard a fair balance between authors' and users' interests.[249] Moreover, the Member States' discretion in implementing exceptions is also constrained by the three-step test.[250] Additionally, when interpreting the exception on current events the court emphasized that its purpose is to ensure the exercise of freedoms of information and media.[251]

In light of this case law, a shift in the CJEU's line of reasoning can be identified. Firstly, the Court started by adopting a dogma of strict interpretation of exceptions. The substantive significance of this is that the interests of copyright holders are a priori favored over those of users.[252] Indeed, copyright exceptions are created in the best interest of users of protected works. Logically, a restricted interpretation of these rules serves the interests of rightholders.[253] With *Painer,* this approach began to change as the CJEU started to rule that exceptions should be interpreted and implemented in a way that safeguards their purpose and effectiveness. Since then, the court has consistently looked for guidance in the CFREU when interpreting copyright exceptions.[254] In doing so, the CJEU has not completely set aside the dogma of strict interpretation.[255] However, it has been invoking fundamental rights-based interpretations to expand the scope of copyright exceptions and limitations. These broad interpretations have proved a powerful tool in maintaining a fair balance between copyright and other fundamental rights in the digital context, as they have allowed the CJEU to fit a range of technological uses of protected

[248] *Spiegel Online*. para 18.
[249] *Idem.* paras 34-6.
[250] *Idem.* para 37.
[251] *Idem.* para 32.
[252] Rendas, Tito. Exceptions in EU Copyright Law: In Search of a Balance Between Flexibility and Legal Certainty (Doctoral Dissertation). Wolters Kluwer. 2021. pp 93-4.
[253] *Ibidem.*
[254] Rendas. *Op cit.* 2021. p 229.
[255] See, for example, Case C-435/12, ACI Adam BV and Others v Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding, ECLI:EU:C:2014:254. paras 20-40.

works under the scope of the copyright exceptions and limitations.

Whether one agrees or disagrees with the direction taken by the Court, these rulings serve as a perfect illustration of how the CJEU has filled in the blanks in the EU copyright acquis. In the absence of clear instructions on how to apply and interpret the exceptions, national courts have turned to the CJEU for guidance. The Court has not refrained from taking on its unofficial role as the harmonizer of EU copyright law. Specifically, through its reiterated confirmation of the principle of narrow interpretation of exceptions or by adopting the doctrine of autonomous concepts of EU law, as was seen in *Deckmyn.*

d. CFREU-Oriented Judicial Interpretations as Internal Limitations to the Application of Copyright Exclusivity

The aforementioned rulings showcase the role that fundamental rights play in shaping EU copyright law via the fair balance principle. The CJEU has repeatedly emphasized the need to interpret and implement EU copyright rules in light of the CFREU, in such a way that adequately safeguards the fundamental rights contained therein. This emphasis suggests the need for internally applying fundamental rights-balancing factors to EU copyright law.[256]

This role is made evident in each of the different levels of internal balancing. Regarding the copyright subject-matter, it was determined that fundamental rights could be employed to draw the line between protectable and unprotectable subject-matter. Moving on to the scope of exclusive rights, it has been demonstrated that the author's entitlements may be restricted if doing so proves necessary to protect the fundamental rights of the users of protected works. Fundamental right's role in limiting copyright's scope of protection is particularly evident with regards to copyright exceptions and limitations. According to Jongsma, fundamental rights have a *dual impact* on the determination of their scope, affecting both their implementation and interpretation.[257] On the one hand, Member States have to respect the limits imposed by the CFREU when transposing copyright exceptions and limitations into national law. On the other hand, exceptions and limitations must be interpreted by national courts in such a way that their purpose and effectiveness are safeguarded, *i.e.*, in a way that the fundamental rights they

[256] See Geiger *et* Izyumenko. *Op cit.* 2022. p 12.
[257] Jongsma. *Op cit.* 2019. p 203.

aim to safeguard are sufficiently protected. In this light, it is safe to conclude that fundamental rights operate as embedded limits within copyright law.

Furthermore, it is noteworthy that the impact of the CJEU's fundamental rights-oriented reasoning in the aforementioned judgments is twofold. Firstly, it ensures that a wide margin of appreciation is left to Member States when implementing and applying EU copyright law. For example, the *GS Media* and *Painer* decisions illustrate the freedom that national courts have in defining the boundaries of copyright's scope of exclusivity and permitted uses. A fundamental rights-oriented interpretation, *i.e.*, resorting to the indirect horizontal effects of fundamental rights, gives national judges flexibility they otherwise might not have.[258] Secondly, it can be argued that this approach holds promise to mitigate the issue of legal fragmentation. Fundamental rights-oriented interpretation and the use of fair balance as a guiding principle can have a harmonizing effect in those aspects of EU copyright law that are still only partially harmonized. This is particularly the case with copyright exceptions and limitations. Member States have a margin of appreciation when implementing and interpreting exceptions and limitations. They are, however, still restricted by a set of guidelines, including the general principles of EU law, the objectives of the InfoSoc Directive, the three-step-test, and, ultimately, the CFREU.[259] This way, a fundamental rights-oriented interpretation will become one of the common denominators among all Member States.

Nevertheless, the question of whether this approach is sufficient to adequately safeguard users' fundamental rights remains. Scholars have debated whether internal balancing mechanisms are sufficient to resolve, on their own, the conflict between copyright and other fundamental rights or if they should be complemented by external balancing mechanisms. In the following section, the focus shall be directed towards the latter.

2.3. Copyright's External Balancing Mechanisms

In this thesis, external balancing mechanisms or external limitations to copyright protection are meant as those tools that are found outside the EU copyright acquis, *i.e.*, in other legal branches, and that have a toll on the copyright's scope of exclusivity.

[258] Regarding copyright exceptions and limitations, see Rendas. *Op cit.* 2021. p 231.
[259] Rendas. *Op cit.* 2021. pp 202-3.

A paradigmatic example is that of competition law, as this legal field has frequently been used to restrict the scope of copyright protection.[260] The CJEU has held in the past that copyright should only be exercised in a way that corresponds to its essential function, *i.e.*, protecting the moral rights in the work and ensure a reward for creative effort.[261] Otherwise, it should be disregarded in favor of other rules and principles of EU law, *e.g.*, EU competition law.

Another example, and the one the research will now focus on, is that of the framework of fundamental rights as an external limitation to copyright protection in the EU. As concluded in the previous section, fundamental rights play a role in shaping copyright protection from within EU copyright law, as they either underpin provisions of EU copyright law or inform their interpretation. Now the question is whether they can influence copyright's scope of protection from the outside. In other words, whether fundamental rights can have a horizontal effect in copyright law.

a. The ECHR and the Case Law of the ECtHR

Ashby Donald and *Pirate Bay* are two ECtHR decisions that had scholars believing in a potential external effect of fundamental rights in shaping copyright's scope of protection.[262] Both cases involved criminal convictions for copyright infringements, with both applicants arguing that the infringing acts were lawful in light of the right to freedom of expression (article 10 ECHR). After their claim was denied at the national level, the applicants argued before the ECtHR that their rights to freedom of expression, embodied by the right to impart and receive information, had been violated.[263]

The ECtHR began by explaining that the applicants' actions were protected under freedom of expression and, thus, that their convictions interfered with such a right. The court ruled that such interference breached article 10 ECHR unless it was *i)* prescribed by law, *ii)* used to further one or more of the legitimate aims listed in article 10(2) ECHR,

[260] See C-241/91, Radio Telefis Eireann and Independent Television Publications Ltd v Commission of the European Communities, ECLI:EU:C:1995:98. [*Magill*]
[261] *Magill*. para 28.
[262] See Geiger, C. *et* Izyumenko, Elena. Copyright on the Human Rights 'Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression *in* International Review of Intellectual Property and Competition Law. 2014a.
[263] *Ashby Donald*. paras 4-8. *Pirate Bay*. pp 1-2.

and *iii)* necessary in a democratic society to achieve such aims.[264] The ECtHR dismissed both applications, having found that the interferences with the applicants' right to freedom of expression met the aforementioned criteria.[265] Nevertheless, before doing so, it drew some interesting considerations on the relation between freedom of expression and copyright.

In each instance, the ECtHR emphasized the need to balance the two competing interests protected by the ECHR: the interests of the applicants to facilitate the sharing of the information in question and the interest in protecting the rights of the copyright holders.[266] Moreover, the court suggested that, in certain circumstances, copyright's scope of protection might be restricted in favor of freedom of expression.[267] In this light, even if an author's exclusive rights might have been infringed, this is not enough to justify limiting someone else's right to free expression.[268] Scholars have interpreted these findings to mean that, in addition to the inbuilt mechanisms of copyright law, external balancing factors can be used to limit copyright protection.[269]

b. The CFREU and the Case Law of the CJEU

Until recently, it remained unclear whether external fundamental-rights balancing was allowed under EU copyright law. The CJEU's judgements in the aforementioned *Spiegel Online* and *Funke Medien*[270] seemed to have put an end to the debate. In both instances the CJEU was invited to provide its opinion on whether fundamental rights, specifically freedom of information and of the press, could justify a restriction of author's exclusive rights beyond the exceptions and limitations listed in article 5 of the InfoSoc Directive.[271] In essence, the CJEU was asked whether fundamental rights could act as an external constraint on the scope of protection of copyright. Before diving into the court's rulings, attention must be drawn to the Advocate General Szpunar's (hereinafter, AG) opinions on the two cases.

[264] *Ashby Donald*. paras 34-5. *Pirate Bay*. p 10.
[265] *Ashby Donald*. para 44. *Pirate Bay*. p 12.
[266] *Pirate Bay*. p 11.
[267] Geiger *et al. Op cit.* 2014a. p 2, 26.
[268] Jacques. *Op cit.* 2021. p 286.
[269] See Geiger *et al. Op cit.* 2014a. p 2, 26; Jacques. *Op cit.* 2021. p 286.
[270] For the factual background of the cases see *supra* Chapter II, Section 2.2.3.
[271] *Spiegel Online.* para 40. *Funke Medien.* para 55.

In *Funke Medien,* the AG began by acknowledging a potential conflict between copyright and freedom of expression.[272] He then followed by stating that copyright incorporates balancing mechanisms meant to resolve conflicts between copyright and other fundamental rights.[273] Nonetheless, the AG stressed that there may be exceptional cases where these inbuilt mechanisms are insufficient to provide an adequate solution, and in these cases, copyright must yield to an overriding interest relating to the realization of a fundamental right.[274] Accordingly, the AG suggested that the CJEU takes a similar approach as the one followed by the ECtHR in the aforementioned *Ashby Donald* and *Pirate Bay* cases.[275] Hence, in this case, the AG significantly admitted that copyright may be shaped and even restricted by external balancing mechanisms based on fundamental rights.[276]

However, the remainder of AG's opinion fosters considerable confusion. This is so, due to the ambiguous nature of the external limitation allowed by AG.[277] Indeed, after admitting the existence of external limitations to copyright law, the AG goes on to say that he does not argue in favor of introducing a freedom of expression-based exception beyond those that are expressly allowed for in EU copyright law.[278] Rather, the AG argues in favor of an "*exclusion from protection based on freedom of expression*".[279] The AG thus appears to support an external balancing mechanism shaping the scope of copyright protection instead of informing a new permitted use. When applied in practice, this difference seems quite negligible. This makes one wonder whether the AG followed this line of reasoning to escape the trap of the exhaustive nature of copyright exceptions and limitations.

In *Spiegel Online,* the AG recognized once again that, in principle, copyright's balancing mechanisms were already incorporated by the legislator into EU copyright

[272] Opinion of AG Szpunar, Case C-469/17, *Funke Medien,* delivered on 25 October 2018. paras 35-6. [*Opinion in Funke Medien*].
[273] *Idem*. paras 37-9.
[274] *Idem*. para 40.
[275] *Idem.* paras 42-3.
[276] Geiger, C. *et* Izyumenko, Elena. Freedom of Expression as an External Limitation to Copyright Law in the EU: the Advocate General of the CJEU Shows the Way. Center for International Intellectual Property Studies Research Paper No. 2018-12. 2018. p 10.
[277] *Idem.* p 11-2.
[278] *Opinion in Funke Medien.* para 71.
[279] Geiger *et* Izyumenko.*Op cit.* 2018. p 11-2.

law.[280] Nonetheless, the AG performs a balancing exercise between the interests at hand: protection of copyright and freedom of the press; concluding that in this instance there was no overriding public interest that would justify a derogation from copyright law.[281] Accordingly, the AG did not go as in-depth with his external balancing analysis, but he did support his previous decision in *Funke Medien.* The AG argued that allowing for an exception beyond those statutorily provided in EU copyright law, would "carry with it the risk of calling into question the effectiveness of [EU copyright law] and the harmonization which it is intended to secure".[282]

The concession that copyright may be shaped by external balancing mechanisms based on fundamental rights was not followed by the CJEU. The court began by emphasizing the exhaustive character of the list of exceptions and limitations contained in article 5 of the InfoSoc Directive, and that the balancing mechanisms are already contained in the InfoSoc Directive.[283] It then continued by stressing, in line with the AG in *Spiegel Online,* that allowing derogations from author's exclusive rights beyond those expressly provided for by the EU legislator "would endanger the effectiveness of the harmonization of copyright and related rights effected by [the InfoSoc directive], as well as the objective of legal certainty pursued by it".[284] In this vein, the CJEU dismissed the possibility that fundamental rights could operate as an external limitation to the scope of copyright protection.

Even though it is not surprising, the Court's conclusion is quite conservative. Harmonization and legal certainty goals should not be favored in detriment of the protection of fundamental rights or, as Jongsma cuttingly puts it "denying fundamental rights protection in the name of harmonization seems foolish: harmonization ought not by definition trump the protection of fundamental rights".[285] The CJEU is defending values and goals the InfoSoc Directive itself does not achieve. Member States have applied article 5 of the mentioned Directive in a myriad of ways, picking and choosing between the different limitations, and giving them narrower or broader interpretations

[280] Opinion of AG Szpunar, Case C-516/17, *Spiegel Online,* delivered on 10 January 2019. Paras 62-3, 70. [*Opinion in Spiegel Online*].
[281] *Opinion in Spiegel Online.* paras 70-81. See also Jongsma, Daniël. AG Szpunar on copyright's relation to fundamental rights: one step forward and two steps back? 2019b. p 5.
[282] *Opinion in Spiegel Online.* para 63.
[283] *Funke Medien.* paras 56-8. *Spiegel Online.* para 41-3.
[284] *Funke Medien.* paras 62. *Spiegel Online.* para 47.
[285] Jongsma. *Op cit.* 2019b. p 15.

based on their interests and in a way that best fits their traditions. Thereby, leading to legal fragmentation and, therefore, legal uncertainty. In this sense, the degree of harmonization and legal certainty achieved by the InfoSoc Directive in the area of copyright exceptions and limitations is, at best, modest. It is thus lamentable that the CJEU did not prioritize the protection of users' fundamental rights and instead decided to further constrain an already frozen system of exceptions and limitations.

CHAPTER III – How to Limit Copyright? A Critical Analysis

Against this backdrop, it can be concluded that, despite significantly influencing copyright's scope of protection, namely by inspiring the interpretations of copyright provisions, fundamental rights cannot be used to justify copyright exceptions and limitations beyond those that are statutorily allowed. Does this, however, rule out the possibility of a horizontal direct effect of fundamental rights in copyright law? Further, is a horizontal direct effect of fundamental rights in copyright law needed to safeguard fundamental rights?

3.1. Reflections on whether an External Limitation is needed in the EU: the *Iron Pipes* Case

An interesting case to consider while reflecting on these questions is the *Iron Pipes*[286] case decided by the Supreme Court of Sweden. The case, despite not being referred for a preliminary ruling, is particularly relevant in the context of this analysis of EU copyright law because it highlights the shortcomings of this legal branch when it comes to balancing copyright with other fundamental rights.

The judgment concerned a fight between three politicians of the Sweden Democrats - Erik Almqvist, Ken Ekeroth and Christian Westling- and Soran Ismail, a comedian of Kurdish descent. Just before the Swedish elections in 2010, the comedian alleged in a YouTube video that the politicians attacked him and included a clip of the three men assaulting an unidentified man. Almqvist later posted a YouTube video, claiming he had been the one being attacked and that Ismail's video was yet another instance of the defamation against the Sweden Democrats.[287] Ken Ekeroth, had recorded a video of the altercation, a part of which was uploaded to the Sweden Democrats' YouTube channel with his consent.[288] Longer and previously unreleased segments of Ekeroth's video were shared by various news outlets, including the Swedish State Television (SVT), without his authorization.[289] The unreleased footage showed the three politicians arguing with Ismail while using ethnic slurs. Further segments display the three men threatening a heavily intoxicated man with iron pipes and using sexist language against two female

[286] T-4412-19, Högsta domstolen, Sveriges Television AB *v* KE, decision of 18 March 2020. [*Iron Pipes*].
[287] Strand, Daniel. The Iron Pipe of Swedish Neo-Fascism. Vice. 18 January 2013.
[288] Marusic, Branka. Limitations on Copyrights Based on Freedom of Expression and Information, *GRUR International*, Volume 69, Issue 7, 2020. p 770-1.
[289] *Idem.* p 770-1.

witnesses.[290] As Ekeroth, sought compensation for the infringement of his exclusive rights over the recording, the Supreme Court was invited to rule on the balancing act between copyright and freedom of information.[291]

In the aftermath of *Spiegel Online* and *Funke Medien*, the Supreme Court of Sweden considered that the CFREU's fundamental freedoms were sufficiently reflected in the limitations provided for in national law.[292] The limitations for news reporting are set forth in Article 23(3) and 25 of the Swedish Copyright Act (SCA). According to the former provision, three criteria must be met for the limitation to be applicable: the protected work *i)* must have previously been lawfully made available to the public; *ii)* be in connection with a report on a current event; and *iii)* be reproduced in a way that is in conformity with proper usage and to the extent required for the information purpose. Differently, article 25 of the SCA, provides that protected works may be used if they are *i)* seen or heard in the course of an event; *ii)* used in connection with information concerning the event through sound, radio, television, direct transmission or film; and *iii)* used to the extent justified by the informatory purpose. The Court ruled that the use of the recordings made by SVT was not covered by both the exceptions, as the segments of the video had not previously been lawfully made available to the public, neither had been seen or heard in the course of an event.[293]

The Swedish court did, however, acknowledge three potential external limits to copyright protection: competition law, criminal law, and criminal procedural law. In this vein, it was held that there are cases, such as the one at hand, where the interests of freedom of expression are so compelling that courts are required to curtail criminal responsibility for copyright infringement.[294] Although it is commendable that the Swedish Court found a role for freedom of expression and information to exclude SVT's criminal liability, it is regrettable that it did not find room for these rights to restrict Ekeroth's claim for compensation.

A fair balance-oriented analysis of the factual background of this judgment is extremely interesting for the purposes of this study. There is a significant polarity between

[290] New clip puts 'self-defence' claims in doubt. The Local, Sweden, 16 November 2012.
[291] Marusic. *Op cit.* 2020. p 771.
[292] *Ibidem.*
[293] *Idem.* p 772.
[294] *Ibidem.*

the interests at hand. On the one hand, there is the interest of the copyright holder of the recordings. On the other hand, there is the public interest in receiving the information and viewing the recordings. The public's interest in this case is apparent considering that the video was recorded just before the elections and involved candidates who were later elected to represent the Sweden Democrats in parliament. In this light, the question arises of whether the fair balance between copyright and freedom of expression and information is sufficiently achieved in this context: *are fundamental rights sufficiently protected if politicians running for parliament are afforded copyright protection over a recording of them engaging in potentially illegal acts?* In the following sections, the *Iron Pipes* case shall be assessed in light of the different layers of fair balance identified above.

a. Copyright Internal Balancing Analysis

As was explained *supra* internal balancing considerations may emerge at the following levels: *i)* when defining the protectable subject-matter; *ii)* when defining the scope of the exclusive rights; and *iii)* when interpreting copyright exceptions and limitations.

Starting at the first level, it is necessary to establish what exactly is protected by copyright in this case. Copyright primarily protects authors' own intellectual creations. However, in this case, given the substance of the video and the context in which it was recorded, it could be questioned whether it should be considered an expression of the author's intellect and creative decisions. It is debatable whether Ekeroth made any original, creative or intellectual choices by filming the argument while also taking part in the altercation. Under the circumstances he was in it is doubtful that he made any decisions regarding the angles, lighting, duration, content, or other aspects of the recording. Thereafter, there is an argument to be made that a fundamental-rights-oriented interpretation of the concept of work could help exclude the qualification of such a video as a work. As was previously explained, drawing the line between protectable and unprotectable subject-matter can be seen as an internalization of the fair balance. Accordingly, it should be considered whether, in this case study, protecting the recording through copyright is necessary to incentivize and reward its author while respecting other's fundamental rights and freedoms. This exclusion would be implemented through the originality and idea-expression dichotomy. Taking into account the CJEU's reasoning in *Funke Medien,* it could be contended that these recordings do not showcase any originality and that their content is *essentially determined by the information and facts*

which they contain.[295] In the *Iron Pipes* case, it is arguable that Ekeroth made no deliberate choices when recording the video, and thus there appear to be no creative decisions that need to be incentivized or rewarded. In this light, the freedom of expression of the information media companies and the freedom of information of the general public could play a part in shaping the contours of the concept of work, deterring the copyrightability of the recordings.

Nevertheless, this line of reasoning would unlikely be adopted by a national judge deciding on the matter, as audiovisual works tend to be *prima facie* reflections of their creators' originality and intellect. Recordings imply a number of different decisions such as the camera used, the length of the recording, the content recorded, the angle employed by the person recording, etc. It must be noted that information media companies and the general public's freedom of expression and information are somewhat safeguarded by the idea-expression dichotomy. According to this principle, the subject-matter being protected in this case is the recording itself, *i.e.*, the expression, and not the occurrences it depicts, *i.e.*, the ideas. Copyright law does not protect facts or news of the day, [296] as this content does not meet the required criteria to be considered a work. Thereafter, news outlets would still be able to report on the altercation without infringing Ekeroth's copyright insofar as they did not share the recording. This exclusion denotes a concern for protecting the rights of individuals to free expression and information.

Moving to the second level of internal balancing, it is first necessary to identify the relevant exclusive right for the scenario at hand. In this instance, the recordings of the altercation were made available to the public on online newspapers as well as broadcast on television channels. Hence, the exclusive right of interest would be the right of communication to the public.[297] There are three main criteria for determining whether a conduct qualifies as a communication to the public within the meaning of article 3 of the InfoSoc Directive. Firstly, the work needs to be made available. According to the CJEU this is the case when someone provides a public with access to a work in a way that "the persons forming that public may access it, irrespective of whether or not they avail themselves of that opportunity".[298] Next, there must be a public, which is understood by

[295] *Cfr. Funke Medien*. para 24.
[296] Article 2(8) of the Berne Convention.
[297] Article 3 of the InfoSoc Directive.
[298] *Renckhoff.* para 20.

the CJEU as meaning an "indeterminate number of potential recipients and implies, moreover, a fairly large number of persons".[299] Thirdly, the public must be new, meaning that it must be made available to people other than those intended by the rightsholder.[300] Applying these notions to the current case study, it can be concluded that all of the criteria are met. Indeed, the recording is made available to an indeterminate number of people, different than those originally intended by Ekeroth.

Above, it was discussed that fundamental rights play a role in defining the scope of authors' entitlements. For example, it was explained that in *Renckhoff* the CJEU took a narrow interpretation of the right of communication to the public, because a broader interpretation would upset the fair balance between copyright and the fundamental right to education. Differently, in the *Iron Pipes* case, a narrow, fundamental-rights-based interpretation of the right of communication to the public would still not be able to safeguard the media companies' and the public's freedom of expression and information. This is so because the making available of a recording by news outlets is a prime example of a communication to the public. Each and every one of the aforementioned criteria is fulfilled by such an act of communication. The right of communication to the public would be robbed of all its effectiveness and purpose if it was interpreted in such a narrow way that would exclude the dissemination of the recording by information media companies.

Lastly, the third level of internal balancing concerns copyright exceptions and limitations, which are the quintessential copyright internal balancing mechanisms. Given the factual background of the case study, the relevant copyright exception is the one related to the reporting of current events. Revisiting article 5(3)(c) of the InfoSoc Directive, it can be understood that Member States may provide for exceptions or limitations to the right of reproduction and of communication to the public in cases of "reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, […], is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory

[299] *Idem.* para 22.
[300] *Idem.* para 24.

purpose and as long as the source, […], is indicated, unless this turns out to be impossible". This exception has a broad scope, covering articles or other subject-matter on current events of public interest to the extent justified by the informatory purpose and insofar as the source is indicated, unless this is not possible.

If this provision were directly transposed into Swedish legislation, it could be found that, in the *Iron Pipes* case, news outlets, such as SVT, could freely share the recordings without infringing Ekeroth's copyright, insofar all the requirements were fulfilled. It should be noted that the altercation constituted a current event, in the sense that it was an occurrence that, at the time it was reported, was of informatory interest to the public. As previously explained, at the moment the occurrences came to light, the three politicians were of great interest to the public as they were representing the Sweden Democrats in parliament. Thereafter, news outlets could lawfully make the recordings available to the public as long as they dully indicated Ekeroth as the author and only shared the work to the extent necessary in light of the informatory purpose. In this vein, a fair balance between copyright and freedom of expression and information would be appropriately achieved. Ekeroth's moral rights as the author of the recording would be respected, and his economic rights would be restricted to the extent necessary to safeguard the information media companies' rights, and the public interest.

Nevertheless, the Swedish legislator opted for a narrower implementation of the press reporting exception. The Sweden legislator circumscribed the exceptions to cases where the relevant subject matter had previously been lawfully made available to the public, or had been seen or heard in the course of an event. Furthermore, in light of the strict criteria, a broad, fundamental-rights-oriented interpretation of the Swedish press reporting exception would not be able to help a national judge achieve a fair balance in this instance.

Importantly, these observations suggest that the concept of fair balance is not harmonized at the EU level. The CJEU contends that the balancing mechanisms are contained in the InfoSoc Directive.[301] Accordingly, the Court seems to contend that a fair balance between copyright and other fundamental rights is embedded, *i.e.*, fully integrated, in the InfoSoc Directive. However, this is not accurate. Firstly, this idea is not legally sound, as, even at the level of EU legislation, not all balancing mechanisms are

[301] Cfr. *Funke Medien*, para 58.

contained in the InfoSoc Directive. For example, exceptions and limitations are contained, not only in the aforesaid directive, but also in the Orphan Works Directive, the Marrakesh Directive, and most recently in the CDSM Directive. Secondly, the CJEU's reasoning overlooks the fact that the InfoSoc Directive, being exactly that – a directive – only establishes general guidelines that all Member States must comply with. However, it gives space for each country to decide how they want to implement the respective provisions into their national legal systems. While this does have the benefit of injecting some flexibility into the EU copyright system by giving Member States some margin of appreciation when implementing and interpreting EU copyright provisions, it falls short of achieving a minimum of protection for fundamental rights.

By establishing a cherry-picking approach, the InfoSoc Directive overly relies on the legal traditions and common sense of the Member States. However, what happens if a Member State decides to abolish all non-mandatory copyright exceptions and limitations? Or, in a less radical scenario, what happens if a Member State does not want to provide for a press reporting exception? Or, provides for an excessively restricted one? Would then the CJEU be able to argue that the internal balancing mechanisms contained in the InfoSoc Directive are sufficient to ensure a fair balance between copyright and other fundamental rights?

Against this backdrop, it can be stated that, while important, copyright's internal balancing mechanisms are not always enough to achieve a balanced result. In the following section, attention will be directed towards copyright's external balancing mechanisms, specifically, whether an external fundamental-rights-based limitation could help change the end-result in the *Iron Pipes* case.

b. Copyright External Balancing Analysis

Firstly, it is necessary to understand how an external, fundamental-rights-based limitation would look like in the *Iron Pipes* case. Until this point, it has been repeatedly emphasized that the conflicting interests in this case are copyright protection, on the one side, and freedom of expression and information, on the other. A copyright-based interference with freedom of expression can be identified, since Ekeroth's copyright hinders the news outlets' right to impart information and the public's right to receive it. Therefore, in this instance, any external, fundamental-rights based limitation would have

to find its foundations in freedom of expression and information.

Various legislative instruments provide the legal basis for freedom of expression and information. Taking into account EU's constitutional pluralism *supra* discussed, three systems of fundamental rights have to be considered: the ECHR, the CFREU and Member States' constitutional laws. [302] The ECHR sets forth, in its article 10(1), that everyone has the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. On its turn, the CFREU replicates this idea in its article 11, providing that everyone has the right to freedom of expression, which includes the freedom to hold opinion and to receive and impart information without interference by public authority and regardless of frontiers. Further, the CFREU adds in paragraph 2 of the aforesaid article that freedom and pluralism of the media shall be respected. On the national level, and considering that the *Iron Pipes* case takes place in Sweden, attention must be directed to the Swedish framework of fundamental rights. In Sweden, freedom of expression is guaranteed in three legal instruments. First, it is protected under Article 1 of Chapter 2 of the Instrument of Government,[303] which establishes the rights to *i)* freedom of expression, defined as the freedom to communicate information and express thoughts, and *ii)* to freedom of information, defined as the freedom to procure and receive information. Secondly, it is protected under the Freedom of the Press Act.[304] Thirdly, it is protected under the Fundamental Law on Freedom of Expression.[305]

In light of these provisions, a copyright external balancing would look like the direct application of the freedom of expression and information either in article 10 ECHR, article 11 CFREU, or in the Swedish national provisions protecting freedom of expression and information. For example, if, as a defense to copyright infringement, SVT invoked the right to freedom of expression and information as provided for in article 10 ECHR, a similar analysis to the one conducted by the ECtHR in the *supra* mentioned *Ashby Donald* and *Pirate Bay* cases could be performed. Firstly, an interference with the right to freedom

[302] In this context, it is relevant to reiterate the idea of horizontal applicability of the CFREU, ECHR and national constitutions. As explained in Chapter 1 of the present thesis, there is an argument to be made that, as primary EU law, the CFREU is liable to have horizontal direct and indirect effects. Moreover, the aforesaid horizontal effects are also often recognized by Member States as regards the fundamental rights set forth in the ECHR and in the constitutions of EU Member States.
[303] Regeringsformen (1974:152). [Instrument of Government].
[304] Tryckfrihetsförordningen (1949:105). [Freedom of the Press Act].
[305] Yttrandefrihetsgrundlagen (1991:1469). [Fundamental Law on Freedom of Expression].

of expression and information would have to be identified. As was mentioned *supra*, Ekeroth's copyright over the recording would hinder the news outlets' right to impart information and the public's right to receive it. Secondly, it would be necessary to identify whether such interference is legitimate. According to article 10(2) ECHR, an interference with freedom of expression would be legitimate if the following requirements are met: *i)* the interference is provided for by law; *ii)* the interference pursues one of the legitimate aims set forth in the aforesaid article; and *iii)* the interference is necessary in a democratic society to achieve such aims.

Applying these criteria to the *Iron Pipes* case, it can be observed that criteria *i)* and *ii)* are met. According to EU copyright law, the recordings could be considered copyright-protected subject-matter. Hence, the interference was prescribed by law. Following, given the legitimate aims specified in article 10(2) ECHR, it can be argued that the interference sought to "protect the right of others" and "prevent crime". As for the third criterion, it is necessary to determine whether the interference is necessary in a democratic society. According to the ECtHR, this test implies whether such interference corresponds to a "pressing social need".[306] Moreover, it would require considering the nature of the conflicting interests and the degree to which such interests require protection in the circumstances of the case.[307] Firstly, the nature of the information should be taken into account. Given the *Iron Pipes* case factual context, it could be considered that the information being shared is relevant for political expression and debate. Information on the use of sexist and racist slurs by members of a political party is by nature relevant for political debate. Even more so when considering that the political party at hand has been trying to publicly distance itself from racist ideologies, as well as from the neo-Nazi movement, which forms part of its historical roots.[308] Moreover, such background also highlights the necessity of communicating the recordings to the public. Erik Almqvist's defensive response to the allegations suggests that if the facts were only addressed by the press, without providing evidence, all that would follow would be a "he-said, she-said" campaign. Secondly, the character of the expression, *i.e.*, whether or not it has a commercial aim, should be taken into account. More often than not, news outlets receive profits from their reporting activities. However, it can be argued that the primary aim of

[306] *Pirate Bay.* p 11.
[307] *Idem.*
[308] Malmo, Richard Orange. Sweden Democrats can't shake neo-Nazi tag. DW, Germany. 9 August 2018.

the expression is non-commercial. One can distinguish cases of movie or music piracy, where the expression's sole aim appears to be the commercialization of the relevant works, from reporting news and profiting from it. Moreover, the essential function fulfilled by the press in a democratic society cannot be overlooked.[309] In this context, attention should be drawn to the ECtHR's ruling in *Lingens v. Austria* where it was found that the press not only has the task of imparting information and ideas on political issues and areas of public interest, the public also has the right to receive them.[310] This has prompted some authors to argue that courts should exercise the utmost caution when national authorities take measures or impose sanctions that may discourage the press from participating in public interest debates. These considerations suggest that, although the expression might have a commercial facet, that aspect should not be decisive.

Furthermore, on the other side of the scales, it could be taken into consideration that copyright was being misused for purposes not corresponding to its rationales. Importantly, Geiger and Izyumenko have highlighted that one of the faults of the EU copyright system as it stands is that it permits abusive uses of copyright to achieve goals that are wholly unrelated to the aims of promoting creativity and the dissemination of expression.[311] In the *Iron Pipes* case, it is apparent that copyright is being instrumentalized to prevent the dissemination of information of political interest or, at least, to silence unwanted criticism. Moreover, copyright protection is not necessary either to protect the personal relationship between Ekeroth and the recording, nor to enable him to exploit his works economically.[312]

Taking all of the above factors into account, it could be found that the interference with freedom of expression was not "necessary in a democratic society" within the meaning of article 10(2) ECHR. The right to freedom of expression could therefore apply directly as an external, fundamental rights-based limitation, circumventing the application of Ekeroth's copyright over the recordings. In that sense, there would be no

[309] Geiger *et* Izyumenko. *Op cit.* 2014. p 22.
[310] Case of Lingens v Austria (Plenary), Application no. 9815/82, ECtHR 1986. para 41. [*Lingens v Austria*].
[311] Geiger, C. et Izyumenko, Elena. Towards a European 'Fair Use' Grounded in Freedom of Expression. Center for International Intellectual Property Studies Research Paper No. 2019-02. 2019. p 16.
[312] See *Opinion in Funke Medien.* paras 58– 62. AG Szpunar argues that for a restriction on freedom of expression flowing from copyright to be characterized as necessary, it must meet at least one of the two following objectives: *i)* it must protect the personal relationship between the author and his intellectual creation; *ii)* it must enable authors to exploit their works economically and thus earn an income from their creative endeavors.

copyright infringement and no right to fair compensation for the communication to the public of the relevant subject matter. Most importantly, a fair balance between the competing interests at hand would be achieved in this instance.

3.2. Reconciling an external fundamental-rights based limitation with the CJEU's judgments in *Spiegel Online* and *Funke Medien*

In light of the foregoing, one can contend that allowing an external, fundamental rights-based limitation would have the significant advantage of creating a fair balance in cases where copyright internal balancing mechanisms are unable to adequately protect fundamental rights other than copyright. In addition, such an exception would also have the potential to somewhat mitigate the rigidity of the system of exceptions and limitations laid down in the InfoSoc Directive. Arguably, it would add some flexibility into the aforesaid system by creating some breathing space for national courts when deciding on a specific case, without opening the Pandora's box of legal uncertainty.

However, given the CJEU's ruling in *Funke Medien* and *Spiegel Online,* external limitations to copyright would *prima facie* not be allowed in the context of EU copyright law. Nevertheless, one can argue that this is not necessarily the case to be followed in forthcoming and prospective EU copyright case law. In the following pages, attention will be drawn to the arguments raised by the CJEU in the abovementioned judgements with a view to reconcile the possibility of an external, fundamental rights-based limitation with the Court's reasoning.

a. Impact on the effectiveness of the harmonization of copyright and on legal certainty

The main issue the CJEU identified when determining whether the admissibility of an external exception to copyright was that it would undermine the effectiveness of the harmonization achieved by the InfoSoc Directive and on the goal of legal certainty it pursues. A few considerations are needed in this regard.

Firstly, it is worth it to put into question the level of harmonization achieved by the InfoSoc Directive. Indeed, as the title of the InfoSoc Directive suggests, the aim of establishing an exhaustive list of optional exceptions and limitations was to increase

harmonization within the Union, such was not the end result. The EU legislator left a list of 20 optional limitations for the Member States to pick from, without giving them guidelines on how to implement them into national law. As explained *supra* the outcome is that Member States applied article 5 in a myriad of ways and undermining the level of harmonization achieved by the InfoSoc Directive. Unsurprisingly, this optional approach has also led to a great problem of legal fragmentation, and quite ironically, legal uncertainty, across the EU. Authors, rightsholders, and end-users are currently faced with the application of very distinct rules to a single situation across the EU. As noted by Guibault, this poses a significant barrier to the development of cross-border services[313] and, as a result, has a detrimental impact on the functioning of the internal market. Moreover, these adverse effects are exacerbated in the context of the digital economy, where the absence of territorial boundaries leads to issues of determining the applicable law to a given situation

Regardless of this, it is important to recognize that allowing copyright external limitations would not necessarily lead to chaos of legal uncertainty within the EU copyright law framework. Before the advent of *Funke Medien* and *Spiegel Online,* national courts resorted to external, fundamental rights-based limitations to copyright when copyright law was unable to establish a fair balance. For example, in *Scientology,*[314] the Court of Appeal of The Hague accepted the direct application of freedom of expression and information as provided for in article 10 of the ECHR to override the application of copyright law.[315] There is no reason to believe that this had a bearing on the effectiveness of the harmonization achieved by the InfoSoc Directive.

Moreover, EU copyright law has a safeguard in place that ensures that copyright exceptions and limitations are not applied excessively: the three-step-test. This mechanism, which finds its legal basis in article 5(5) of the InfoSoc Directive, provides yet another layer of legal certainty. According to the three-step test, copyright exceptions and limitations shall only be applied *i)* in certain special cases, *ii)* which do not conflict with a normal exploitation of the protected subject-matter, and *iii)* do not unreasonably prejudice the legitimate interests of the rightsholder. In this way, the three-step test could operate to make sure that external, fundamental-rights based limitations are not so broad

[313] Guibault. *Op cit.* 2010. p 58.
[314] Church of Scientology *v* Karin Spaink / Xs4all, The Court of Appeal of The Hague, 4 September 2003.
[315] Hugenholtz *et* Senftleben. *Op cit.* 2011. p 11.

and flexible as to undermine and compromise the protection of authors' rights.

In addition, it should be understood that establishing a fair balance between the two bundles of rights would require a case-by-case analysis. For instance, when facing a conflict between copyright and freedom of expression, it can be argued that the latter should only prevail under specific circumstances. A suggestion can be advanced according to which freedom of expression should only act as an external limitation in cases where copyright is employed to prevent the dissemination of important information to the public and when the internal balancing mechanisms are insufficient to safeguard freedom of expression.[316] This would be the case when the information has a political, artistic or academic nature. Differently, achieving a fair balance between copyright and freedom of expression would involve favoring the interests of the copyright holder if the infringing uses were solely commercial and served no public interests. Illustratively, according to this conceptualization, freedom of expression would not be able to be invoked to enable the piracy of songs or movies.

b. The exhaustiveness of the list of exceptions contained in the EU InfoSoc Directive

The CJEU did not completely rule out the possibility of a horizontal direct effect of fundamental rights in EU copyright law. The CJEU's reasonings are based on the assumption that Member States have in place copyright exceptions and limitations that sufficiently safeguard fundamental rights. However, as can be understood from the *Iron Pipes* case, that is not always true. A shortcoming of the optional list of exceptions and limitations is that Member States have the power to decide which optional exceptions they want to implement, if any. Further, Member States have complete discretion in implementing the exceptions and limitations, which means they can choose to draft exceptions that are very restrictive in nature, leaving out a number of socially valuable uses. In addition, as it can also be concluded from the *Iron Pipes* case, an interpretation of the copyright internal balancing mechanisms inspired by fundamental rights is not

[316] See Macmillan Patfield, F. 'Towards a Reconciliation of Free Speech and Copyright' *in* Yearbook of Media and Entertainment Law edited by Eric Barendt. 1996. *apud* Lee, Yin Harn. *Op cit.* 2015. p 189. Barendt, Eric. 'Copyright and Free Speech Theory' *in* Copyright and Free Speech: Comparative and International Analyses *edited by* Jonathan Griffiths and Uman Suthersanen. 2005. *apud* Lee, Yin Harn. *Op cit.* 2015. p 191.

always enough. The introduction of 5 mandatory exceptions by the CDSM Directive somewhat mitigated this problem, but it's a band-aid solution to a systemic problem.

It can be argued that, fundamental rights should, *at least*, be allowed to act as external limitations to copyright law, *i.e.*, should have a direct horizontal effect, in those cases where fundamental rights are not sufficiently protected under national laws. This approach is not necessarily incompatible with the one taken by the CJEU in *Spiegel Online* and *Funke Medien,* as these judgments only outlawed the possibility of invoking copyright exceptions and limitations based on fundamental rights *beyond* those that are statutorily provided. What is being proposed here is different: fundamental rights should be allowed to constitute external limitations to copyright protection within the scope of the exceptions provided under EU law. Returning to the *Iron Pipes* case, the Swedish press exception was unable to sufficiently accommodate freedom of expression and information. Therefore, it was concluded that an external exception based in freedom of expression could be employed in order to achieve a fair balance. However, such exception could still fit under the press exception established in article 5(3)(c) of the InfoSoc Directive. Thereby, it would still be compliant with the exhaustive nature of article 5 of the InfoSoc Directive. This idea could be played out with different fundamental rights. Consider the scenario where a certain Member State has a narrowed-scope teaching exception in place. The right to education could constitute an external limitation to copyright protection, rendering permissible the otherwise infringing uses. Yet, this external limitation would still be encompassed by the teaching exception set forth in article 5(3)(a) of the InfoSoc Directive.

This approach has also been suggested in COMMUNIA Policy Paper on fundamental rights as a limit to copyright law during emergencies,[317] in which it was advocated that "if due to the absence or insufficient of legislative action, the exceptions and limitations existing in a certain EU Member State have no flexibility to cover educational, research and other public interest activities that take place remotely because of lockdown, the national copyright law cannot be deemed to have properly internalized the fundamental rights enshrined in the EU Charter of Fundamental Rights". [318] In this vein, it is argued that the fundamental rights to freedom of information, science and education should be

[317] COMMUNIA Policy Paper on fundamental rights as a limit to copyright law during emergencies. 2020.
[318] *Idem.* p 5.

allowed to be directly invoked as a limit to authors' exclusive rights.[319] This conclusion is quite admirable, but it should not be restricted to emergency situations such as the Covid-19 pandemic. Instead, it should be broadened so that encompasses all instances where fundamental rights are not sufficiently safeguarded in the context of EU copyright law.

[319] *Ibidem.*

Conclusions

The present research primarily aimed to comprehend the role fundamental rights play or ought to play in limiting the scope of copyright protection in the EU. In this sense, it was discovered that the protection afforded by copyright holders is significantly influenced by fundamental rights. This influence occurs at two levels: the legislative and the judicial. On the one hand, fundamental rights permeate EU copyright legal provisions. This is apparent, for instance, in the InfoSoc Directive of 2001, in which the EU legislator explicitly addresses the need to comply with the fundamental principles of law, including freedom of expression and the public interest. Moreover, as was emphasized throughout this dissertation, the aforesaid Directive recognizes the need to establish a fair balance between authors' and users' interests. It does so, namely, by putting in place a system of copyright exceptions and limitations that safeguard different fundamental rights, such as the right to education, freedom of expression and information, freedom of press, freedom to conduct a business, freedoms of the arts and sciences. On the other hand, fundamental rights shape copyright's scope of protection by influencing the interpretation of EU copyright law. The CJEU has often referred to the fact that EU copyright provisions need to be interpreted in light of the CFREU, in such a way that adequately safeguards the fundamental rights contained therein. In this vein, copyright's scope can be restricted in order to adequately and effectively protect the fundamental rights of users of protected work.

However, despite often evoked, fair balance is not fully incorporated in EU copyright law. The InfoSoc Directive only achieves a minimum level of harmonization. While this means that national legislators and national judges have a wide margin of appreciation when performing a balancing analysis in their legal interpretation and application, it also entails that a minimum level of protection for fundamental rights and the public interest may not always be attained. The internal balancing mechanisms provided for by the InfoSoc Directive are not always sufficient to achieve a fair balance between copyright and other fundamental rights. This is emphasized by the exhaustiveness of the list of copyright exceptions and limitations provided by the InfoSoc Directive. A closed list is unable to accommodate new uses that the EU legislator had not previously foreseen. Furthermore, in light of the fast-paced technological evolution of recent years, it runs the risk of quickly becoming obsolete. Different materializations of the conflict between copyright and fundamental rights will continue to arise, and a copyright system that has

crystallized over time will not always be able to offer a clear or appropriate solution.

In this light, the analysis has demonstrated that internal balancing mechanisms should be complemented by external ones. Particularly, external, fundamental-rights based limitations would have the benefit of increasing flexibility by deeming legitimate and valuable uses that are unforeseen by either the EU or national legislators. In this way, the protection of users' fundamental rights and the public interest would be adequately ensured. Moreover, the potential risks of increasing legal uncertainty in the EU copyright acquis could be mitigated via the three-step test and by considering that this type of limitation would only come into play if the restriction of the relevant fundamental right were to be considered non-legitimate in light of the relevant legislative text.

Fundamental rights should be able to justify copyright limitations *beyond* the scope of those provided by the EU legislator. However, given the CJEU's adamant reasoning in *Funke Medien* and *Spiegel Online* a compromising solution was advanced according to which fundamental rights-based limitations should only come into play under the scope of copyright exceptions and limitations provided by the EU legislator. Pursuant to such proposal, national judges interpreting copyright law would have discretion to apply external, fundamental rights-based limitations to copyright, albeit with limited leeway. This proposal would also have the advantage of significantly reducing any residual risk of legal uncertainty. Applied in this way, it could even be argued that external, fundamental rights-based limitations would contribute to the harmonization of EU copyright law. The application of the aforesaid limitations by national judges deciding on copyright infringement disputes would translate into a quasi-mandatory application of the copyright exceptions and limitations provided by the EU legislator. Thus, forgoing the need for a lengthy and burdensome legislative process of reforming EU copyright law.

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